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POLICY MEMORANDUM

Assessment, management, and disclosure of exculpatory and impeachment information in criminal prosecutions (with special emphasis on law enforcement)

Purpose

This policy establishes a framework for the assessment, management, and disclosure of exculpatory and impeachment information in prosecutions handled by the Office of the Washington County State's Attorney. This policy is intended to encourage consistency in practice with the goal of ensuring transparency and fairness in trial processes in accord with statute, rules, and professional responsibility obligations.

Special emphasis is placed on the handling of exculpatory or impeachment material as it relates to law enforcement witnesses, or other agents of the State.[1]

General References

- U.S. CONST. amend VI
- VT. Const. article 10
- 20 V.S.A. ch. 151
- V.R.Cr.P. 16
- V.R.Prof.Cond. 3.8
- V.R.E. 403
- V.R.E. 404(b)
- V.R.E. 608
- V.R.E. 609
- U.S. Dep't of Justice, Justice Manual (Title 9 – Criminal)

[1] Nothing in this policy shall excuse the obligation of a prosecuting attorney to exercise due diligence with respect to the disclosure of evidence in a criminal matter, based on the particular circumstances and legal considerations applicable thereto. This guide serves as a starting point for compliance, and is not meant to definitively resolve every situation where disclosure may be required to ensure a fair, just, and transparent process that instills confidence in the integrity of the criminal justice system.

SECTION I: BACKGROUND & TERMINOLOGY

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." - Justice William O. Douglas

The modern foundation for disclosure requirements of exculpatory evidence to the defense was established in the 1963 case of *Brady v. Maryland*, 373 U.S. 83 (1963). The United States Supreme Court clearly identified the obligation of prosecutors under the Constitution to provide the defense with favorable evidence that is material either to guilt or to punishment of the accused. Suppression of such evidence constitutes a due process violation.

While *Brady* provided a reasonable foundation for disclosure practice it left many unanswered questions such as providing a legal definition for the terms "suppression," "favorable," and "material, as they relate to evidentiary disclosure. Brady also focused on exculpatory evidence, not the broader concept of impeachment evidence that must be disclosed. Accordingly, a body of caselaw, referred to as *Brady progeny*, has further specified the Constitutional obligations of prosecutors to disclose both exculpatory and impeachment evidence in the criminal court process.

In *Brady*, the Supreme Court noted:

> We now hold that the suppression by the prosecution of evidence favorable to an accused . . . 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.

Nine years later, in *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that *Brady* material includes material that might be used to impeach key government witnesses, stating:

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting [the witness's] credibility falls within th[e] general rule [of *Brady*].

Thus, the now well-known descriptor of *Brady/Giglio* material was born. Generally:

- The term "***Brady* material**" refers to evidence or information — other than *Giglio* material — that could be used by a defendant to make his conviction less likely or a lower sentence more likely;

- The term "***Giglio* material**" refers to evidence or information that could be used by a defendant to impeach a key government witness.

- The term "***Brady* violation**" applies to situations where:
  (1) the evidence at issue is favorable to the defendant, either as exculpatory or impeachment evidence;
  (2) the state has suppressed the evidence, either willfully or inadvertently; and
  (3) prejudice has ensued.

DEFINTIONS
SUPPRESSION: For *Brady* purposes, it does not matter whether suppression was intentional or inadvertent. "Under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene* 527 U.S. 263 (1999)
MATERIALITY: Evidence is material, for *Brady* purposes, if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. "Prosecutors should take a broad view of materiality and err on the side of disclosing exculpatory and impeachment evidence." *Kyles v. Whitley*, 514 U.S. 419 (1995).
PREJUDICE: "To establish the prejudice element the defendant must prove that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *United States v. Hano*, 922 F.3d 1272 (2019).
REASONABLE PROBABILITY: "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667 (1985).

In situations where it is unclear whether disclosure is necessary, "…the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." - *Cone v. Bell*, 555 US 449 (2009).

In addition to case law, and criminal rules of procedure, V.R.Prof.Cond. 3.8.(d) provides that the prosecutor in a criminal case shall: …

> [M]ake 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;

Accordingly, there are both legal and ethical bases upon which prosecutors must disclose exculpatory information to the defense. The ethical basis requires that each prosecutor must exercise his or her own judgment and discretion in determining whether disclosure is necessary. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the

defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

Exculpatory Evidence

Consistent with *Brady*, the term exculpatory evidence includes information that, if true, could demonstrate a defendant's innocence, or less culpability for the crime charged whereby she may be eligible for a lesser sentence. For example: Evidence inconsistent with the defendant's guilt;

- Evidence that negates, or is inconsistent with an element of the crime;
- Failure of a witness of the crime to identify the defendant;
- Information that supports an affirmative defense;
- Information casting doubt on the accuracy of other evidence;
- Information linking another as the perpetrator of the crime; and,
- Information favorable and material to the sentencing phase.

In some cases, these inconsistencies may render a key witness so unreliable as to require dismissal of a case. In other situations, the evidence may be contradicted by other testimony or evidence and will not trigger dismissal or abandonment of the prosecution. Nevertheless, the need to disclose such evidence is critical in circumstances where the case will proceed to disposition by plea agreement or by trial.

Impeachment Evidence

Consistent with Giglio, impeachment evidence entails information about a witness that a fact finder may consider in determining the credibility or reliability of a prosecution witness. For example:

- Evidence/information that negates, or is inconsistent with a prosecution witness's statements or reports;
- Plea agreements between a prosecution witness and the prosecution in the immediate or related case;
- Favorable disposition of criminal charges pending against a prosecution witness;
- Offers or promises made or other benefits provided to prosecution witness in exchange for cooperation;
- Prior convictions of the prosecution witness;
- Pending charges against the prosecution witness;
- Evidence or information that a prosecution witness has a racial, religious or personal bias against the defendant—individually or as a member of a group; or,

- Evidence or information that would undermine a prosecution witness's claim of expertise (e.g. previous inaccurate statements or expert opinions.)

Giglio Material & Law Enforcement Personnel (U.S. Dep't Justice Policy):

Broadly construed, the Department of Justice has recognized *Giglio* material to include "[a]ny finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding." Other materials include:

- Any past or pending criminal charge brought against the employee;
- Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
- Prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
- Information that may be used to suggest that the agency employee is biased for or against a defendant (*See United States v. Abel*, 469 U.S. 45, 52 (1984): "[b]ias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.");
- Any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, agencies and employees should disclose findings or allegations that relate to substantive violations concerning:
- Failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;
- Failure to comply with agency procedures for supervising the activities of a cooperating person (e.g. CI);
- Failure to follow mandatory protocols with regard to the forensic analysis of evidence;
- Information that reflects that the agency employee's ability to perceive/recall truth is impaired.

Unprofessional Conduct by Vermont Law Enforcement Officers

20 V.S.A. ch. 151 provides for the Vermont Law Enforcement Training Council to administer certain investigatory and disciplinary actions with respect to law

enforcement misconduct. 20 V.S.A. § 2401 defines three categories of unprofessional conduct:

- "Category A conduct" means a felony or a misdemeanor that is committed while on duty and did not involve the legitimate performance of duty. Additionally, certain misdemeanor offenses, generally listed offenses, when committed off duty are also construed as Category A conduct (e.g. domestic assault,
- "Category B conduct" means gross professional misconduct amounting to actions on duty or under color of authority, or both, that involve willful failure to comply with a State-required policy or substantial deviation from professional conduct as defined by the law enforcement agency's policy or if not defined by the agency's policy, then as defined by Council policy, such as:
    (A) sexual harassment involving physical contact or misuse of position;
    (B) misuse of official position for personal or economic gain;
    (C) excessive use of force under color of authority, second offense;
    (D) biased enforcement; or
    (E) use of electronic criminal records database for personal, political, or economic gain.

- "Category C conduct" means any allegation of misconduct pertaining to Council processes or operations, namely involving making of false statements, interfering with investigations, or failing to investigate covered matters.

SECTION II: ASSESSMENT & DISCOVERY OF MATERIALS

V.R.Cr.P. 16(b)(2) requires disclosure "to defendant's attorney any material or information within his [or her] possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor." V.R.Cr.P. 16(c) further provides that "[t]he prosecuting attorney's obligations under … this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office."

Thus, prosecutors are charged with a broad and affirmative responsibility to collect and disclose such information. This requires communication and coordination with law enforcement agencies or laboratories participating in the investigation of the matter under prosecution.

Collecting & Assessing Materials

First, it is critical to appreciate that the existence of exculpatory or impeachment information, especially the latter, does not per se necessitate dismissal or abandonment of a prosecution or use utilization of a witness. To the contrary, such information, taken in conjunction with other facts or evidence, may do little to impact the viability of a case. The particulars of each case will dictate the impact of such information, however, the discovery obligation should never be neglected for fear of consequence on the prosecution. To the contrary, fair and complete disclosure will ensure a fair process and instill confidence in the justice system.

Second, while some exculpatory or impeachment information will be readily apparent (set forth in the affidavit of probable cause, or the witness record checks provided in the due course of discovery), other information may require a directed inquiry or search within agency records. To ensure broad disclosures of potential impeachment information, early disclosure of the entire case file from law enforcement is appropriate, and setting the requirement that local agencies make timely disclosures to the prosecutor when the credibility or truthfulness of a law enforcement officer is in issue. As these agencies fall under the scope of V.R.Cr.P. 16(c), a prosecutor must take steps to discover whether any information exists – thereby necessitating clear communication and expectations with law enforcement agencies.

Third, when collecting information, the investigating agency and other stakeholders (including the Office of the Attorney General or other State's Attorney's offices) may have relevant information that is subject to disclosure. At a minimum, a prosecutor should assess whether any of the following is known by or in the possession of the prosecution team relating to non-law enforcement witnesses and be reviewed for disclosure:

- Statements or reports reflecting witness statement variations, or inconsistent statements;
- Benefits provided to witnesses including: (1) dropped or reduced charges, (2) testimonial or transactional immunity; (3) reductions in sentence for cooperation; (4) other consideration with respect to outcome of pending charges; (5) declination/non-prosecution agreements by state or federal authorities relating to involvement in the matter; (6) letters to other law enforcement officials (e.g. federal prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf; (7) consideration or benefits to culpable or at risk third-parties.
- Other known conditions that could affect the witness's bias such as: (1) animosity toward defendant or a group/protected class of which the defendant is a member or affiliated with; (2) relationship with victim; (3) known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);
- Prior acts subject to admissibility under V.R.E. 608;
- Prior convictions under V.R.E. 609;
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events (e.g. prior findings of incompetency to stand trial, or prior false reports based on disordered thought or perception).

Statements of witnesses and victims made during the course of trial preparation, or to the non-confidential victim advocates employed within State's Attorneys' offices may prompt disclosures up to and including during trial.[2] Further, statements made after trial that cast doubt on the credibility or reliability of a witness' testimony may also need to be required, thereby prompting further discovery, requests for post-trial relief, or post-conviction relief.

Finally, the disclosure of information for purposes of discovery does not mean that such evidence will actually prove to be useful to a defendant in his or her defense, and even if such information is relevant, generally, it may be excluded from trial based on limited probative value versus the prejudicial effect. Even if a witness is impeached, it does not mean that a fact finder will inherently find the testimony of the witness to be unreliable or incredible on the issue in controversy.

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[2] Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present.

Assessing Unsubstantiated Claims/Information

Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of a witness or law enforcement officer may or may not be considered potential impeachment information. Information which reflects upon the truthfulness or bias of the witness, to the extent known or maintained by the agency, should be disclosed when:

- An allegation was made by a prosecutor, judge, or other public body (e.g. Vermont Law Enforcement Training Council, local oversight committee, select board, etc.);
- When the allegation received publicity; or
- When the prosecutor and agency agree that such disclosure is appropriate, based upon circumstances involving the nature of the case or the role of the agency witness.

Internal affairs processes, collective bargaining agreements, and other agreements in place may limit the extent to which agencies are willing or able to disclose unsubstantiated misconduct or adverse information. Under such circumstances, the use of protective orders or other limitations on the use and public disclosure of such information may be appropriate – thereby ensuring a balance of a defendant's right to explore defenses and prepare for trial, along with consideration of the privacy and employment rights of law enforcement agency employees.

Considering Disclosure beyond that which is Constitutionally Required

A fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy strongly recommends disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).[3] Accordingly, the following must also be disclosed:

- Information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal;
- Information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a

[3] The policy recognizes, however, that a trial should not involve the consideration of information which is not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime;

- Unlike the requirements of *Brady* and its progeny, which focus on evidence, information, regardless of whether the information subject to disclosure would itself constitute admissible evidence; and
- Multiple pieces of information, where the cumulative impact of such may satisfy the considerations noted above, including situations where the information viewed in isolation may not reasonably be seen as meeting the standards above.

In summary, prosecutors must engage in the broad assessment of information available and ensure that defendants and their counsel have the opportunity to assess and consider such evidence in preparation of a defense – what may seem incongruous or inconsequential to a prosecutor may be vital to an argument or theory a defendant intends to rely upon at trial: "…the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." - *Cone v. Bell*, 555 US 449 (2009).

SECTION III. MANAGEMENT & DISCLOSURE OF MATERIALS

Applicable case law does not generally prescribe a specific form by which information is disclosed. The critical element is that the information is received and available to the defendant, through counsel, for preparation of a defense or confrontation of witnesses at trial. Nevertheless, consistency in the handling of disclosures promotes transparency and predictability in the handling of such information.

Timing of Disclosures

Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See*, *e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

- Exculpatory information. Exculpatory information must be **disclosed reasonably promptly** after it is discovered.
- Impeachment information. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a state witness, will typically be **disclosed at a reasonable time before trial** to allow the trial to proceed efficiently.

Other information, relevant to sentencing or the outcome of pretrial motions must also be disclosed in a timely manner that provides fair notice and opportunity of a defendant to conduct his or her own inquiry into such matters. Pretrial scheduling orders or other orders of the court may dictate when such disclosures must be made. As a cardinal rule, earlier is better – ensuring the timely litigation of issues, making of decisions, and in some cases, hastening case disposition.

Contents of Disclosure & Retention of Records

When information is disclosed pursuant to this policy, the following information should be retained in the case file/docket, and should also be maintained or referenced within the JustWare system of records under the individuals "filing cabinet" tab. This will ensure the availability of information, or at least, reference to the existence of such information by successor State's Attorneys or other offices in the future. The retained information should include:

- The potential impeachment information itself;

- Written analysis or substantive communications, including legal advice, relating to that disclosure or decision;

- Protective orders relating to the handling or disclosure of the information; and
- Any related pleadings or court orders.

In other circumstances, written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information should be retained with the office's filing system (in hard copy, or electronically). In either circumstance, a clear and accessible system of records should be maintained to ensure the availability of information for future disclosure. The files should be routinely updated and actively managed.

Due care must be given to differentiate work product, privileged information, or information that is non-public/protected by court order within such systems. The increased press and public interest in *Brady/Giglio* information and the existence of lists relating thereto, particularly with respect to law enforcement officers, creates a high likelihood of public records requests. Clear and consistent processing and handling of materials will ensure the public interests in records is balanced with the countervailing legal or privacy limitations that are applicable.

For law enforcement witnesses, a general disclosure letter, with other discovery to be produced at a defendant's request through the criminal discovery process may be appropriate to ensure a publicly available records exists, describing the information or conclusions concerning credibility or truthfulness, that does not incorporate information subject to protective orders, or other legal limitations on dissemination.

SECTION IV. RESPONSES TO LAW ENFORCEMENT UNPROFESSIONAL CONDUCT

The existence of impeachment evidence or issues with credibility carry greater consequence when involving a law enforcement witness. Vermont's criminal justice system relies nearly exclusively on officer affidavits to enable the court's finding of probable cause on an information filed by a State's Attorney. Though not technically defunct, the grand jury is seldom used in practice. Thus, the credibility and reliability of law enforcement affidavits is integral to the threshold decision to prosecute, and for the court to find probable cause.

Impeachment evidence, or issues of credibility, relating to law enforcement officers exists in a continuum – from inadvertent or negligent lapses that impact evidence to clearly egregious and intentional behavior such as committing perjury. Some matters will not require disclosure, some will require disclosure only in certain cases or circumstances, and in more extreme settings, disclosure will also be accompanied by a prosecutor's decision that an officer should not testify or serve as an affiant because of potential impeachment information.

Assessing Deceptive or Untruthful Behavior

Conceptualizing *Brady/Giglio* information among several categories is helpful in gauging the response to and the impact of unprofessional conduct or untruthfulness on criminal cases.

It is up to individual State's Attorneys and prosecutors to assess the severity of actions or omissions by law enforcement officers – taking into account intent, experience, past history, circumstances of the statement or discrepancy between statements, and impact on the rights of a defendant. As discussed in the following sub-section, more severe conduct (i.e. "Conduct of Substantial Concern") will frequently result in non-prosecution decisions, while lesser conduct may result in non-prosecution decisions or limitations/pre-conditions on accepting cases referred for prosecution. Some conduct may or may not result in any limitations beyond making legally or ethically required disclosures, or require no action at all beyond clarification or correction.

Conduct of Substantial Concern

Intentional or malicious unprofessional conduct by a law enforcement officer that creates a substantial risk of undermining credibility before a tribunal and would cause a reasonable person to doubt the reliability of statements made in other matters.

This type of unprofessional conduct will frequently result in a State's Attorney's consideration of categorical non-prosecution of cases, or classes of cases, based on substantial doubts of officer integrity and credibility. This is based on a determination that an officer engaged in a purposeful or calculated course of action

to influence a case or criminal matter. Such actions may be directed toward a particular defendant, or designed to protect the officer or another from sanction for substantial errors or deviations from acceptable law enforcement practices. A non-exhaustive list of situations that may be encountered include:

- Criminal conduct resulting in conviction that is fraudulent in nature or constitutes Category A unprofessional conduct as defined under 20 V.S.A. § 4201;
- Deceptive statements or omissions in a formal setting, including testimony, affidavits, incident reports, official statements, or internal affairs investigations;
- Tampering with or fabricating evidence;
- Deliberate failure to report criminal conduct by other officers;
- Willfully making a false statement to another officer on which the other officer relies upon in official setting;
- Repeated, habitual or a pattern of dishonesty, however minor, during internal affairs investigation;
- Persistent dishonesty following *Garrity* warnings or following administrative action;
- Engaging in a pattern of biased enforcement or disparate treatment of any protected class or category of persons defined under 13 V.S.A. § 1458(6); or
- Other deceitful acts that demonstrate disregard for Constitutional rights of others or the laws, policies and standards applicable to the officer's conduct.

Conduct of Significant Concern

Unprofessional conduct by a law enforcement officer that may be intentional, though not necessarily malicious, that creates a significant risk of undermining credibility before a tribunal and would cause a reasonable person to question the reliability of statements made in other matters.

While not condoned, this type of dishonesty or behavior may be explained or mitigated when considering the context or circumstances. This type of conduct covers situations where an officer's acts, omissions, or statements are found to be deceptive or untruthful, without clearly corresponding prejudice to a criminal defendant or pending matter. Frequently, these are situations where a law enforcement officer engages in conduct to benefit or protect him or herself, to include concealing administrative or personal conduct that does not directly prejudice or impact a defendant.

- A simple exculpatory 'no' when faced with an allegation of misconduct;
- A deceptive statement made in an effort to conceal minor unintentional misconduct (such as negligent loss of equipment);

- A purely private, off-duty statement intended to deceive another about private matters;
- An isolated dishonest act that occurred years prior (e.g. cheating on a college exam);
- Isolated 'Administrative Deception' related to minor employment matters (e.g. a call in sick when not really ill, a misleading claim of unavailability for a shift); or
- Other Category B or C unprofessional conduct as defined under 20 V.S.A. § 4201 that is not otherwise covered under the preceding section.

Conduct of Concern

Careless or negligent conduct that is not malicious, but nevertheless creates a risk of undermining the credibility of a law enforcement officer, at least in a particular case, and could cause a reasonable person to question the reliability of statements made in other matters.

Some conduct within this tier may require a *Brady/Giglio* disclosure in the affected case, but may not require persistent disclosure depending on the attendant circumstances. Some of situations may not even provide grounds for impeachment, even if some form of disciplinary or corrective action is imposed. Examples of Tier 3 conduct includes:

- Failure to follow proper procedure or protocol for the handling of evidence or reports, where no prejudice ensues to a defendant;
- Negligence in reporting facts or providing information to the public that later turns out to be false;
- A spontaneous, thoughtless statement made under stressful circumstances that is later recognized as misleading and is corrected;
- Negligence to turn on body worn camera or preserve video of an incident, where there is no intent by the officer to prejudice a defendant or obscure misconduct;
- Mistake of law based on genuine misapprehension or misunderstanding of rule or requirement; or
- Omission of non-substantive information in reports of CAD systems (e.g. failing to check boxes in traffic tickets, or leaving portions of Valcour/Spillman case entry system blank, without an intent to deceive or prejudice a defendant.

Some matters that generally not constituting conduct of concern, includes:

- Investigatory tactics that are deceptive but lawful (e.g. lies/ruses during an interrogation or interview);

- Lies told in jest concerning trivial matters or to spare another's feelings; or
- Nonmaterial exaggerations, boasting or embellishments in descriptions of events or behaviors of others.

Further, minor inconsistencies, variances in recall between statements made close in time to an event (or recorded contemporaneously to an event) with deposition or in court testimony will rarely require disclosure beyond the case at hand. Prosecutors should be mindful that the human mind and ability to recall is imperfect. Lapses in memory frequently occur and the rules of evidence provide for appropriate means to refresh recollection. As noted above, a consistent pattern of memory lapses or inability to recall may be problematic, but infrequent gaps of memory are common. Some factors to consider concerning credibility include:

- The circumstances under which the statement is made, e.g. was it made under intense pressure or a situation where the stress or excitement of situation influenced perception? Traumatic situations such as officer involved shootings, response to an active shooter situation, or circumstances where an officer is assaulted may all trigger a heightened stress response that impacts immediate recall and perception. Memories or perceptions may be different upon reflection or when away from the stress inducing situation.
- Are present perceptions different from initial ones based on the presentation of new information, e.g. an officer believed an offender was wearing a black shirt, but upon seeing the shirt in evidence acknowledges it was actually blue.
- Whether there acknowledgement of a flawed perception at the time of the event or incident, e.g. after reviewing body camera footage acknowledging that he or she did not notice something or misapprehended information initially reported.
- Whether the officer made an effort to correct the record, or acknowledged the error made, e.g. swearing to an affidavit that states a traffic stop was at the wrong mile marker or in the wrong town.

These lists are non-exhaustive, and are provided for explanatory purposes only.

Declination of Cases & de Facto Disqualification of Officers as Witnesses

Among the decisions a State's Attorney must make when considering and responding to law enforcement misconduct or unprofessional conduct is whether to take action beyond the disclosure of the matter. Dismissal of charges may be an appropriate and necessary remedy in some cases, but the more challenging decision is whether to take action with respect to the law enforcement officer him or herself.

In extreme situations, criminal investigation and prosecution may be appropriate. However, the purpose of this policy is not to prescribe or predict the potential criminal justice response to such issues. Rather, this policy addresses the relevant considerations and process to make decisions of whether to decline cases submitted by a law enforcement officer on the basis of unprofessional conduct or credibility issues. A range of options is available:

- Total declination all cases, resulting in functional disqualification of law enforcement officer (frequently when there is "conduct of substantial concern");
- Declination of certain cases or classes of cases referred for prosecution by a law enforcement officer;
- Imposition of requirements for supplemental/additional review prior to filing by supervisory officers or prosecutors, or production of body worn camera footage or other materials prior to filing to allow for full prosecutorial review; or
- General practice of case-by-case prosecutorial discretion, with disclosures made as appropriate with legal and ethical standards.

The decision to categorically decline cases should not be reached in an arbitrary or capricious manner, rather, substantial evidence or investigation, and careful analysis, should underlie such a decision. Prosecutors enjoy immunity in terms of decision making in this regard, however, law enforcement agencies or municipalities may face employment law challenges. *See e.g., Hubacz v. Vill. of Waterbury*, 207 Vt. 399, 413 (2018) (termination "requires a finding that the officer in question cannot fulfill the duties associated with his employment and cannot be reassigned in such a way as to accommodate the nonprosecution decision.").
A number of considerations should guide the response, beyond making legal or ethically required disclosures in pending matters. These considerations include, but are not limited to:

- Impact of impeachment material, particularly admissible evidence, on trial proceedings;
- Impact, if any, of public confidence and trust in the criminal justice system based on continued reliance of a law enforcement officer who has engaged in unprofessional conduct or is subject to a continuing disclosure under V.R.Cr.P. 16;
- Whether the deficiency or behavior lends itself to rehabilitation;
- Whether risk of future unprofessional conduct may be mitigated through use of body worn cameras, heightened supervisory review, or other measures to reduce or eliminate the risk of impeachment at trial or pretrial proceedings;
- Age, experience, level of training/certification, and past performance of the law enforcement officer compared with the nature/extent of the unprofessional or deceptive conduct; and

- Impact of decertification proceedings, other actions by the Vermont Law Enforcement Training Council, or internal affairs/employment response by the law enforcement officer's agency.

Non-prosecution decisions or other limitations on acceptance of a law enforcement officers cases are likely to trigger significant interest from media, oversight organizations, and local municipal governments. Ensuring a clear and concise rationale for the decision to non-prosecute or limit acceptance of case referrals for a law enforcement officer should be maintained. The decision to disqualify or refuse acceptance of a law enforcement officers cases is reserved to the State's Attorney.

APPROVED March 15, 2021

Encls.
Model Letter – Officer *Brady/Giglio* Material

APPENDIX A – MODEL BRADY/GIGLIO LETTER (LAW ENFORCEMENT)

In re: Trooper John Q. Smith, Vermont State Police

Dear Counsel:

It has come to my attention that Trooper John Q. Smith, of the Vermont State Police, was the subject of a criminal and an internal affairs investigation.

In reviewing the matter, I concluded that there is credible evidence that Trooper Smith engaged in conduct that risks undermining his credibility before a fact finder, or cause a reasonable person to question the reliability of his statements.

In this case, Trooper Smith improperly claimed sick time and over time on several occasions where he was not in fact ill and did not actually respond to after hours calls for service. Criminal charges were not pursued, however, the Vermont State Police took administrative actions in response to this incident. I concluded that this conduct creates a cognizable basis to challenge the credibility and accuracy of representations made by Trooper Smith.

Although there is no evidence to suggest that Trooper Smith's reports filed in your client's cases are not accurate, this information is disclosed consistent with the State's Constitutional and ethical requirements, including V.R.Cr.P. 16(a)(2)(G) and (b)(2) to ensure awareness of this matter for purposes of discovery planning and disposition of pending cases where Trooper Smith was the investigating officer. Thank you.

Letters should include: (1) a brief introduction; (2) a characterization of the investigation and reference to the appropriate description of conduct, with explanation; (3) a short summary of the substantive facts/basis of impeachment; and (4) a conclusion that notes rationale for the disclosure and whether there is indication that the law enforcement officer's reports are inaccurate or compromised.

The final paragraph may also be used to indicate other actions (e.g. "Based on this information other matters Trooper Smith investigated have been dismissed" or "based on this information, my office has declined to prosecute future matters referred by Trooper Smith.") Additionally, pertinent documents or reports critical to discovery should be included as enclosures to such letter.