



FPAA

Prosecuting Crime, Protecting People

Florida Prosecuting Attorneys Association

Brady / Discovery



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ETHICS OF DISCOVERY: Rule 3.220, Brady & Giglio Obligations

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Florida Rules of Criminal Procedure 3.220

(a) The Defendant may elect to participate in discovery by demand or by his actions (e.g., chapter 119 public records request or taking of a deposition both trigger reciprocal discovery under rule 3.220(a))

PROSECUTOR'S OBLIGATION

Rule 3.220(b) (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant *and permit the defendant to inspect, copy, test, and photograph ...*:

- (A)- List of witnesses (all persons known to the prosecutor to have information that may be relevant to the charged offense including 90.404(2) similar fact evidence witnesses “to be presented at trial”)
- (B)- Statements of any witnesses (written, recorded or summarized). Statements include all police and investigative reports
- (C)- Statements of the defendant, and to whom made
- (D)- Co-defendant statements

PROSECUTOR'S OBLIGATION

- (E)- Grand Jury minutes containing testimony of defendant
- (F)- Tangible papers or objects obtained from the defendant
- (G)- Material or information provided by a CI
- (H)- Existence of electronic surveillance, of the defendant's conversations or premises, and any related documents

PROSECUTOR'S OBLIGATION

- (I)- Search or seizure and any related documents
- (J)- Reports or statements of experts; including test results of physical or mental exams, scientific tests, experiments or comparisons
- (K)- Any other tangible papers or objects intended to be used in hearing or trial
- (L)- Any tangible paper, objects or substances that could be tested for DNA

CI Disclosure Obligations

3.220(b)(1)(M)

Material information provided by an informant witness, including:

- (i) Substance of defendant's statement to informant
- (ii) Summary of criminal history of informant
- (iii) Time and place of any statements
- (iv) Any benefit received or expected
- (v) Prior history of cooperation by informant in return for any benefit

** The intent of this rule was that it apply only to informants who are expected to testify*

Matters Not Subject to Disclosure Rule 3.220(g)

Work Product. Legal research or records, correspondence, reports, or memoranda to the extent that they contain opinions, theories, or conclusions of the prosecutor, or members of their legal staff

Informants. No requirement to disclose the identity of a CI, unless the informant is to appear at a hearing or trial, or failure to disclose will violate the constitutional rights of the defendant (i.e., exculpatory)

Restricted Disclosure

- **Rule 3.220(b)(2)** In camera determination that investigative report contains irrelevant, sensitive, information and disclosure may seriously impair law enforcement or jeopardize an investigation. Court may prohibit or restrict the disclosure.* (e.g., location of a pole camera)
- **Rule 3.220(e)** Court may restrict disclosure where there is a substantial risk of personal harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from disclosure that outweighs any usefulness. (e.g., personal social media posts)

*Court may prohibit the state from using undisclosed sensitive investigative material **Rule 3.220(b)(3)**

Ongoing Duty to Disclose

Both the prosecutor and defense attorney have a continuing duty to disclose witnesses and material that would have been required at the time of compliance with discovery

Rule 3.220(j)

Category Witnesses

Category A – fact witnesses, e.g., investigating officers, rebuttal, alibi, **Brady**, witness to statements, informants, EXPERTS, child hearsay witnesses

Category C – witness performed ministerial function, not being called at trial and involvement fully recorded in police report or statement

Category B – Anyone not listed as A or C (e.g., officers on perimeter or transport log – no report)

DEFENDANT'S OBLIGATION

Within 15 days of receipt by defendant of state's discovery exhibit...

- Material intended to be used at trial
- List of witnesses defense intends to call at trial
- Reports or statements of experts, including results of examinations and scientific tests
- Key complaint of prosecutors is late release of information by defense

Depositions

Practical Application

- location: courthouse or agreed location **3.220(h)(3)**
- location: In the county where witness resides **3.220(h)(3)**
- objections: this is not a civil case - depo generally cannot be used other than for impeachment or refreshing recollection (note: use of objections to clarify the record - vague, ambiguous, compound - context)
- objections: witness refuses to answer -- certify the question and move on

Depositions

Additional Practical Application

- Motion for protective order: **Rule 3.220(1)(1)** (limit scope, seal, or prevent deposition to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy)
- Motion to terminate or limit deposition: **Rule 3.220(1)(2)** (during the deposition, if it is being conducted in bad faith – in such a manner as to unreasonably annoy, embarrass, or oppress the deponent – Court may terminate, continue, limit time, scope, impose sanctions)
- MAKE A RECORD
- Defense cannot create evidence. **Kuntsman v. State, 643 So.2d 1172 (3rd DCA 1994)** (photo array created by defense and shown to witness at deposition)
- Sensitive witnesses: < 16 years old, shall be videotaped

Do not tell a witness he/she
can't talk to the defense
attorney or suggest that they
withhold material
information.

Rule 3.220(i)

Fla. Bar Rule 4-3.4(a) & (f)

Interrogatories

Interrogatories are not permitted in a criminal case.

Moore v. State, 135 So.3d 462 (5th DCA 2014)

(in denying defense motion to depose Child Protection Team members, Court ordered interrogatories over defense objection - reversed)

Defense Subpoena Duces Tecum

- As of January 1, 2016, Defendant is permitted to issue a subpoena duces tecum to third parties in a criminal case, pursuant to **Rule 3.220(h)(1)**, consistent with the rules of civil procedure.
- **F.R.Civ.P 1.351(b)** requires 10 days notice to the other party before service of the subpoena including specific items to be produced. If opposing party objects, the subpoena may not be served until issue resolved by the court.
- **F.R.Civ.P 1.351(d)** allows opposing party to object and file a motion with the court.
- Marsy's Law?

Protective Order

A motion filed objecting to a subpoena duces tecum under **F.R.Civ.P 1.351(d)** should be in the form of a protective order if release of the information will invade the privacy of a victim or witness (e.g., phone records, private Facebook posts, other social media platforms, bank records, etc.) or otherwise “annoy, embarrass or oppress” the witness (e.g., 10 years of business records)

Rule 3.220(f) *On a showing of materiality the court may require such other discovery to the parties as justice requires.*

The Defendant must first demonstrate materiality of the sought after information; reasonably calculated to lead to admissible evidence. **Eagan v. DeManio, 294 So.2d 639 (Fla. 1974), Seigel v. State, 68 So.3d 281 (4th DCA 2011).** The burden is on the Defendant to show materiality. **Demings v. Brendmoen, 158 So.3d 622(5th DCA 2014)**(Sheriff had standing to contest discovery request for investigative operations plan.)

SANCTIONS: Rule 3.220(n)

- Failure to comply with an applicable discovery rule or order is subject to a motion to compel and order. Sanctions include striking witness, mistrial, introduction of otherwise inadmissible evidence, etc.
- Willful failure to comply with a discovery rule or discovery order subjects counsel to sanctions, including contempt and costs.
- Request for discovery *or response* must be signed by attorney of record, which constitutes “**a certification that the signer has read the request, response or objection**” and it is consistent with the rules, not done to harass or cause delay or additional cost of litigation, and is not unreasonable or burdensome

Defense objection:

Discovery Violation

Always, always, always -ask for a **Richardson** Hearing

Brown v. State, 165 So.3d 726 (4th DCA 2015)

(Although state had provided videotape to defendant on several related cases, it neglected to provide the tape for the specific case at trial. While defense counsel was obviously aware of the tape, because the judge failed to conduct a **Richardson** hearing to establish whether the violation was, 1) willful or inadvertent, 2) trivial or substantial, and 3) if defendant was prejudiced, case reversed and remanded)

Discovery Schedule

Rule 3.220(o)

The trial court may hold pretrial conferences to consider such matters as will promote a fair and expeditious trial

“the court may set, and upon the request of any party shall set, a discovery schedule, including a discovery cut-off date, at the pretrial conference.”

APPLICATION OF MARSY'S LAW

- **Article I, s.16(b)(5)** The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.
- **Article I, s.16(b)(10)** The right to proceedings free from unreasonable delay...(victim's right to speedy trial)

Fla.Crim.R.P. 3.220(b)(4)

- A prosecutor has an ongoing obligation under the Rules of Criminal Procedure to disclose “*as soon as practicable*” after the filing of the charging document, “*material information*” that “*tends to negate the guilt of the defendant*”
- Does the Rule apply to impeachment material covered under *Brady*?
- Does the prosecutor have an obligation to turn over impeachment information prior to a plea?
- See *Ruiz, supra.*, **ABA Formal Opinion 09-454**, *supra.*



BRADY

BRADY OBLIGATION

Materiality

“...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 (1963)

Brady materiality rule similar to Rule 3.220(b)(4)

Reversal:

Three Prong Test

1. The evidence must be favorable to the accused, either exculpatory or impeachment
2. Evidence must have been suppressed by the State, either willfully or inadvertently, and
3. There must be *prejudice*

Strickler v. Greene, 527 U.S. 263 (1999)

Carroll v. State, 815 So.2d 601 (Fla. 2002)

Brady Standard of Materiality

Evidence is material for Brady purposes only if *reasonable probability* exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability *sufficient to undermine the confidence in the outcome*.

U.S. v. Bagley, 473 U.S. 667 (1985)

Prejudice/Materiality

Prejudice is measured by determining “whether the favorable evidence could reasonably be taken to put the whole case in a different light as to *undermine confidence in the verdict.*”

Wright v. State, 857 So.2d 861 (Fla. 2003)

(no duty to disclose criminal history of another possible suspect, neighborhood complaints about that suspect, and police reports involving other known criminals in the neighborhood)

CUMULATIVE MATERIALITY ANALYSIS

- ✓ The court must conduct a “cumulative materiality analysis” to “evaluate the tendency and force of the undisclosed evidence, item by item before separately evaluating it’s cumulative effect.”

Kyles v. Whitley, 514 U.S. 419 (1995)

- ✓ In making the determination, the court “cannot simply discount the inculpatory evidence in light of the undisclosed evidence and determine if the remaining evidence is sufficient...it is the net effect of the evidence that must be assessed.” **Jiminez v. State, 265 So. 3d 462 (Fla. 2018)**(81 pages of undisclosed handwritten notes), **Smith v. State, 235 So.3d 265 (Fla. 2017)**(adding up the force of the undisclosed evidence and weighing it against the totality of the evidence introduced at trial.)

...IN OTHER WORDS

- The stronger the state's case, the less the prejudicial effect of undisclosed exculpatory evidence.
- The inverse is true. Denton v. State, 246 So.3d 413 (4th DCA 2018) (reversing conviction where state did not disclose independent DNA lab test that showed the victim as the major contributor, with an unknown minor contributor. The only evidence of guilt was a fingerprint and the testimony of a witness that the defendant had been in the area on several occasions – ID was the main issue)

Splitting Hairs

Hoffman v. State, 800 So.2d 174 (Fla. 2001) (State required to disclose results of hair analysis where test results *excluded defendant and victim* and thereby implicated a 3rd, unknown person. Mere general disclosure of existence of analysis, without results, is not sufficient. Defense is not obligated to make continuing inquiry)

******evidence supporting conviction was thin***

But see, **Rhodes v. State, 986 So.2d 501 (Fla. 2008)** (No Brady violation where victim was identified as the source of DNA on most hair samples, and findings were inconclusive as to the defendant as a possible source. *Inconclusive results were found not to be exculpatory*)

Rhodes Court distinguishes **Hoffman**

Prejudice/Materiality

The fact that the state withheld impeaching information regarding the terms of a cooperation agreement by disclosing that the witness was to “testify truthfully” in a death penalty sentencing where the actual agreement required that he “testify truthfully in accordance with his prior testimony and statement made to the police” was a suppression of favorable evidence but not sufficiently prejudicial to be a material violation.

Parker v. State, 89 So.3d 844 (Fla. 2011)

* **Giglio** issue not preserved. Case decided solely on **Brady** issue

**The Court noted the sufficiency of evidence to overcome any prejudice

Mere Possibilities

“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense”

U.S. v. Agurs, 427 U.S. 97 (1976)

Boyd v. State, 910 So.2d 167 (Fla. 2005)

(a list of potential print matches, with no actual match.
The Court noted substantial amount of other evidence supporting conviction)

State v. Morrison, 236 So.3d 204 (Fla.2017)(ultimate conclusion that evidence of unused condom in the victim’s pocket supported theory that victim planned to have sex with witness’ girlfriend and therefore the witness killed the victim is “rank speculation.”)

Brady Burden

The burden is on the defendant to show prejudice.

“...the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality” Carroll v. State, 815 So.2d 601 (Fla. 2002)
(Investigative notes indicating that stepfather of victim may have been an abuser and a possible suspect)

Note– the Court made a finding of no prejudice based on quantity of evidence against defendant in “context of the entire record”

BRADY INCLUDES IMPEACHMENT

Failure to Disclose Workman's Compensation Award: Financial Motive

Deren v. State, 15 So.3d 723 (4th DCA 2009) (State withheld a letter detailing a bouncer's worker's compensation award of \$24,000. Brady violation in a prosecution for battery and disorderly conduct arising from an incident in which the defendant intervened in a fight between his friend and the bouncer – the worker's comp statute precluded compensation if the injury was caused primarily by the willful intention of the employee to injure or kill another.)

Guzman v. State, 868 So.2d 498 (Fla. 2003)

Cumulative impeachment

Guzman involved a witness who received a \$500 reward that was not disclosed or revealed by the witness when asked if she had received a benefit for her testimony. The court found no **Brady** violation* in light of the significant impeachment of the witness apart from the \$500 as well as ample corroborative evidence.

* The trial court used the **Brady** standard. Since the alleged violation involved false statements it was remanded for review under the more stringent **Giglio** standard

Law Enforcement

Knowledge in the possession of law enforcement is imputed to the prosecution.

Antone v. State, 355 So.2d 777 (Fla. 1978),

Curry v. State, 1 So.3d 394 (1st DCA 2009)

EVIDENCE NOT IN STATE POSSESSION

- There is no *Brady* violation where the allegedly suppressed evidence is not in the possession of the State.

Gomez v. State, 245 So.3d 950 (4th DCA 2018) (U-Visa – State did not have possession or control – no obligation to go out and get the document which was available to both sides by subpoena.)

Harrigan v. State, 184 So.3d 657 (3rd DCA 2016) (video of original theft from body shop in neighboring county available to defense but never requested, despite judges' suggestion – judge offered to pay for investigator – state theory that defendant aware that car was stolen 3 days later, fleeing and eluding with punched ignition and that deft did not originally steal car – therefore, theft video not material.)

Reasonable Diligence

Floyd v. State, 18 So.3d 432 (Fla. 2009)
(defendant knew a taped interview existed but failed to order it from police agency)

see also, *Tompkins v. State*, 872 So.2d 230, 239 (Fla.2003) (no suppression where defense was given illegible copy of police report because defense knew about report and could have requested a legible copy); *Provenzano v. State*, 616 So.2d 428 (Fla. 1993) (no *Brady* violation where defendant either had, or could have obtained his jail records from jail officials and could have reviewed the notes of the State expert witness if he had requested them).

BRADY PRONG TWO

SUPPRESSION OF EVIDENCE

Defendant's knowledge of allegedly suppressed evidence will defeat a Brady claim. Jimenez v. State, 265 So.3d 462 (Fla. 2018) (81 pages of handwritten notes, covering information already known to the defendant)

KNOWLEDGE OF THE DEFENDANT

”...a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot be found to have been withheld from the defendant.”

Floyd v. State, 18 So.3d 432 (Fla. 2009),

***Floyd incorporates the due diligence requirement into the second prong. If the defendant knows of its existence and has access to the information, it is not withheld within the meaning of Brady. Also, see Wickham v. State, 124 So.3d 841 (Fla. 2013) (Prior convictions of co-defendant), Maharaj v. State, 778 So.2d 944 (Fla. 2000)

Caveat: Beware of 3.850 ineffective assistance

–Win the battle, lose the war

Duty to Disclose Prior Record of Victim/Witnesses

State required to produce NCIC *summary* upon demand and with Court Order, criminal record of defendant, co-defendants and potential witnesses *that are in their possession*.

State v. Crawford, 257 So.2d 898 (Fla. 1972)

State v. Coney, 294 So.2d 82 (Fla. 1973)

Note: State is prohibited from disclosing actual CJIS materials

Limits of Duty to Disclose

“We find no authority within the criminal discovery rules that requires the state to disclose the criminal histories of all listed witnesses, including those who will not be called to testify.”

State v. Wright, 803 So.2d 793 (4th DCA 2001)

Prior Record:

Defense Due Diligence

“The State has no duty to actively assist the defense in investigating the case.”

“the defense has the initial burden of trying to discover impeachment evidence, and the state is not required to prepare the defense’s case. This is especially true when the evidence is as accessible to the defense as to the state.”

Hansbrough v. State, 509 So.2d 1081 (Fla. 1987),
State v. Wright, *infra*.

***Beware **Brady** if you have impeachment info

Oral Statements: Non-Exculpatory

“Neither side is required to alert the opposing party to the content of a witness’ testimony, except to the extent a written or recorded, oral statement of the witness or an expert witness’ report may foreshadow what he will say on the stand.”

Whitfield v. State, 479 So.2d 208 (4th DCA 1985),
also see Fla.R.Crim.P. 3.220(b)(1)(B) & (J)

Change in Testimony

While the state is not obligated to provide defense with *non-exculpatory* unrecorded oral statements made by a witness, if those statements materially differ from written or recorded statements previously given, they must be disclosed.

Elghomari v State, 66 So.3d 416 (4th DCA 2011)

INFORMAL RECANTATION

Child victim in a sexual abuse case recanted over the phone to the prosecutor. When confronted, he asked to meet with the prosecutor, who met with the victim alone. The victim retracted his recantation. The recantation and its subsequent retraction were not disclosed to defense until a new prosecutor found the case notes. This was not a fatal **Brady** violation because the matter was disclosed before trial, however, the former prosecutor became a witness “to show coercion or manipulation by the State.”

Smith v. State, 98 So3d 632 (4th DCA 2012)

What About Victim Recommendations?

Does there come a point when the victim recommendation itself becomes impeachable?

Victim Impact Statement: Recommendation of Jail, Restitution.

Victim tells, or writes that the defendant has ruined his life and that he wants the defendant to “rot in jail.”

Plea Bargains:

Brady Applies to Substantive Evidence

“In the context of a plea, an appellant must allege that he would not have entered a plea and proceeded to trial, but for the state’s *suppression* of the favorable evidence.”

Taylor v. State, 848 So.2d 410 (1st DCA 2003)

(State failed to reveal blood test and witness testimony that other driver in DUI manslaughter was intoxicated, driving erratically, and talking on cell phone at time of crash)

Plea Bargains:

Impeachment Evidence Not Subject to Brady

“...a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”

U.S. v. Ruiz, 536 U.S. 622 (2002)

But see, Ethical obligations under 4-3.8(c) as interpreted by ABA Formal Opinion 09-454

Plea Bargain:

Recantation vs. Affidavit of No Prosecution

Defendant entitled to hearing on motion to withdraw his plea after learning that an affidavit by the victim (girlfriend) filed with the SAO stating her desire to drop the case was not disclosed.

Randall v. State, 604 So.2d 36 (1st DCA 1992)(Court remanded for an evidentiary hearing stating, “It is reasonable to assume that knowledge of the alleged victim’s actions would have been useful to Randall at trial”)

Note: No record of action on remand. Evidence thin...

Plea Bargain:

Deceased Witness

➤ The State is under no legal obligation to advise the Court or Defense that a witness has died, or is otherwise unavailable, prior to the plea.

Adler v. State, 666 So.2d 998 (5th DCA 1996)

➤ **Also see, Marsh v. Butterworth**, 2008 WL 2782757 (S.D. Fla. 2008)(deported victim),

➤ **People v. Jones**, 375 N.E. 2d 41 (N.Y. 1978)(Death of witness is not exculpatory evidence)

Brady is an Appellate Issue

Common sense: If the violation is discovered at or before the trial, there is no “outcome” that has been undermined or jury that is affected. Therefore, regular discovery rules should normally apply...i.e., **Richardson** hearings to determine willfulness, inadvertence, prejudice, least restrictive alternative to excluding evidence, etc.

Similarly, if the information was discovered by police/prosecution after trial, **Brady** does not apply – proper vehicle would be 3.850 (newly discovered evidence). See, **Rhodes**, id.

To Disclose or Not to Disclose...

Do you really want to die on that hill?

Your **Brady** battles should be inadvertent or unintentional and not willful. Although there is no harmless error analysis (other than materiality), to the extent that you are aware of the evidence, you want to avoid the appellate issue if practicable.

* Remember the Florida Bar Rule 4-3.8

Elephant in the Room

Florida Bar Rules of Professional Conduct

Rule 4-3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (c) 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.

See, **ABA Formal Opinion 09-454**

INTERNAL AFFAIRS

Brady Material?

Investigations
Prior Complaints
Prior IA findings

Inadmissible Evidence:

Cannot Form the Basis of a Brady Violation

Wood v. Bartholomew, 516 U.S. (1995) (polygraph test is not admissible and therefore could not have affected the outcome of the proceeding.)

But see, ethical obligation under Rule 4-3.8(c),
ABA Formal Opinion 09-454

Inadmissible Evidence

IA Investigations

Evidence regarding an internal affairs investigation (unrelated to the defendant's criminal charges) is generally not admissible and, thus, does not satisfy the materiality element of a **Brady** violation.

Suggs v. State, 238 So.3d 699
(Fla.2017)(FDLE investigating Sheriff and prosecutor for misconduct in an unrelated case was not admissible as either substantive or impeachment evidence.)

UNRELATED I.A. INVESTIGATIONS

“The investigation that resulted in Deputy Broome’s suspension did not arise from the same incident as Bullard’s criminal charges and it did not involve the use of excessive force. Because it was completely unrelated to Bullard’s case, it would not have been admissible. Accordingly, Bullard failed to establish the materiality element of a Brady violation...”

State v. Bullard, 858 So.2d 1189 (2nd DCA 2003)(IA found deputy made false statements to the public regarding salary issues in the sheriff’s office unrelated to the defendant’s case.)

Officers Under Active Prosecution

A police officer is no different than a civilian when subject to an open active prosecution. The same motive to curry favor with the state exists and that status is subject to *Brady* disclosure.

Breedlove v. State, 580 So.2d 605 (Fla. 1991)

In Murder prosecution, detectives were under investigation for unrelated criminal activity (drug activity). The witness was not indicted until after the trial.

Court held that *where a witness is not “under actual or threatened criminal charges” but merely under criminal investigation, then it “must be related to the case at hand” in order to be admissible*. Since the alleged criminal activity of the detectives was collateral to the issues in the murder case, they were inadmissible, and therefore, there was “no reasonable probability that the outcome of the suppression hearing or the trial would have been different.”

Excessive Force I.A.s

Michael v. State, 884 So.2d 83 (2nd DCA 2004)(Resisting With Violence and Disorderly Intoxication:

“ ...the proffered questions regarding the officer’s five prior complaints of excessive force could have provided the jury with a plausible motive for the officer to misrepresent the facts of the incident in an effort to avoid another complaint which could have led to disciplinary action”)

Hinojosa v. State, 857 So.2d 308 (2nd DCA 2003)(theory of defense, LEO was aggressor – excessive use of force IA complaints admissible)

Officer Misconduct

If admissible, officer misconduct must be provided.

Arnold v. McNeil, 622 F. Supp.2d 1294 (M.D. Fla. 2009)(officer involved in criminal activity, including dealing cocaine during same time frame as defendant where officer was only person to identify defendant as seller of drugs)

Stripling v. State, 349 So.2d 187 (3rd DCA 1997)(LEO in bribery case where entrapment was defense and officer was under criminal investigation for other alleged shake downs)

Limits on X-Examination

De La Portilla v. State, 877 So.2d 871 (3rd DCA 2004)(Defense entitled to x-examine LEO witnesses regarding prior and pending use of force IA investigations in prosecution for Battery LEO, *but court could limit defense from going into details*)

PRACTICAL CONSIDERATIONS

- Closed IA cases are subject to public records – i.e., available to defense.
- Open IA investigations are not subject to public records disclosure under F.S. 112.533(2). Not all open IA Investigations are admissible. see, *Suggs, Breedlove*.
- If there is a question of admissibility, open investigations may be reviewed in camera by the Court prior to their release in discovery.
- Prior complaints are admissible (potentially material) only when relevant to a defense to the crime charged, e.g., when defendant's theory of the case involves excessive use of force, entrapment, bribery, etc.)

Question: To what extent must a prosecutor anticipate a relevant excessive force defense and order an LEO personnel file?

*Keeping in mind that knowledge in possession of law enforcement is imputed to the prosecution for Brady and Discovery purposes.

Admissible I.A./Active Prosecution

Strategic Considerations

- Is the witness material? Nolle pros?
- If material, can you proceed in good faith without the witness?
- If the witness is not material, you can strike the witness.
- Striking the witness should eliminate any **Brady** impeachment issues*

*but not the obligation to supply the **Brady** material

State Strikes, Defense Adds

- If you strike the witness, be prepared for the defense to add the LEO to their witness list.
- A witness may not be called for the sole purpose of impeachment. State v. Serfrere, 267 So.3d 407 (4th DCA 2019) (LEO under investigation in another state for theft. State did not call him as a witness), Felton v. State, 120 So3d 126 (4th DCA 2013)
- Unless defense can articulate a good faith reason to call the officer, independent of impeachment, state can move *in limine* to strike or limit the testimony.
- Good faith basis: e.g., LEO participated in sale of illegal drugs (substantive evidence supporting defense theory of the case)

BRADY LISTS?

The image features a solid blue background with a subtle gradient. At the top, there are several thin, wavy lines in shades of blue and teal, creating a sense of movement. In the center of the image, the word "GIGLIO" is written in a bold, sans-serif font. The letters are a light cyan color and have a slight 3D effect with a darker shadow underneath them.

GIGLIO

Giglio v. U.S., 92 S.Ct. 763 (1972)

“When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general **Brady** rule that suppression of material evidence justifies a new trial”

The **Giglio** prosecutor failed to disclose a promise not to indict the key co-conspirator witness (the only witness linking the defendant to the crime) that was made by the previous prosecutor. *The witness testified that no promises were made.*

GIGLIO

Three Prong Test

- 1) That the testimony was false
- 2) That the prosecutor knew or came to know the testimony was false
- 3) That the statement was **material**

Ventura v. State, 794 So.2d 553 (Fla. 2001) (witness testified that no promises were made in exchange for his testimony. U.S. Attorney correspondence revealed that the government agreed to dismiss bond jumping charges against the witness. Court found undisclosed impeachment info to be cumulative and corroborative evidence of guilt to be strong – affirmed)

Obligation of the Prosecutor

Giglio stands for the proposition that a prosecutor “has a duty to correct testimony he or she knows is false when a witness conceals bias against the defendant through that false testimony”

Routly v. State, 590 So.2d 397, 400 (Fla. 1991)

* ***Giglio*** applies to false testimony concealing substantive as well as impeachment evidence.

Reichman v. State, 966 So.2d 298 (Fla. 2007)

Obligation to Correct is Ongoing

U.S. v. Alzate, 47 F.3d 1103 (11th Cir. 1995) (Innocent misstatements to the court and jury changed when AUSA was informed by detective of mistakes in his testimony. The mistakes involved material issues pertaining to a cocaine trafficking defense of duress. At issue were defendant's statements relative to an unrelated box of cocaine in the interrogation room. After being informed of the unintentional false testimony, the prosecutor continued to rebut the defense without disclosure.)

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The **Alzate** Court went on to say:

“The matter could have been corrected by stipulation or by testimony from Agent Ostis. The jury could have been told that the box that was an integral part of Alzate’s explanation did in truth exist. That is what should have happened. It did not. The reason matters went awry is that Boscovich, the representative of the Government of the United States in that courtroom, chose to keep silent and not disclose his knowledge that statements he had made to the court and jury were false.” **Alzate @ 1107-1108**

TRIAL TESTIMONY

- The witness must testify at trial. Jimenez v. State, 265 So.3d 462, 486 (Fla. 2018) (“Supposed false testimony that is not presented during the trial cannot form the basis for a *Giglio* claim.”)
- Also, see Reichman v. State, 966 So.2d 298 (Fla. 2007) (No *Giglio* violation where witness makes false statements at deposition but never testified at trial.)

PRONG ONE

FALSE TESTIMONY

- Slight differences or ambiguities in testimony, over time, were not considered false. Appellate court will not disturb a trial court's finding of fact if supported by substantial evidence. Serrano v. State, 225 So.3d 737 (Fla. 2017), Rodriguez v. State, 39 So.3d 275 (Fla. 2010) (post conviction credibility issues are determined by the trial court), also, see Taylor v. State, 62 So.3d 1101, 1114 (Fla. 2011), Hurst v. State, 18 So.3d 975 (Fla. 2009).
- Unclear testimony is not false testimony. Bogle v. State, 213 So.3d 833 (Fla. 2017) (minor omissions, answers to specific vs. general questions), Routly v. State, 590 So.2d 397 (Fla. 1991) (cumulative impeachment, material information disclosed)

PRONG TWO

KNOWLEDGE

- ❖ The prosecutor must be aware of the false nature of the testimony.
- ❖ Ducket v. State, 231 So.3d 393 (Fla. 2017) (Defendant claimed that the FBI analyst's testimony was false and misleading, based on subsequent reviews of his work by DOJ. The prosecutor had no idea the FBI findings were flawed or that witness may have lied or misrepresented at trial.
- ❖ Note: the court noted that other significant evidence of guilt was introduced.

PRONG THREE

Prejudice/Materiality

“...a different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony.” Under **Giglio**, a statement is material if “there is a reasonable probability that the false evidence *could have affected the judgment of the jury...*” **United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995), Ventura, Routly, supra.**

BURDEN OF PROOF

- Initially, defense has the burden under prongs one and two. United States v. Bagley, 105 S.Ct. 3375 (1985), Guzman v. State, 868 So.2d 498 (Fla. 2003)
- Once established, the state has the burden of demonstrating that the false testimony was **harmless beyond a reasonable doubt**. State v. Dougan, 202 So.3d 363, 378 (Fla. 2016) (The thrust of Giglio is to “ensure the jury knows the facts that motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury.”)
- Dougan, id. facts: material witness testified that his plea deal was for 2nd degree murder and life sentence. The actual deal was a straight up plea where sentence was contingent on the trial outcome – defendant ultimately received 15 years

Ambiguous promises

“Not everything said to a witness or to his lawyer must be disclosed. For example, a promise to ‘speak a word’ on the witness’s behalf does not need to be disclosed. Likewise, a prosecutor’s statement that he would ‘take care’ of the witness does not need to be disclosed. Some promises, agreements, or understandings do not need to be disclosed because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count.”

Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999)(Prosecutor told witness his testimony would be “taken into consideration” in reducing charges and witness testified he was not promised a deal)

SLIPPERY SLOPE

Brady Disclosure vs. Giglio False Testimony

Napue v. Illinois, 360 U.S. 264 (1959)

(Co-defendant was a material witness. ID an issue. Witness was promised that if he would testify, prosecutor would recommend a reduction in his sentence. Witness testified at trial – both on direct and x-exam - that no promises were made. Prosecutor aware that this testimony was false. The fact that the defendant was impeached on other grounds did not turn “a tainted trial into a fair one” -- New trial mandated)

** The fact that the prosecutor could not guarantee a sentence reduction was not relevant.

Personal Consequences

Michael Nifong, District Attorney for Durham County, NC was disbarred in large part for knowingly withholding exculpatory evidence in a high profile case involving Duke University Lacrosse players accused of sexual battery. Specifically, he withheld DNA test results as well as statements from his DNA expert indicating DNA from items in the rape kit were from multiple unidentified males . When the issue came up in court, he denied knowledge of the exculpatory evidence.

RESULT: Nifong was disbarred for life and sentenced to 30 days for contempt of court.

THE END!

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