



**ETHICS OF DISCOVERY:  
RULE 3.220  
BRADY  
GIGLIO**

# DISCOVERY

- Do your discovery - *timely*
- Read your discovery before you sign
- 15 days from demand– obligation is ongoing
- Turn over all material exculpatory evidence (same as **Brady**)
- Turn over everything you intend to use at trial (no sandbagging)
- **Rule 3.220** – depositions, CI's, witness & defendant's statements, other evidence.

## 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. **\*Ongoing obligation to notify defense if witness alters a previously disclosed statement. (Rule 3.220(j) amended in 2018)**
- (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 document
- (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.

## 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 sides 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, 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 that the defense intends to use at trial. (amended in 2018)

## 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 cannot be used other than for impeachment. (note: 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(l)(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(l)(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.)
- A lawyer cannot create evidence. **Kuntsman v. State, 643 So.2d 1172 (3<sup>rd</sup> DCA 1994)** (photo array created by defense and shown to witness at deposition.)
- **Rule 3.220(h)(4)** – Sensitive witnesses: < 18 years old, shall be videotaped. (amended 2016)

Do not tell a witness they cannot 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

- are not permitted in a criminal case

**Moore v. State, 135 So.3d 462 (5<sup>th</sup> 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 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.

# 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 social media posts, 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 (4<sup>th</sup> DCA 2011), Demings v. Brendmoen, 158 So.3d 622(5<sup>th</sup> DCA 2014)(Sheriff had standing to contest discovery request for investigative operations plan.)

## STATE DEMAND FOR NOTICE: PROCEDURE

- Each circuit should develop an addendum to its demand for reciprocal discovery which includes a demand for notice of intention to issue a subpoena duces tecum.

Suggested language:

- DEMAND FOR NOTICE OF INTENTION TO ISSUE SUBPOENA DUCES TECUM FOR DEPOSITION PURSUANT TO **F.R.CRIM.P 3.220(h)(1), F.R.CIV.P. 1.310 AND 1.351**

## PUBLIC RECORDS

Once disclosed *and provided* to defense, discovery becomes a public record, subject to section 119, Florida Statutes exceptions and Marsy's Law redactions.

## 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 that 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 (4<sup>th</sup> 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, the case was reversed and remanded 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.

## 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.”*

## 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

Material exculpatory evidence

Constitutional Right

-Due Process-

Good or bad faith is irrelevant

**When in doubt- give it out**

## **BRADY**

### **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 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)**

# 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)

## 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 materiality determination, the court takes into account all the evidence in the case. 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 (4<sup>th</sup> 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)

## 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 (4<sup>th</sup> 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.**)

\* Applies to Crimes Compensation Trust Fund awards.

# CUMULATIVE IMPEACHMENT

- Guzman v. State, 868 So.2d 498 (Fla. 2003)(witness 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.
- Parker v. State, 89 So.3d 844 (Fla. 2011)(terms of a cooperation agreement 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.)

\* In both cases the trial courts used the *Brady* standard. In *Parker* the court found the *Giglio* issue was not preserved. In *Guzman*, since the alleged violation involved false statements it was remanded for review under the more stringent *Giglio* standard

## Confidential Informants

### Simpson v. State 47 Fla. L. Weekly S6 (Fla. 2022)

- Grisly axe double murder: Circumstantial DNA evidence and an after the fact confession to biased witness – DNA and statements implicate other potential suspects/witnesses.
  - State did not reveal that a possible suspect was a confidential informant in an unrelated case. This impeachment information was found to be material.\*
  - “...because Little Archie had been an informant in another case, he had a ‘relationship to a party’ that was a potential source of bias.”
  - Disclosure is required **“even where there is no evidence that the witness was given favorable treatment in exchange for the information.”**
  - Not cumulative when impeachment offers a “new source of potential bias.” (suspect *and* relationship)
- \* “..it was not a slam dunk for the State, and there were a number of weak points.”

## WHAT ABOUT VICTIM RECOMMENDATIONS?

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

Victim Impact Statement: Recommendation of Jail, Restitution.

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

\*How strong is your case? How over the top is the statement?

## 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 (1<sup>st</sup> DCA 2009)**
- **Franklin v. State, 975 So.2d 1188 (1<sup>st</sup> DCA 2008)**(Applies to all departments of executive branch-DOC), **Hrehor v. State, 916 So.2d 825 (2<sup>nd</sup> DCA 2005)**(knowledge of DCF file imputed to the state.)
- Does not apply to files possessed by Federal agencies (DEA), unless a compact or agreement exists between state and federal agencies. **Barron v. State, 990 So.2d 1098 (3<sup>rd</sup> DCA 2007).**

## EVIDENCE NOT IN STATE POSSESSION

- There is no *Brady* violation where the allegedly suppressed evidence is not in the possession of the State (including law enforcement).

**Gomez v. State, 245 So.3d 950 (4<sup>th</sup> 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 (3<sup>rd</sup> 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 did not originally steal the car but was aware that the car was stolen (3 days after theft) -----fleeing and eluding with punched ignition– therefore, theft video not material.)

## Defense knowledge 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.)
- ✓ "...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)**

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 –

## 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); **Peovenzano 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).

## 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.)

**Horn v. State, 2020 WL 6156056 (1<sup>st</sup> DCA 2020)** (a summary of a prior Child Protection Team report and opinion of the department witnesses as to the credibility of the child victim was not admissible, therefore not *Brady*.)

But see, ethical obligation under Rule 4-3.8(c),

**ABA Formal Opinion 09-454**

## Duty to Disclose Prior Record of Victim/Witnesses

State is 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 (4<sup>th</sup> 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

## Plea Bargains: 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 (1<sup>st</sup> 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 S0.2d 36 (1<sup>st</sup> 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: Unavailable 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 (5<sup>th</sup> 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.

**When in doubt – Give it out**

## 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

### Internal Affairs Investigations

Evidence regarding an IA 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 IA 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 (2<sup>nd</sup> 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 Internal Affairs**

**Michael v. State, 884 So.2d 83 (2<sup>nd</sup> 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 (2<sup>nd</sup> DCA 2003)** (theory of defense, LEO was aggressor – excessive use of force IA complaints admissible.

# Officer Misconduct

Officer misconduct must be provided if admissible.

**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 (3<sup>rd</sup> DCA 1997)**(LEO in bribery case where entrapment was defense and officer was under criminal investigation for other alleged shake downs.)

Question: To what extent must a prosecutor anticipate a relevant theory of 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.

What about defense due diligence?

# 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 (4<sup>th</sup> DCA 2019)** (LEO under investigation in another state for theft. State did not call him as a witness.), **Felton v. State, 120 So3d 126 (4<sup>th</sup> 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

- ✓ Not required by constitution, statute, rule or Florida Bar Rules.
- ✓ Where does it start, where does it end?
- ✓ Political question.
- ✓ Follow your office policy.

When in doubt, give it out  
– Be vigilant –



# GIGLIO

- ✓ Don't lie or mislead;
- ✓ Don't allow witnesses to lie or mislead;
- ✓ Prosecutor must inform the Court of false testimony;
- ✓ Obligation is ongoing.

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

- 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.*
- "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."

# GIGLIO

## Three Prong Test

- 1) Was the testimony false?
- 2) Did the prosecutor know or come to know the testimony was false?
- 3) Was the statement material?

## 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 (11<sup>th</sup> Cir. 1995)**(Innocent misstatements to the court and jury changed when AUSA was informed by detective of mistakes in his testimony. After being informed of the unintentional false testimony, the prosecutor continued to rebut the defense without disclosure.)

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**

\*36x

## 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.)\*

\*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 (11<sup>th</sup> 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)**(material witness testified that his plea deal was for 2<sup>nd</sup> 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.)

# Brady v. Giglio

## Burden and Materiality Standard

### ***Brady***

Burden on defense to show prejudice. i.e., a *reasonable probability* that the undisclosed evidence would have produced a different verdict.

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

### ***Giglio***

Once the false statement/knowledge is established by defendant, the burden shifts to the state to “prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt.”, **Guzman, id., United State v. Bagley, 105 S.Ct. 3375 (1985).**

## GUZMAN REVISITED

- Case remanded for trial judge to determine whether the perjured testimony (undisclosed \$500 paid to witness) was sufficient to create a “reasonable possibility” that the jury was affected.
- Trial judge determined that based on ample impeachment as well as corroborative evidence, the State carried its burden of proving the perjury was harmless beyond a reasonable doubt. Affirmed. **Guzman v. State, 941 So.2d 1045 (Fla. 2006)**
- Guzman sought habeas corpus relief. New trial ordered and affirmed, **Guzman v. Secretary, Department of Corrections, 663 F.3d 1336 (11<sup>th</sup> Cir. 2011)**(quantity of evidence – main witness)
- But see, **Moore v. State, 132 So.3d 718 (Fla. 2014)**(court noted overwhelming evidence vs. minor impeachment information –i.e., prior fight/bias -withheld at trial)

- When in doubt, give it out –
- Be vigilant –
- Never shade or hide the truth –

# THE END!

[ajohnson@sa15.org](mailto:ajohnson@sa15.org)