AN UNFINISHED SYMPHONY: *GIGLIO V. UNITED STATES* AND DISCLOSING IMPEACHMENT MATERIAL ABOUT LAW ENFORCEMENT OFFICERS

*Thomas P. Hogan**

In every criminal case in the United States, prosecutors have a Constitutional duty to disclose to the defense all "material" evidence that undermines the credibility of any police officer who may testify at trial. The problem with this ambitious requirement is that prosecutors have virtually no idea about the definitional boundaries of what constitutes such law enforcement impeachment evidence. The Supreme Court precedent in this area is incoherent, as members of the Court have admitted. The various definitions of police impeachment evidence proposed by prosecutors, law enforcement agencies, legislative bodies, and lower courts are wildly inconsistent. The simplest factual scenarios result in directly opposing conclusions about whether certain information about the police must be disclosed, all because the basic definitions of police impeachment material have not been established. This Article explores and exposes this primary definitional deficiency in the criminal justice system. The Article then proposes a comprehensive list of categories of what should be considered disclosable law enforcement impeachment evidence to be used throughout the United States, bringing order to a chaotic but incredibly important area of criminal law.

* Partner at Gaza & Hogan LLC, practicing complex litigation and criminal defense; former Assistant United States Attorney for the Eastern District of Pennsylvania and elected District Attorney for Chester County, PA. The author acknowledges and thanks Kristine Hamann of the Prosecutors' Center for Excellance and Georgetown Law School students Rebecca Noeske and Alexandra Rogers for their diligent research, comments, and guidance.

PRELUDE

One of the most troubling and perplexing issues facing law enforcement in the United States is how to define and disclose impeachment evidence regarding law enforcement officers in criminal cases. By tradition and long-standing practice, federal prosecutors refer to potential impeachment information about police officers as law enforcement "*Giglio* Material."[1] In its most obvious form, such *Giglio* Material might include a criminal conviction for planting evidence. The United States Supreme Court constitutionally mandated the disclosure of impeachment evidence to defendants in criminal cases in *Giglio v. United States*.[2] *Giglio* is a direct descendant and subset of the Court's opinion about the required disclosure of exculpatory evidence set forth in the seminal case *Brady v. Maryland*.[3]

Despite the fact that *Giglio* has been settled precedent for almost 50 years, there is still a massive amount of confusion among prosecutors and police in the United States about law enforcement impeachment evidence. There are red-hot arguments about whether prosecutors should keep lists of officers with impeachment problems;[4] who decides what constitutes *Giglio* Material;[5] what information should be disclosed to the defense and the public;[6] the interplay between impeachment material and

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[1] *See Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")*, United States Department of Justice Memorandum from Attorney General Janet Reno (Dec. 9, 1996), https://www.justice.gov/archives/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law [hereinafter "Reno Policy"]. *See also* Erika Brown Lee, *United States Department of Justice Privacy Impact Assessment for Giglio Information Systems* (Mar. 2, 2015), https://www.justice.gov/file/438536/download ("*Giglio* is the name of a United States Supreme Court precedent that imposes certain obligations on prosecutors to disclose potential impeachment information on federal law enforcement agency witnesses or affiants.").

[2] Giglio v. U.S., 405 U.S. 150 (1972).

[3] Brady v. Maryland, 373 U.S. 83 (1963). While many local prosecutors follow the federal lead in referring to law enforcement impeachment evidence as *Giglio* Material or *Giglio* protocols, some local prosecutors opt for the terms *Brady* Material or *Brady* protocols, in deference to the original case. This Article generally will refer to law enforcement *Giglio* Material, but the reader should be aware that the *Brady* and *Giglio* cases are often used interchangeably when referring to mandatory disclosure of police impeachment material.

[4] *See, e.g.*, Henry Gass, *When DA Doesn't Consider an Officer Reliable, Should Public Know?,* CHRISTIAN SCI. MONITOR (Sept. 3, 2019), https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t-consider-an-officer-reliable-should-public-know (listing law enforcement organizations suing district attorneys over keeping of *Brady/Giglio* lists).

[5] *See, e.g.*, Justin George & Eli Hager, *One Way To Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019), https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say (noting conflict whereby police unions claim that decisions about impeachment material "should be left to courts or administrative tribunals," not prosecutors).

[6] *See, e.g.*, Stephanie Wykstra, *The Fight for Transparency in Police Misconduct, Explained*, VOX (June 16, 2020), https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct (noting that New York allows public disclosure of police misconduct files).

the ability of police officers to keep their jobs;[7] and numerous other contentious issues. Legislative bodies appear as confused as everybody else, trying multiple schemes to address this problem.[8] Even more worrisome, a national survey found that a majority of prosecutors' offices in the United States do not have a formal *Giglio* policy, and some local law enforcement leaders are not even aware that such a constitutional requirement exists.[9]

After sorting through the cases and scholarly articles in this area, one central problem emerges. It is a problem that has been almost completely ignored by both courts and academic commentators. Simply put, nobody knows exactly what constitutes law enforcement *Giglio* Material. The Supreme Court issued a few broad opinions in the area of disclosable impeachment evidence, then walked off the podium, leaving a symphony that lies unfinished after the first movement.[10] Appellate courts and scholars argue over the proper standard of "materiality" for a potential reversal on appeal regarding the non-disclosure of law enforcement impeachment evidence, as well as myriad procedural issues.[11] However, nobody knows whether the fact that a police officer lied to his spouse during divorce proceedings or has a history of alcoholism constitutes *Giglio* Material that must be collected and disclosed to the defense in a criminal case where the officer might testify. Without such primary definitional clarity, none of the other debates in this area can achieve any semblance of structural logic, and prosecutors and law enforcement in the United States will be stuck in an eternal loop of uncertainty and mistakes.

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7 *See, e.g.,* Val Van Brocklin, *Brady v. Md Can Get You Fired*, OFFICER.COM (Aug. 16, 2010), https://www.officer.com/training-careers/article/10232477/brady-v-md-can-get-you-fired (stating "find yourself *Brady*-listed and you may just find yourself out of police work.").

8 *See infra*, Part II.C.

9 *See* Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison.*, USA TODAY (Oct. 17, 2019), https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/ (examining a nationwide prosecutor survey and Miami-Dade County prosecutorial training on disclosing *Giglio* Material).

10 *See infra*, Part I.A

11 *See, e.g.*, Riley E. Clafton, *Comment, A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307 (2020); Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RESERVE L. REV. 531 (2007); John C. Thomure, Jr., *Kyles v. Whitley: An Opportunity Lost?: An Examination of The Rule of Discovery Concerning the Disclosure of Impeachment Material Contained in Personnel Files of Testifying Government Agents in Federal Criminal Cases*, 83 MARQ. L. REV. 547 (2000); Lis Wiehl, *Keeping Files on the File Keepers: When Prosecutors are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 WASH. L. REV. 73 (1997).

In the current climate focusing on police misconduct and increased transparency, it is imperative for criminal justice in the United States that clear rules are established regarding what constitutes law enforcement *Giglio* Material. This Article attempts that task, offering guidance and points of debate for courts, legislatures, prosecutors, and the police.

This Article is divided into four parts. In Part I, the truncated evolution of *Giglio* Material under Supreme Court precedent is deconstructed. Part II surveys some of the widely varied *Giglio* protocols that have been created across the nation by prosecutors, police, and legislative bodies, and details how state courts have addressed *Giglio* Material. Part III poses some of the most common and some of the most perplexing *Giglio* factual scenarios involving police conduct. Interestingly, this section exposes that under the current shatteringly incoherent Supreme Court precedent in this area, issues such as unequivocal lies and intentional Constitutional violations by the police in a criminal case are not necessarily considered *Giglio* Material, even though every policy created by prosecutors and law enforcement agrees that such conduct should be classified as disclosable impeachment material. Part IV discusses proposed solutions to the primary definitional issue of how to determine what constitutes *Giglio* Material for law enforcement officers. This final section sets forth bedrock issues that should be considered law enforcement *Giglio* Material, such as on-duty dishonesty and anything demonstrating prejudice to constitutionally protected classes, as well as revealing entirely new categories of *Giglio* evidence, such as substance abuse and mental health issues for police officers. The ultimate proposal is straightforward—the Supreme Court should abandon the "materiality" test for the disclosure of impeachment information and Federal Rule of Criminal Procedure 16 should be amended to include categorical definitions of law enforcement impeachment evidence. In the alternative, this final section also discusses procedural tools that might force courts to issue opinions to make these definitional decisions, unless the courts would like to take on the case-by-case analysis of law enforcement *Giglio* Material currently required of prosecutors.

The goal of this Article is to establish some hard-and-fast rules to define law enforcement *Giglio* Material. Hopefully, this discussion will trigger the United States Supreme Court and legislative bodies to grapple intelligently with this issue and publish clear procedural rules, or will force prosecutors and the police to recognize uniform national standards. Only then can the criminal justice system effectively resolve secondary issues, such as where and how to keep lists of such impeachment evidence and whether such information should be publicly disclosed.

I. THE NASTY, BRUTISH, AND SHORT EVOLUTION OF *Giglio*

This section addresses the limited and spectacularly inconclusive precedent from the United States Supreme Court about *Giglio* Material. The section also discusses some of the real-world consequences for prosecutors caused by this great void in the law.

A. Supreme Court Precedent

A quartet of cases from the United States Supreme Court provides the meager doctrinal guidance about exactly what constitutes law enforcement *Giglio* Material: *Brady v. Maryland*,[12] *Giglio v. United States*,[13] *United States v. Bagley*,[14] and *Kyles v. Whitley*.[15] There are other cases that have had some minimal historical impact on the definition of *Giglio* Material, but these four cases are the functional core of the controlling precedent. *Brady* was decided in 1963. *Kyles*, the final case, was decided in 1995. In the subsequent quarter century, the Supreme Court has simply remained silent on this issue. A brief analysis of each of these four cases provides some necessary context for why the definition of law enforcement impeachment evidence has become so unhinged.

1. *Brady v. Maryland*

Brady v. Maryland is the seminal case that established the ground rules for discovery in criminal cases.[16] *Brady* was a death penalty case with two defendants accused of a murder committed during a robbery.[17] The co-defendants were tried separately.[18] Defendant Brady claimed that his co-defendant had committed the actual murder.[19] Brady conceded that he was legally culpable for the murder because he participated in the robbery, but requested that the death penalty not be imposed on him.[20]

During the pre-trial portion of the case, Brady requested any statements made by his co-defendant.[21] The prosecution turned over some statements, but did not turn over a statement in which the co-defendant admitted that he had committed the actual murder.[22] Brady was convicted and sentenced to death.[23] Post-trial, Brady discovered the exis-

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12 Brady, 373 U.S. 83 (1963).
13 Giglio, 405 U.S. 150 (1972).
14 U.S. v. Bagley, 473 U.S. 667 (1985).
15 Kyles v. Whitley, 514 U.S. 419 (1995).
16 373 U.S. 83.
17 *Id.* at 84–85.
18 *Id.* at 84.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*

tence of the co-defendant's statement which had not been disclosed by the government.[24] Brady requested the reversal of his conviction based on the suppression of the evidence by the prosecution, predicating his argument on the Due Process Clause of the Fourteenth Amendment in the United States Constitution.[25]

In a concise opinion, the Supreme Court reversed Brady's conviction under the Fourteenth Amendment's Due Process Clause.[26] The Court held, "[S]uppression 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 of the prosecution."[27] The Court thus established a two-pronged standard for evidence which must be disclosed to the defense in criminal cases—evidence that is (1) favorable to the accused, and (2) material to guilt or punishment.

In addition to establishing the basic Constitutional requirement for discovery in criminal cases, *Brady* also provided an early example of a significant factor in this area of the law—the "colossal blunder" factor. These cases have a tendency to evolve only in the presence of a colossal blunder by the government. In *Brady*, it was suppression of a co-defendant's statement which directly corroborated Brady's defense, an unthinkable error. If hard cases make for bad law, it might also be said that easy cases (*i.e.*, colossal blunder cases) make for virtually no law at all.

2. *Giglio v. United States*

The next step in the evolution of *Giglio* Material was the decision in the eponymous *Giglio v. United States*.[28] In *Giglio*, the defendant was accused of passing forged money orders.[29] A cooperating witness for the government, who was part of the defendant's scheme, was the key prosecution witness.[30] The witness testified at trial that no promises had been made to him for his testimony and the government specifically closed on this point.[31] The defendant was convicted.[32]

Post-trial, the defendant discovered that evidence had been withheld from him by the government.[33] Specifically, one prosecutor had handled the indictment of the defendant by a federal grand jury, while a second

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24 *Id.*
25 *Id.*
26 *Id.* at 86.
27 *Id.* at 87.
28 *See generally* Giglio v. U.S., 405 U.S. 150 (1972).
29 *Id.* at 150.
30 *Id.* at 151.
31 *Id.* at 151–52.
32 *Id.* at 150.
33 *Id.* at 152–53.

prosecutor handled the actual trial.[34] The grand jury prosecutor had promised the witness that he would not be prosecuted if he testified for the government against the defendant.[35] The trial prosecutor was unaware of the grand jury prosecutor's promise to the witness and did not disclose this promise to the defense.[36] The witness then testified falsely at trial that no promises of non-prosecution had been made to him, despite specific cross-examination on the issue.[37]

In *Giglio*, the Supreme Court reversed the defendant's conviction.[38] The Court held that impeachment evidence—"evidence affecting credibility"—falls squarely within the general disclosure rule of *Brady*.[39] The non-disclosed promise to the cooperating witness clearly was relevant to the credibility of the witness and would have been used to impeach him at trial.[40]

Thus, *Giglio* established the simple rule that impeachment evidence for witnesses was part of the discovery required by the *Brady* doctrine. From this seemingly straightforward holding, the complex issue of law enforcement *Giglio* Material was born, as potential impeachment evidence about testifying police officers falls into the same general category of required discovery about any testifying witness.

Once again, the colossal blunder factor came into play in *Giglio*. The case featured the rather unbelievable sequence of one federal prosecutor in a case making an unequivocal promise of functional immunity to a witness, then the second federal prosecutor in the case having no idea that the promise was made, and the witness lying about the promise at trial.[41] There is not much guidance to be gleaned from such a bizarre scenario. The unanimous six-page opinion by Chief Justice Warren Burger reflected the straightforward nature of the factual issue and legal holding.[42]

3. *United States v. Bagley*

After the relatively short and clear opinions in *Brady* and *Giglio*, the Supreme Court issued a much lengthier, more confusing, and more controversial opinion in *United States v. Bagley*.[43] In *Bagley*, the Supreme Court began to grapple with the materiality prong of *Brady*. The defen-

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34 *Id.*
35 *Id.* at 152.
36 *Id.* at 152–53.
37 *Id.* at 151.
38 *Id.* at 155.
39 *Id.* at 154.
40 *Id.* at 151, 154–55.
41 *Id.* at 151–53.
42 *See id.* at 150–51.
43 *See* U.S. v. Bagley, 473 U.S. 667 (1985).

dant in *Bagley* was charged with firearms and drug offenses.[44] The main government witnesses were two state law enforcement officers employed as private security guards by a railroad used by the defendant as part of his alleged crimes.[45] The defense requested any "deals, promises or inducements" made to these two quasi-law enforcement witnesses.[46] The government produced affidavits from the witnesses that stated that they had not been offered any rewards or deals.[47] The defendant was convicted in a bench trial of the drug offenses, but acquitted of the firearm offenses.[48]

Post-trial, the defendant discovered that the two witnesses had been working with the Bureau of Alcohol, Tobacco and Firearms (ATF).[49] The witnesses had filled out forms with ATF for the "Purchase of Information and Payment of Lump Sum Therefor."[50] The two witnesses had been paid by ATF after the trial.[51] The defendant alleged a *Brady/Giglio* violation on appeal because this information had not been disclosed to him for purposes of impeaching the two witnesses.[52]

In discussing the defendant's claims, the *Bagley* Court reiterated the *Brady* standard that evidence must be disclosed if it is: (1) favorable to the defense, and (2) material to the issues of guilt or punishment.[53] In addressing the materiality prong, the Court held that evidence is material if it "might have affected the outcome of the trial."[54] A reversal is required "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[55] The Court then remanded the case to the Ninth Circuit Court of Appeals to apply this standard.[56] Thus, the significance of *Bagley* is that it defines the *Brady/Giglio* materiality prong as evidence that "might have affected the outcome of the trial."[57] *Bagley* also was the first perilous step in establishing materiality as a moving target.[58]

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44 *Id.* at 669.
45 *Id.* at 670.
46 *Id.* at 687 (White, J., concurring in the judgment).
47 *Id.* at 670.
48 *Id.* at 670–71.
49 *Id.* at 671.
50 *Id.*
51 *Id.* at 687 (White, J., concurring in the judgment).
52 *Id.* at 671–72.
53 *Id.* at 674.
54 *Id.* at 674–75 (quoting U.S. v. Agurs, 427 U.S. 97, 104 (1976)).
55 *Id.* at 678.
56 *Id.* at 684.
57 *Id.* at 678.
58 Although the Supreme Court may have been unaware of the fact, the use of the term "material" was being phased out of evidentiary codes between the issuance of *Brady/Giglio* and the later opinion in *Bagley*. In 1975, Federal Rule of Evidence 401 was adopted and explicitly declined to use the term "material" in defining what should be considered relevant evidence, stating that the new language of Rule 401 "has the advantage of avoiding the loosely

In dissent, Justice Thurgood Marshall made some prescient comments about this amorphous *Brady/Giglio* standard.[59] His dissent will be discussed following the analysis of *Kyles v. Whitley* below, the last of the quartet of Supreme Court cases forming the definitional basis of *Giglio* Material.

Interestingly, *Bagley* was a bench trial, and the judge who heard the original trial also was presented with the issue post-trial of whether the non-disclosed evidence would have made a difference in the trial result.[60] Writing as both the fact-finder at trial and as the finder-of-law for the post-trial legal issues, the judge explicitly found that the trial verdict would *not* have been different if the evidence about the two witnesses had been disclosed.[61] This unique circumstance, which is seemingly dispositive of the issue of whether the suppressed evidence "might have affected the outcome of the trial,"[62] did not deter the *Bagley* majority from remanding the case to the Ninth Circuit for a final decision.[63]

Once again, the colossal blunder factor came into play in *Bagley*. Diligent research has yet to uncover another case where the critical government witnesses were sort-of law enforcement officers who were working in a private capacity and were being secretly paid after-the-fact by a federal agency. The predictive value of *Bagley* is essentially null.

4. *Kyles v. Whitley*

Kyles v. Whitley is the final United States Supreme Court case attempting to address the *Brady/Giglio* definitional standard.[64] The defendant in *Kyles* was charged with capital murder in New Orleans for the killing of a 60-year old woman during a robbery/carjacking in the parking lot of a grocery store.[65] The defendant was identified by multiple eyewitnesses; the victim's purse was found in the defendant's garbage; the murder weapon was found in the defendant's residence; and an informant implicated the defendant in the killing.[66] The defense claimed that the government informant, who did not testify at trial, actually was

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used and ambiguous word 'material.'" Fed. R. Evid. 401, Notes of Advisory Committee on Proposed Rules (1975). Thus, even as the rules were jettisoning the concept of "materiality" as being too ambiguous to be useful, the Supreme Court was doubling down on its reliance on the vague term for purposes of defining *Giglio* Material.

59 *See* Bagley, 473 U.S. at 685–709 (Marshall, J., dissenting).

60 *Id.* at 673.

61 *Id.*

62 *Id.* at 674–75.

63 And the trial court's finding also did not stop the Ninth Circuit from ultimately reversing and remanding the case with instructions to vacate the defendant's conviction. *See* Bagley v. Lumpkin, 798 F.2d 1297, 1302 (9th Cir. 1986).

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

65 *Id.* at 423.

66 *Id.* at 427–28.

the murderer and set up the defendant.[67] After a hung jury in the first trial, the second trial resulted in the defendant being convicted and sentenced to death.[68]

During pre-trial motions, the defense had requested any *Brady*/*Giglio* evidence.[69] The prosecution claimed that there was none.[70] Following the trial, the defense claimed on appeal that various conflicting eyewitness statements, inconsistent statements from and other damaging information about the non-testifying informant, and other potential impeachment evidence had not been disclosed to the defense.[71] Most of this material had never even been disclosed to the prosecutors by the police in the case.[72] In addition, between the hung jury and the second trial, the chief prosecutor in the case had interviewed the informant.[73] That interview, containing some inconsistent statements, was not disclosed to the defense before the second trial (and neatly fits the "colossal blunder" pattern noted in prior cases).[74] On appeal, the defendant claimed *Brady*/*Giglio* violations.[75]

The Supreme Court was bitterly divided in *Kyles*, with a 5-4 split in favor of reversal.[76] The narrow legal point with major significance for *Brady*/*Giglio* issues was the holding that knowledge about information controlled by the police (or "others acting on the government's behalf in the case") is imputed to the prosecution, whether or not the prosecutors had actual knowledge of the information.[77] That point was non-controversial and has been accepted into *Brady*/*Giglio* black letter law.

However, writing for the majority, Justice David Souter broke new ground on the materiality standard for *Brady*/*Giglio* violations. Justice Souter wrote that the test for materiality "turns on the cumulative effect of all such evidence suppressed by the government," not an analysis of any single piece of evidence.[78] The traditional test for materiality seemingly remained "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[79] However, Justice Souter went on to opine that a reasonable probability of a different result for *Brady*/*Giglio* materiality pur-

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67 *Id.* at 429.
68 *Id.* at 422.
69 *Id.* at 428.
70 *Id.*
71 *Id.* at 430, 431 n.6, 453–54.
72 *Id.* at 442 n.13.
73 *Id.* at 429.
74 *Id.* at 429–30.
75 *Id.* at 431.
76 *Id.* at 421, 454.
77 *Id.* at 437–38.
78 *Id.* at 421, 436–37.
79 *Id.* at 433–34 (quoting Bagley, 473 U.S. at 682).

poses depends on whether the government's evidentiary suppression "undermines confidence in the outcome of the trial."[80] This does not require that disclosure would have resulted in an acquittal, but instead questions whether the failure to disclose still resulted in "a verdict worthy of confidence."[81] In making a determination about what constitutes *Giglio* Material that must be turned over, the prosecutor must "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."[82] The majority held that a *Brady*/*Giglio* violation took place under this new standard and reversed the defendant's conviction.[83] If *Bagley* made the materiality standard a moving target, *Kyles* made materiality a moving target attached to a mongoose running through a fog bank.

Justice Antonin Scalia, joined by three colleagues, wrote a blistering dissent.[84] In essence, he stated that the majority opinion was a tortured attempt by the Court to show that it cared about death penalty cases.[85] Justice Scalia cited the "massive core of evidence" presented by the prosecution and the "desperate implausibility" of the theories advanced by the defense and in the majority opinion.[86] He argued that *certiorari* never should have been granted in the case, much less the reversal of a conviction.[87]

5. Summary of Supreme Court Precedent

The above-described Supreme Court precedent allegedly defines for prosecutors exactly what constitutes *Giglio* Material that law enforcement must disclose to the defense in criminal cases. Whatever is favorable to the accused and "material" to guilt or punishment is *Giglio* Material and must be disclosed.[88] This includes material impeachment evidence.[89] Materiality is defined as constituting a "reasonable probability" that the result of the proceeding would have produced "a verdict worthy of confidence" despite the evidence not having been disclosed.[90] All the prosecutor needs to do pre-trial is assess all of the evi-

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80 *Id.* at 434.

81 *Id.*

82 *Id.* at 437.

83 *Id.* at 454.

84 *Id.* at 456.

85 *Id.* at 457–58 ("The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that.").

86 *Id.* at 461, 475.

87 *Id.* at 459–60.

88 Brady, 373 U.S. at 87.

89 Giglio, 405 U.S. at 154–55.

90 *See* Kyles, 514 U.S. at 434; Bagley, 473 U.S. at 681–82.

dence the government has, all of the theories and evidence that the defense might present (without knowing what they are), and then "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."[91] If the prosecutor can also determine how many angels can dance on the head of a pin, that also should be disclosed.

If you think that this standard is a tad convoluted and unworkable, you are not alone. In *Bagley*, Justice Thurgood Marshall offered a well-grounded criticism of the Court's attempted *Brady*/*Giglio* standard.[92] First, Justice Marshall pointed out, "The private whys and wherefores of jury deliberations provide an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference."[93] Justice Marshall went on to note, "[The prosecutor] must evaluate his case and the case of the defendant—of which he presumably knows very little—and perform the impossible task of deciding whether a certain piece of information will have a significant impact at trial. . . . At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful."[94] Justice Marshall succinctly summarized his critique by concluding that the Supreme Court's jurisprudence in this area "imposes on prosecutors the burden to identify and disclose evidence pursuant *to a pretrial standard that virtually defies definition.*"[95]

Unlike his colleagues on the Court, Justice Marshall had been a trial lawyer earlier in his career.[96] He understood the realities of a criminal trial in ways that the other justices, by dint of their limited or non-existent experience in actual trials, would never fully grasp. Indeed, Justice Marshall explicitly noted that his dissent was "based in significant part on the reality of criminal practice . . . ."[97]

Another curious point for the later analysis of *Brady*/*Giglio* precedent from the Supreme Court is the complete absence of any discussion regarding Federal Rules of Evidence 608 and 609. Rule 608 establishes how a witness may be impeached regarding their reputation for truthful-

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91 *See* Kyles, 514 U.S. at 437.

92 *See* Bagley, 473 U.S. at 685–709 (Marshall, J. dissenting).

93 *Id.* at 693.

94 *Id.* at 701.

95 *Id.* at 700 (emphasis added).

96 *See* Michael O'Donnell, *Thurgood Marshall, Badass Lawyer*, THE ATLANTIC (October 2015), https://www.theatlantic.com/magazine/archive/2015/10/thurgood-marshall-badass/403189/#:~:text=soon%20after%20graduating%20first%20in,or%20respond%20to%20racial%20violence. ("Soon after graduating first in his class from Howard University's law school, Marshall marched into the South to represent criminal defendants, soldiers, and laborers in jury trials.").

97 Bagley, 473 U.S. at 696.

ness or with specific instances of misconduct.[98] Rule 609 sets forth when and how witnesses can be impeached with a prior criminal conviction.[99] These rules set well-established boundaries on impeachment material, and thus would have formed a natural discussion point for the Supreme Court when addressing discoverable impeachment material. But Rules 608 and 609 are never mentioned in these Supreme Court cases.[100] The Federal Rules of Evidence were enacted in 1975, explaining why *Brady* and *Giglio* did not address these rules, but leaving no explanation for why *Bagley* and *Kyles* failed to consider the rules.

And this is precisely where the Supreme Court abandoned the field in the *Brady*/*Giglio* analysis.[101] While laying a confusing groundwork to start a determination of what exactly should be defined as law enforcement *Giglio* Material, the Court never even squarely considered the issue of *Giglio*'s application to police conduct. Why did the Court stop analyzing the field of *Giglio* Material at this awkward juncture? One commentator argues strongly that the Supreme Court stopped considering such cases because of two factors.[102] First, the United States Department of Justice voluntarily adopted a *Giglio* policy covering federal law enforcement agents, effectively pre-empting the field.[103] Second, the passage of the federal Antiterrorism and Effective Death Penalty Act of 1996 limited the number of state *habeas* cases reaching the Supreme Court.[104] These two factors "thus worked to choke off the opportunity—and the need—for the federal courts to settle the question of *Brady*'s application to police personnel files."[105]

But even this explanation is incomplete. The DOJ policy covered federal prosecutions, but had no authority over the far greater number of

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98 FED. R. EVID. 608.

99 FED. R. EVID. 609.

100 *See, e.g.*, Kyles, 514 U.S. 419 (failing to address the Federal Rules of Evidence).

101 The Supreme Court continued to issue opinions on general *Brady* exculpatory evidence issues, but it did not add any clarity to the issue of *Giglio* impeachment evidence. The closest the Supreme Court came to addressing *Giglio* in any meaningful sense again was in *Strickler v. Greene*, 527 U.S. 263 (1999). In *Strickler*, in an appeal from a *habeas* proceeding, the Court addressed the issue of whether there was a *Brady* violation regarding the suppression of *Giglio* impeachment evidence by the government and whether that issue had been waived by not being raised on direct appeal. However, the *Strickler* decision merely repeated the standards established by the above-discussed quartet of cases, noted that the impeachment evidence that had not been disclosed was obviously material (another example of the "colossal blunder" pattern), and then addressed the convoluted issue of whether the actual claim on appeal had been procedurally defaulted because it was not raised in the state court proceedings, ultimately upholding the conviction. Strickler, 527 U.S. at 280–81, 282, and 296. Thus, *Strickler* failed to advance the discussion of what exactly constitutes a definition of *Giglio* Material in any meaningful fashion.

102 *See* Abel, *supra* note 11.

103 *Id.* at 759–60.

104 *Id.* at 761.

105 *Id.*

local prosecutions that occur in the United States every year.[106] Moreover, in other significant areas such as juveniles serving life sentences for murder, the Supreme Court had no trouble finding sufficient state criminal cases to re-define and re-shape the law.[107]

A better explanation is that *Giglio* Material about police officers is an extraordinarily complex and contentious area of the law, and the Supreme Court is loath to get involved. Moreover, as will be discussed below, the limited and confusing number of state court decisions addressing law enforcement *Giglio* Material may have left the Supreme Court with slim pickings for direct appeals.[108] However, given the current emphasis on police misconduct and its impact on criminal justice, it is clear that the Supreme Court cannot afford to avoid this issue for much longer.

B. Real-World Consequences of Supreme Court Incoherence

Thus, the Supreme Court has provided extremely limited guidance to prosecutors and lower courts about what constitutes law enforcement *Giglio* Material. The guidance provided is either in areas so obvious as to be rendered virtually useless (*e.g.*, the "colossal blunder" cases) or is couched in such impenetrable standards as to be worse than useless. Therefore, prosecutors have limited legal precedent to consider in deciding exactly what evidence of police misconduct needs to be turned over under the *Brady*/*Giglio* line of cases. This lack of clear guidance has had a pervasive and ongoing negative impact on fair and effective prosecutions in the United States. A national survey and a specific high-profile example serve to illustrate the deleterious effects of the Supreme Court's incoherence in this crucial area of the law.

In 2019, a nationwide survey was conducted to determine how many local prosecutors' offices maintained a *Brady*/*Giglio* list for disclosing police impeachment evidence.[109] Out of 443 offices who responded, 316 admitted that they did not maintain such lists.[110] Thus, over 70% of the responding offices conceded that they were not complying with the constitutional mandates of *Brady*/*Giglio*.[111] These failures were found in both small jurisdictions and places as large as Chicago.[112] And

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106 *See* Reno Policy, *supra* note 1.

107 *See generally* Miller v. Alabama, 567 U.S. 460 (2012) (reversing Arkansas and Alabama cases and statutes permitting mandatory life sentences for juvenile murderers); Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (applying *Miller* retroactively).

108 *See infra*, at Part II.D.

109 *See* Reilly & Nichols, *supra* note 9.

110 *Id.*

111 *Id.*

112 *Id.*

some prosecutors and police have admitted to a general unfamiliarity even with the concept of *Giglio* Material.[113]

An even more direct example of the problems with not compiling and disclosing *Giglio* Material was experienced by then-San Francisco District Attorney Kamala Harris, now the Vice President of the United States. In 2005, the staff in the San Francisco District Attorney's Office recommended to District Attorney Harris that she enact a *Giglio* policy for law enforcement impeachment material.[114] Harris, already bruised from a political fight with police unions about not seeking the death penalty in the murder of a police officer and concerned about another brawl with the unions, declined to enact such a policy for *Giglio* Material.[115] Five years later, in 2010, a San Francisco police crime lab technician who had a prior conviction for domestic violence that was never disclosed because of the lack of the appropriate policy was discovered to have been skimming cocaine from seized evidence.[116] If a *Giglio* policy had been in place, the San Francisco District Attorney's Office conceded that it was unlikely that the technician ever would have been allowed to handle evidence, and she certainly would have been impeached at trial when she testified.[117] The judge in the case faulted District Attorney Harris for not having a policy in place to address law enforcement *Giglio* Material.[118] Approximately 1,000 criminal cases were then dismissed because of the involvement of the technician and the failure to disclose *Giglio* Material about her background.[119] As a result of this incident, District Attorney Harris implemented what was described as a "model" *Giglio* policy,[120] and her experience can serve as an early warning to prosecutors about the resistance of police unions to this type of reform.

Thus, the criminal justice system in the United States is suffering from a double whammy regarding law enforcement *Giglio* Material.

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113 *Id.*; *see also* Val Van Brocklin, *Brady Lists Ignite Conflicts between Police and Prosecutors, Management and the Front-line,* POLICEONE.COM (Feb. 25, 2019), https://www.policeone.com/legal/articles/brady-lists-ignite-conflicts-between-police-and-prosecutors-management-and-the-front-line-jaBRldmLu8wSdPnN/ ("Officer ignorance about *Brady* can be astounding. When asked about the police department's *Brady* policy, the internal affairs commander in one Maryland agency replied, 'What's that? . . . . You mean the gun law?'").

114 *See* Zusha Elinson & Alejandro Lazo, *Kamala Harris Didn't Act for 5 Years on Policy to Help Ensure Fair Trials*, WALL STREET J. (June 10, 2019), https://www.wsj.com/articles/kamala-harriss-balancing-act-demands-of-law-enforcement-and-reformers-11560194725.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*; *see also* Kate Zernike*, 'Progressive Prosecutor': Can Kamala Harris Square the Circle*?, N.Y. TIMES (Feb. 11, 2019), https://www.nytimes.com/2019/02/11/us/kamala-harris-progressive-prosecutor.html?auth=login-email&login=email; Jaxon Van Derbeken, *Judge Rips Harris' Office For Hiding Problems*, SFGATE (Feb. 10, 2012), https://www.sfgate.com/bayarea/article/Judge-rips-Harris-office-for-hiding-problems-3263797.php.

120 *See* Elinson & Lazo, *supra* note 114.

First, the United States Supreme Court has offered ambiguous and inarticulate guidance in this critical area. Second, and partially as a result of the lack of Supreme Court guidance, local prosecutors have not been complying with the constitutional requirements of *Brady*/*Giglio*. As a result of these failures, cases have been dismissed after-the-fact and an unknowable number of defendants have gone to trial without the appropriate *Giglio* disclosures being made. This is an unsustainable pattern.

Despite the lack of clear rules from the Supreme Court, some of the more sophisticated prosecutors' offices and police agencies have attempted to create policies for law enforcement *Giglio* Material. In addition, legislatures and state courts have attempted to jump into the definitional fray. A representative sampling of these law enforcement protocols, legislative proposals, and state court opinions are surveyed below.

II. *GIGLIO* PROTOCOLS AROUND THE NATION

Prosecutors, the police, and legislatures all have struggled to create policies that define what constitutes disclosable police impeachment evidence. State appellate courts have joined in this confusion. Collectively, they resemble composers attempting to formulate a concerto without knowing how to read music or what instruments will be used to play their creation. Following is a survey of selected policies and cases that have attempted to define law enforcement *Giglio* Material. This survey includes representative samples from around the United States, from organizations of various sizes and sophistication, and encompasses the actual participants in the criminal justice system.

A. Law Enforcement Policies

Because law enforcement *Giglio* Material is specifically concerned with the conduct of the police, it is illuminating to start this survey with the police community's own view of what qualifies as such impeachment material. Following are summaries of *Giglio* policies by an international police organization, a state law enforcement association, and an individual police department.

1. The IACP Model

In April of 2009, the International Association of Chiefs of Police (IACP) issued a model policy on *Brady/Giglio* evidence.[121] The IACP is a well-respected organization that the police community often looks to

[121] *See* INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY ON BRADY DISCLOSURE REQUIREMENTS (April 2009), https://www.theiacp.org/sites/default/files/all/b/BradyPolicy.pdf [hereinafter IACP Model].

for guidance.[122] The IACP Model does not explicitly differentiate law enforcement *Giglio* Material from general *Brady* disclosure requirements.[123]

However, the policy does make at least passing references to disclosable police officer conduct. For instance, the IACP Model states that disclosable police impeachment material includes, "A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness's truthfulness, bias, or moral turpitude. This includes employees under suspension."[124] The policy also captures, "An officer's excessive use of force, untruthfulness, dishonesty, bias, or misconduct in conjunction with his or her service as a law enforcement officer."[125]

The IACP Model is notable for a number of reasons. First, even though it was drafted 37 years after *Giglio*, it includes extremely limited examples of what actually constitutes law enforcement *Giglio* Material.[126] After almost four decades of thinking about *Giglio* and potential impeachment material for law enforcement, it would be reasonable to assume that IACP leaders would have created a readily accessible laundry list of specific conduct that qualifies as police *Giglio* Material. They did not. Such limited examples may reflect the ambiguous precedent of the Supreme Court. It also may reflect political reluctance to characterize police conduct as disclosable impeachment material.

Second, where the IACP Model does explicitly discuss such law enforcement *Giglio* Material, it makes the scope of such mandatory disclosures extremely narrow. Findings of misconduct are only subject to disclosure if they have been sustained by a "Board of Rights or Civil Service Commission," exempting misconduct that was not under the jurisdiction of such boards or that did not survive the sometimes-tortured appellate and arbitration procedures for police discipline.[127] Similarly, a police officer's dishonesty or bias is only subject to disclosure if such conduct was "in conjunction with his or her service as a law enforcement officer," apparently leaving out any conduct while not on-duty.[128]

Third, the IACP Model applies some impeachment disclosure rules to civilian witnesses that logically would apply equally to law enforcement witnesses, but the policy evades applying such rules to the police. These include the mandatory disclosure for civilian witnesses of: (1) *any* criminal record or pending criminal cases; (2) information regarding *any*

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122 INT'L ASS'N OF CHIEFS OF POLICE, ABOUT IACP (last accessed Sept. 17, 2021), https://www.theiacp.org/about-iacp.

123 IACP Model, *supra* note 121, at 2.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

mental or physical impairment of the witness that would cast doubt about the witness' ability to testify accurately; and (3) *any* evidence of bias against the defendant or any member of a group based on race, religion, or personal bias.[129] It is difficult to justify applying such rules to civilian witnesses, but not police officers.

Despite these limitations, there is a definitional core of impeachment evidence that is identified as subject to disclosure under the IACP Model. Dishonesty is prominently mentioned.[130] Bias against a defendant or constitutionally protected group is clearly identified.[131] Excessive force makes the disclosure list.[132] Past criminal convictions and pending criminal matters are at least applied to civilian witnesses.[133] The issue of physical or mental impairments is raised for civilian witnesses, and merits further discussion below. The IACP Model may provide minimal guidance about police-specific *Giglio* Material, but it at least begins to define some general categories for *Giglio* disclosures.

2. The Illinois Chiefs Model

The Illinois Association of Chiefs of Police (Illinois Chiefs) is a long-standing organization representing over 450 law enforcement organizations in Illinois.[134] Like the IACP, the Illinois Chiefs have published a policy on disclosure of *Brady/Giglio* evidence.[135]

Unlike the IACP Model, the Illinois Chiefs Model includes a specific section for disclosure about law enforcement impeachment material.[136] That section consists of exactly three lines:

- Any department-sustained finding of misconduct related to truthfulness or dishonesty;
- Any criminal convictions involving acts of dishonesty; and
- Any present allegations of misconduct under investigation involving truthfulness or dishonesty.[137]

The Illinois Chiefs Model follows the IACP Model in stressing that dishonesty by police officers must be disclosed, albeit limited to dishon-

129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 ILL. ASS'N OF CHIEFS OF POLICE, ABOUT US (last accessed Sept. 17, 2021), https://www.ilchiefs.org/about-us.
135 *See* ILL. ASS'N OF CHIEFS OF POLICE, BRADY MATERIAL DISCLOSURE, https://www.ilchiefs.org/assets/docs/draft_brady-policy-%20ILACP(00366068-5xC010D).pdf [hereinafter Illinois Chiefs Model].
136 *Id.* at 2–3.
137 *Id.*

esty that arose from criminal convictions or official conduct.[138] What is far more remarkable about the Illinois Chiefs Model is what it does not contain. There is absolutely no mention of bias/prejudice, unlawful force, or multiple other seemingly obvious areas of law enforcement *Giglio* Material.[139] As with the IACP Model, the question is whether such omissions are caused by the Supreme Court's failure to provide substantive examples of *Giglio* Material or regressive political forces within law enforcement.

3. The Baltimore PD Policy

Having reviewed the policies of an international association of chiefs and a state association of chiefs, it is useful to look at the *Giglio* policy of an individual police department. In September of 2019, the Baltimore Police Department (Baltimore PD) published an updated draft of its policy regarding *Brady/Giglio* evidence.[140]

The Baltimore PD Policy differentiates general *Brady* exculpatory material from *Giglio* impeachment material,[141] evidencing a more nuanced view of the obligations of the police than the IACP Model and the Illinois Chiefs Model. However, the Baltimore PD Policy also gives extremely short shrift to law enforcement *Giglio* Material. The majority of its discussion regarding impeachment material is directed at civilian witnesses.[142] The Baltimore PD Policy includes three sections (out of ten total impeachment sections) that mention impeachment material about police officers.[143] Those three sections can be summarized as follows:

- "Any allegation of misconduct in any court" or Baltimore PD administrative proceedings "that reflects on the truthfulness, integrity, motive, or bias" of any police officer, "regardless of the outcome of the proceeding";[144]

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138 *Id.*

139 For an association in a state that includes Chicago—the location of the Laquan McDonald shooting, the homicide conviction of a police officer for that shooting, and allegations of a cover-up by other officers related to the shooting—these omissions are glaring. *See* Nausheen Husain, *Laquan McDonald Timeline: the Shooting, the Video, the Verdict and the Sentencing*, CHICAGO TRIB. (Jan. 18, 2019), https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html.

140 *See* ORDER OF THE BALTIMORE POLICE COMMISSIONER, EXCULPATORY EVIDENCE DISCLOSURE REQUIREMENTS (Sep. 17, 2019), https://www.powerdms.com/public/BALTIMOREMD/documents/568218 [hereinafter Baltimore PD Policy]. The publicly available version is marked as a draft.

141 *Id.* at 2.

142 *Id.* at 2–3.

143 *Id.*

144 *Id.* at 3.

- For any police officer, "evidence of untruthfulness, dishonesty, lack of integrity, motive, or bias";[145] and
- Evidence of "a racial, religious, or personal bias against a defendant" or a group.[146]

For civilian witnesses, the Baltimore PD Policy includes broader categories of discoverable impeachment material. These include any criminal convictions or pending criminal cases, any information that tends to cast doubt on the credibility of a witness, and information regarding mental or physical impairments that cast doubt on the ability to testify accurately.[147] Interestingly, and somewhat inconsistently, the Baltimore PD Policy includes as an appendix a "Required Court Disclosure Form," which asks police to provide information that goes beyond the information listed in the policy itself, such as involvement in any civil lawsuits.[148]

The Baltimore PD Policy reflects some similar themes with the IACP Model and the Illinois Chiefs Model, but with a key difference. Once again, the police view of what must be disclosed as law enforcement *Giglio* Material is extremely narrow. The Baltimore PD Policy focuses on similar core elements found in the IACP Model and the Illinois Chiefs Model: dishonesty and bias/prejudice.[149] Like the Illinois Chiefs Model, the Baltimore PD Policy omits excessive force entirely.[150] However, the Baltimore PD Policy goes beyond the two other policies in disclosures regarding police misconduct investigations. The IACP Model and Illinois Chiefs Model limit disclosures to sustained findings of police misconduct.[151] The Baltimore PD Policy states that misconduct allegations must be disclosed "regardless of the outcome of the proceeding or investigation."[152]

Reviewing these three policies, which are a fair sampling of police policies on law enforcement *Giglio* Material, two clear themes emerge. First, the police have a very narrow view of what they must disclose about their own conduct under *Brady/Giglio* precedent. Second, even within that narrow window, the law enforcement policies agree that issues of dishonesty and bias/prejudice must be disclosed. This at least provides a starting point for creating a bedrock list of law enforcement *Giglio* Material.

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145 *Id.*
146 *Id.*
147 *Id.* at 2–3.
148 *Id.* at 9.
149 *Id.*
150 *Id.*
151 IACP Model, *supra* note 121, at 2; Illinois Chiefs Model, *supra* note 135, at 2–3.
152 Baltimore PD Policy, *supra* note 140, at 3.

B. Prosecutors' Policies

After surveying the police view of the definition of law enforcement *Giglio* Material, it is revealing to compare that view with prosecutors' policies on defining such material. From *Brady* through *Kyles*, the Supreme Court consistently has stated that it is the prosecutor who ultimately has the duty to enforce the requirements of turning over impeachment material.[153] Following is an analysis of the definition of law enforcement *Giglio* Material promulgated by the United States Department of Justice, two separate state-wide associations of local prosecutors, a state attorney general, and an individual local prosecutor's office.

1. The DOJ Policy

Any discussion of prosecutors' policies defining law enforcement *Giglio* Material necessarily begins with the relevant protocols from the United States Department of Justice (DOJ). DOJ was responsible for christening this area of disclosures as "*Giglio* Material" and has the most experience in thoughtfully evolving its own policies.

In 1996, the year after *Kyles* was decided, United States Attorney General Janet Reno issued DOJ's inaugural *Giglio* policy.[154] The Reno Policy was the first systematic attempt by DOJ to classify and clarify what constitutes *Giglio* Material.[155] DOJ immediately conceded, "The exact parameters of potential impeachment information are not easily determined."[156] The Reno Policy then briefly defined *Giglio* Material in one sentence: "This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased."[157] The policy made no attempt to differentiate law enforcement *Giglio* Material from general *Giglio* Material.[158] The policy covered all of the United States Attorneys' Offices and the federal investigative agencies.[159]

The DOJ *Giglio* policies have followed a steady developmental pattern since the Reno Policy, as neatly captured in a report to the standing

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153 *See* Brady, 373 U.S. at 88 (describing the prosecutor as the "architect" of the proceedings); Kyles, 514 U.S. at 1567 ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility" of deciding what to disclose.).

154 *See* Reno Policy, *supra* note 1.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

Advisory Committee on Criminal Rules (Advisory Committee).[160] Rule 16 of the Federal Rules of Criminal Procedure covers the government's discovery obligations in criminal cases.[161] However, Rule 16 does not include the government's obligations under *Brady* and *Giglio* to produce exculpatory and impeachment evidence.[162] On multiple occasions since *Brady* was decided, the Advisory Committee and other organizations have recommended amending Rule 16 to encompass *Brady* and *Giglio* disclosure requirements.[163] These suggestions have discussed discarding the amorphous "materiality" standard (that reached a confusing peak in *Kyles*) and creating a hard-and-fast list of categories of *Brady/Giglio* material.[164]

DOJ's strategy in response to these proposed amendments has been consistent: (1) oppose any amendments; (2) claim that the current case law is clear; (3) assert that DOJ is fulfilling all of its discovery obligations; and (4) keep amending the internal United States Attorneys' Manual to provide more and more details about what constitutes *Brady* and *Giglio* material.[165] DOJ even maintained this stance in the midst of the debacle of the prosecution of United States Senator Ted Stevens, where the case was ultimately dismissed in part because of a failure to comply with *Giglio* requirements.[166] DOJ's tactic has been successful. As recently as 2011, the last time the issue was raised, DOJ managed to thwart any substantive amendments to Rule 16 addressing *Brady* and *Giglio*; after a vigorous debate, the Advisory Committee narrowly voted 6-5 against amending Rule 16 specifically to address these issues.[167] However, the constant pressure has resulted in DOJ substantially refining and modifying its policy regarding law enforcement *Giglio* Material.

Currently, DOJ has a much more extensive policy regarding law enforcement *Giglio* Material than was initially formulated by the Reno Policy. Last updated in January of 2020, the current United States Attor-

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160 *See* Laural Hooper, David Rauma, Marie Leary & Sheila Thorpe, *A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases: Final Report to the Advisory Committee on Criminal Rules*, FED. JUD. CTR. (Feb. 2011), https://www.uscourts.gov/sites/default/files/rule16rep_2.pdf [hereinafter Advisory Committee Report].

161 FED. R. CRIM. P. 16.

162 *Id.*; Advisory Committee Report, *supra* note 160, at 3, 11 (noting original decision in 1968 not to codify *Brady* in Rule 16, leaving development to case law).

163 *See* Advisory Committee Report, *supra* note 160, at 3–7.

164 *Id.* at 5, 11–13, and 32–33.

165 *Id.* at 3–4, 6–7, and 23.

166 *Id.* at 5. *See also* Carrie Johnson, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, NPR (March 15, 2012), https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.

167 *See* Advisory Committee on Criminal Rules Meeting Minutes, Portland, Oregon (April 11–12, 2011), at 10–15, https://www.uscourts.gov/sites/default/files/fr_import/criminal-min-04-2011.pdf.

neys' Manual provides a laundry list of items considered law enforcement impeachment material.[168] DOJ also has a complex system of procedures and overlapping protocols to keep track of such information across the nation for federal cases.[169]

The DOJ Policy starts with repeating verbatim the Reno Policy's general definition of impeachment material and the difficulty with defining such material.[170] The DOJ Policy then provides specific categories of evidence about law enforcement officers that constitute disclosable *Giglio* Material.[171] In DOJ's own language, the policy requires disclosure of:

> i) any 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;
>
> ii) any past or pending criminal charge brought against the employee;
>
> iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
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> iv) 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;
>
> v) 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:

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168 *See* POLICY REGARDING THE DISCLOSURE TO PROSECUTORS OF POTENTIAL IMPEACHMENT INFORMATION CONCERNING LAW ENFORCEMENT AGENCY WITNESSES ("GIGLIO POLICY"), UNITED STATES DEPARTMENT OF JUSTICE UNITED STATES ATTORNEYS' MANUAL § 9-5.100 (updated January 2020), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#9-5.100 [hereinafter DOJ Policy]. Interestingly, in an example of bureaucratic inertia, the designated name of the policy in the manual has remained exactly the same as when it was initially christened by Attorney General Reno, even though the policy itself has been substantially modified and subsumed into a much larger document.

169 *See* Lee, *United States Department of Justice Privacy Impact Assessment for Giglio Information Systems*, *supra* note 1.

170 *See* DOJ Policy, *supra* note 168, § 9-5.100 (Preface).

171 *Id.* § 9-5.100.5(c).

> (1) 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;
> (2) failure to comply with agency procedures for supervising the activities of a cooperating person (C.I., C.S., CHS, etc.);
> (3) failure to follow mandatory protocols with regard to the forensic analysis of evidence;
>
> vi) 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)[)]. The Supreme Court has stated, "[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."); and
> vii) information that reflects that the agency employee's ability to perceive and recall truth [sic] is impaired.[172]

The DOJ Policy also notes that *Giglio* Material includes both on-duty and off-duty conduct.[173] However, the policy explicitly states that allegations against law enforcement officers "that cannot be substantiated, are not credible, or have resulted in exoneration of an employee" are not considered disclosable impeachment material.[174]

There are a number of notable aspects to the DOJ Policy. First, it repeatedly mentions bias/prejudice and dishonesty as core concerns. Second, it does not discuss excessive force, although some of the categories mentioned (*e.g.*, illegally obtaining a confession)[175] might be construed as covering excessive force. Third, in stating that allegations which "cannot be substantiated, are not credible, or have resulted in exoneration of an employee"[176] are not disclosable *Giglio* Material about law enforcement, the DOJ Policy both leaves itself subject to the sometimes questionable results of police arbitration rulings about discipline and grants DOJ lawyers a large degree of discretion over what is "not credible." Fourth, the DOJ Policy specifically mentions the ability to perceive and recall as a relevant *Giglio* factor for law enforcement; other policies that

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172 *Id.*
173 *Id.* § 9-5.100.1
174 *Id.* § 9-5.100.6.
175 *Id.* § 9-5.100.5 (c)(iv).
176 *Id.* § 9-5.100.6.

address this issue apply it only to civilian witnesses.[177] Fifth and most importantly, it is clear that DOJ has a much more expansive view of what constitutes law enforcement *Giglio* Material than any of the actual law enforcement organizations described above. Where the IACP, Illinois Chiefs, and Baltimore PD consider only a narrow band of conduct to be law enforcement *Giglio* Material, DOJ prosecutors have created a much more comprehensive list of disclosable impeachment material. This reflects a general and important philosophical trend of "splitting the prosecution team," as aptly described by one commentator, because the issue of law enforcement *Giglio* Material has a tendency to create an adversarial relationship between prosecutors and the police.[178]

There are a few other broad points about the DOJ Policy that bear mentioning, all of which give DOJ some systemic advantages in the area of *Giglio* Material. Starting with the Reno Policy, DOJ now has had decades to experiment with, refine, and clarify what constitutes law enforcement *Giglio* Material. Agencies that are just beginning to create a *Giglio* policy would be well-advised to rely upon DOJ's learning curve.

Moreover, DOJ is a monolithic national entity, with the various United States Attorneys' Offices essentially acting as franchises. Thus, it is relatively simple for DOJ to issue one policy, unlike the thousands of completely autonomous district attorneys' offices across the United States who must issue and enforce independent policies.

Finally, there is a tremendous difference in the volume of cases handled between federal prosecutors and local prosecutors. For instance, DOJ filed 64,222 criminal cases in 2018, necessitating just as many corresponding evaluations for law enforcement *Giglio* Material.[179] By comparison, there were over 10 million criminal arrests handled by state prosecutors in 2018, triggering a huge potential number of *Giglio* evaluations and decisions.[180] To make the comparison of relative workloads even more granular, it is useful to contrast a single local prosecutor's office and a single United States Attorney's Office. In 2018, the Chester County (Pennsylvania) District Attorney's Office handled 6,433 filed cases with 37 prosecutors.[181] During the same year, the United States Attorney's Office for the Eastern District of Pennsylvania, which covers

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177 *See, e.g.*, Baltimore PD Policy, *supra* note 140, at 2–3.

178 *See* Abel, *supra* note 11, at 779–89 (arguing that this battle over *Giglio* Material has led to a disruptive breach between prosecutors and the police, fostered by police union interference).

179 *See* U.S. ATTORNEYS' ANNUAL STATISTICAL MANUAL FISCAL YEAR 2018, at 4, https://www.justice.gov/usao/page/file/1199336/download.

180 *See* STATISTA (accessed June 29, 2020), https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990/. State court criminal statistics are notoriously difficult to capture, because of the decentralized nature of the courts and systems.

181 *See* CPCMS Form Reports 1135, Chester County Criminal Case Index; *Chester County District Attorney 2019 Budget Request* (listing 37 prosecutors for 2018).

Chester County and eight other counties in southeastern Pennsylvania, filed 470 cases, while employing over 100 prosecutors.[182] This means that each local prosecutor handled an average of 170-plus cases per year, while each federal prosecutor filed less than five cases per year. Each federal prosecutor has the time and resources to engage in an extensive *Giglio* review; such luxuries are not available to local prosecutors.

Thus, for purposes of defining law enforcement *Giglio* Material, DOJ has an advantage in historical development, unified command and decision-making, and a much smaller caseload. All of these factors make handling *Giglio* Material comparatively easier for DOJ than for local prosecutors.

2. The Michigan Guidelines

In 2016, the Prosecuting Attorneys Association of Michigan (PAAM) released their best practices *Giglio* protocol.[183] PAAM is an organization comprised of the 83 independent, elected county prosecutors in Michigan.[184]

The Michigan Guidelines are useful mainly to see how unmoored the Supreme Court has left prosecutors on the issue of law enforcement *Giglio*. The Michigan Guidelines make no attempt to define or categorize law enforcement *Giglio* Material.[185] Instead, the guidelines simply cite to *Brady* and *Giglio*, stating that "prosecutors should use their individual discretion to determine the disclosable facts specific to each case. If uncertain whether disclosure is appropriate, the case attorney should review the applicable law and consult with other staff and/or prosecution resources, always against the backdrop of the obligation to ensure the defendant's right to a fair trial."[186]

Given how little guidance the Supreme Court has offered in this area, it is not surprising that the Michigan Guidelines essentially tell individual prosecutors that they will have to make their own determinations based on their own interpretation of the law. At least the PAAM recog-

182 *See* U.S. ATTORNEYS' ANNUAL STATISTICAL MANUAL FISCAL YEAR 2018, *supra* note 179, at 4; *see also* About the Office, United States Attorney's Office for the Eastern District of Pennsylvania, https://www.justice.gov/usao-edpa/about (The United States Attorney's Office for the Eastern District of Pennsylvania is "one of the largest in the country with 140 Assistant United States Attorneys (AUSAs) currently on staff.").

183 Prosecuting Attorneys Association of Michigan, *Best Practices Recommendation Brady/Giglio Material*, PROSECUTING ATT'YS ASS'N MICH. (June 17, 2016), https://michiganprosecutor.org/files/PAAM-Best-Practices-Brady-*Giglio*—Adopted.pdf [hereinafter Michigan Guidelines].

184 PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, PROSECUTING ATT'YS ASS'N MICH., https://www.michiganprosecutor.org/about-us-menu/paam (last visited Sept. 17, 2021).

185 Michigan Guidelines, *supra* note 183, at 1–2.

186 *Id.* at 2.

nized that *Giglio* Material is an issue, which puts the Michigan prosecutors ahead of many local prosecutors.

3. The Pennsylvania Policy

The next protocol to merit a review is the *Giglio* law enforcement policy from the Pennsylvania District Attorneys Association (PDAA). Similar to the Prosecuting Attorneys Association of Michigan, PDAA is a state-wide organization representing the 67 autonomous district attorneys' offices in Pennsylvania.[187] PDAA issued a best practices guideline for law enforcement *Giglio* Material in December of 2019.[188] The Pennsylvania Policy was notable because it was a protocol that addressed the full spectrum of law enforcement *Giglio* issues, including everything from reporting *Giglio* Material to procedures for police to appealing *Giglio* decisions.[189] The procedural aspects of the Pennsylvania Policy thus extend beyond some aspects of the DOJ Policy.

The Pennsylvania Policy defined law enforcement *Giglio* Material as encompassing four main areas:

> 1. Dishonesty in the line of duty;
> 2. Misconduct that is relevant to a prosecution or investigation and negatively affects the integrity of a prosecution or investigation;
> 3. Pending criminal charges or a conviction that would result in loss of law enforcement privileges in Pennsylvania; and
> 4. Bias or prejudice toward any constitutionally protected group.[190]

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187 *See* WELCOME TO THE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, PA. DISTRICT ATT'YS ASS'N., https://www.pdaa.org/pdaa/ (last visited Sept. 17, 2021).

188 *See PDAA Offers Guidelines on Disclosing Potential Credibility Issues Involving Police Witnesses*, PA. DIST. ATT'YS ASS'N, (December 11, 2019), https://www.pdaa.org/pdaa-offers-guidelines-on-disclosing-potential-credibility-issues-involving-police-witnesses/. Typical of most states in the United States, the 67 district attorney's offices in Pennsylvania are entirely independent from each other, are led by an elected district attorney, and range from the over 600 people employed in the Philadelphia District Attorney's Office to the two prosecutors (including the elected district attorney) who handle criminal cases for the Montour County District Attorney's Office. *See, e.g.*, OFFICE OF THE DISTRICT ATTORNEY, ABOUT US, CITY PHILA., https://www.phila.gov/districtattorney/aboutus/Pages/default.aspx (last visited Sept. 17, 2021); ATTORNEYS, MONTOUR CTY. DIST. ATT'YS OFF., https://montour.crimewatchpa.com/da/50445/content/attorneys (last visited Sept. 17, 2021).

189 *See XXXXXX County District Attorney Giglio Protocols for Law Enforcement*, PA. DIST. ATT'Y ASS'N, https://www.pdaa.org/wp-content/uploads/2019/12/*Giglio*-Protocols-PDAA.pdf [hereinafter Pennsylvania Policy].

190 *Id.* at 2. Regarding administrative disciplinary proceedings against a police officer, the Pennsylvania Policy explicitly states that the final *Giglio* determination will not be made until the conclusion of the disciplinary proceedings, but the prosecutor's office may make an interim determination pending the final administrative decision. *Id.* at 4.

The policy produced by PDAA has some core similarities to the other policies already discussed, but also has some subtle differences. Like all of the prior policies, the Pennsylvania Policy covers dishonesty and bias/prejudice. However, the dishonesty is limited to untruthfulness in the line of duty, excluding "out of uniform" untruthfulness.[191] The Pennsylvania Policy covers all pending criminal cases against a police officer, plus criminal convictions "that would result in a loss of law enforcement privileges," presumably excluding low-level offenses such as speeding.[192] Finally, the Pennsylvania Policy includes a category for misconduct that is relevant to a prosecution or investigation and negatively affects the integrity of the prosecution or investigation.[193] The latter provision gives a prosecutor a substantial amount of discretion and flexibility in defining law enforcement *Giglio* Material, but also is subject to the same criticism of ambiguity that infects the Supreme Court precedent in this area.

Even more interesting, the drafting of the Pennsylvania Policy provided insight into the minds of police unions. PDAA allowed relevant police unions to view the policy during the draft stages and solicited their input.[194] Not a single union supported the *Giglio* policy. The Pennsylvania State Troopers Association objected to a prosecutor making "her/her own independent determination" regarding law enforcement impeachment material and demanded that a third party make the *Giglio* determination, much like police discipline arbitration.[195] The Pennsylvania State Fraternal Order of Police opined that, for prosecutors' decisions regarding *Giglio* Material for law enforcement, the officers "should be able to have a neutral third party review those determinations."[196] The Pittsburgh Fraternal Order of Police made a similar demand for a third party arbitrator to make decisions regarding law enforcement *Giglio* Material, stating, "[u]nfettered unreviewable findings by anyone in power scares the constitution right out of me . . . . Without

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191 *Id.* at 2.

192 *Id.*

193 *Id.*

194 *PDAA Offers Guidelines on Disclosing Potential Credibility Issues Involving Police Witnesses*, PA. DIST. ATTY'S ASS'N (Dec. 11, 2019), https://www.pdaa.org/pdaa-offers-guidelines-on-disclosing-potential-credibility-issues-involving-police-witnesses/.

195 *See* Letter on Behalf of the Pennsylvania State Troopers Association to Pennsylvania District Attorneys Association/Institute Re: Best Practices—Giglio (May 8, 2019). To the extent that any documents referenced herein are not available via a publicly searchable database, copies of the documents will be maintained by the *Cornell Journal of Law and Public Policy*.

196 *See* Letter from the Fraternal Order of Police, Pennsylvania State Lodge to Pennsylvania District Attorneys Association (June 21, 2019).

someone other than the DA themselves reviewing their final discretion [sic] making ability I cannot agree with the recommendations."[197]

In summary, the Pennsylvania police unions were uniformly opposed to a law enforcement *Giglio* policy. Despite the Supreme Court's clear mandate that the prosecutor must make the *Giglio* decisions,[198] the police unions wanted somebody besides the prosecutor to make the final decision. Interestingly, the unions had little to say about the substantive *Giglio* definitional categories; instead, they focused on getting a different process and final reviewer.[199] Based on their familiarity with the arbitration process, the police unions seem to have grasped that control over the process and decision-maker is actually more important to them than debating the substantive definition of *Giglio* Material. This offers an interesting perspective about the union mindset. As one scholar has noted, "[P]olice unions are a powerful political constituency . . . . [As a result,] many police officers receive excessive procedural protections during internal disciplinary investigations, effectively immunizing them from the consequences of misconduct."[200] The reactions of the Pennsylvania police unions to the Pennsylvania Policy, combined with this trenchant observation about the power of police unions, should serve as another warning to prosecutors about the potential negative impact of police unions on drafting effective law enforcement *Giglio* policies. Simply put, many police unions despise *Giglio* policies and will continue to fight their enforcement.

4. The New Jersey Policy

The New Jersey Attorney General has issued a policy regarding the disclosure of law enforcement *Giglio* Material.[201] Unlike the independent and elected district attorneys in Michigan and Pennsylvania, all of the local prosecutors in New Jersey are appointed and fall under the authority of the state Attorney General.[202] Thus, the New Jersey Policy covers all prosecutors in the state.

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197 *See* E-mail from Pittsburgh Fraternal Order of Police, Lodge #1 President Bob Swartzwelder to Pennsylvania District Attorneys Association (June 10, 2019). The Philadelphia Fraternal Order of Police reviewed the Pennsylvania Policy but did not offer any written comments.

198 *See supra*, note 153.

199 *See supra*, notes 195–97.

200 *See* Stephen Rushin, *Police Union Contracts*, 66 DUKE L. J. 1191, at 1247, 1253 (2017) (discussing political strength of police unions across political spectrum, resulting in excessive procedural protections given to police in misconduct investigations).

201 *See* Memorandum from New Jersey Attorney General Gurbir S. Grewal, *Disclosure of Exculpatory and Impeachment Evidence in Criminal Cases*, NJ.GOV, (June 18, 2019), https://www.nj.gov/oag/dcj/pdfs/policies/LPS_Brady-*Giglio*-Policy_June-2019.pdf [hereinafter New Jersey Policy].

202 *See* STATE OF NEW JERSEY, DEPARTMENT OF LAW & PUBLIC SAFETY, ABOUT US, OFF. ATT'Y GEN., *https://www.nj.gov/oag/aboutus.htm* (last accessed Sept. 17, 2021).

The New Jersey Policy differentiates impeachment material for civilians from impeachment material for law enforcement officers.[203] Differing from the approach of the *Giglio* policies created by police organizations discussed above, the New Jersey Policy includes more *Giglio* impeachment categories for law enforcement witnesses than for civilian witnesses.[204]

The New Jersey Policy identifies potential law enforcement *Giglio* Material as follows:

> – sustained or substantiated finding that an investigative employee has filed a false report or submitted a false certification in any criminal, administrative, employment, financial, or insurance matter in his or her professional or personal life;
> – A sustained or substantiated finding that an investigative employee was untruthful or has demonstrated a lack of candor;
> – A pending criminal charge or conviction of any crime, subject to review for disclosure under N.J.R.E. 609[;]
> – A sustained or substantiated finding that undermines or contradicts an investigative employee's educational achievements or qualifications as an expert witness;
> – A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which concludes [sic] a finding that the investigative employee was *intentionally* untruthful in a matter, either verbally or in writing;
> – A sustained or substantiated finding, or judicial finding, that an investigative employee intentionally mishandled or destroyed evidence;
> – Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
> – Information that may be used to suggest that the investigative employee is biased for or against a defendant . . . .;
> – A sustained or substantiated finding, or judicial finding, that an investigative employee is biased against a particular class of people. For example, based on a

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203 New Jersey Policy, *supra* note 201, at 4–6.
204 *Id.*

> person's gender, gender identity, race, or ethnic group.[205]

The New Jersey Policy also includes a "catch-all" provision, stating: "Other information or material may exist that, depending on the circumstances of the case and the crimes charged, may need to be disclosed even though the information or material does not fall under one of the categories listed above."[206]

Comparing the New Jersey Policy to the previously discussed policies, certain patterns are repeated. The concepts of dishonesty and bias/prejudice are cornerstones of almost every *Giglio* policy. Once again, a prosecutor's policy for law enforcement *Giglio* Material is much more expansive than the policies suggested by the police themselves.[207] Interestingly, on the issue of prejudice against a particular class of people, the New Jersey Policy requires "a sustained finding, or judicial finding" of such bias.[208] This raises the question as to whether a recorded racial epithet from a police officer on the officer's body camera counts as *Giglio* Material when there is not a sustained or judicial finding from a third party. However, since the New Jersey Policy contains an "all other" provision like the Pennsylvania Policy, presumably such items as the recorded racial epithet, excessive force, and problems with recall would fall into this catch-all category.[209]

The New Jersey Policy contains one peculiarity. The policy explicitly leaves it up to each individual prosecutor in each individual case to make an independent determination regarding what constitutes law enforcement *Giglio* Material.[210] Both the DOJ Policy and the Pennsylvania Policy have such decisions made and applied by the office as an entity.[211] The New Jersey Policy's instruction to leave the *Giglio* decision in each case to the individual prosecutors has the potential for inconsistent application of an otherwise comprehensive policy. Evidence that

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205 *Id.* at 5–6 (reproduced verbatim, except where noted).

206 *Id.* at 7.

207 *See supra*, Part II.A.

208 *See* New Jersey Policy, *supra* note 201, at 7.

209 *Id.*

210 *Id.* at 9 ("Similar to the responsibilities under *Brady*, it shall be the responsibility of the prosecutor assigned to a case to independently review the potential *Giglio* Material and any other information found to be relevant and material to the particular case. . . . The prosecutor will review the material to determine whether it should be disclosed to the court for an *ex parte*, *in camera* review or whether it should be disclosed to defense counsel. It is the prosecutor's duty to recommend whether, to what extent, and/or in what manner disclosure to the defense and/or the court shall occur."). While the policy has the prosecutor submitting affirmative *Giglio* disclosure decisions to a supervisor, the policy leaves negative *Giglio* (non-disclosure) decisions entirely to the line prosecutor without any review.

211 *See* § 9-5.100.3, *supra* note 168 (designating a "*Giglio* Requesting Official" for each United State Attorney's Office to coordinate *Giglio* issues); Pennsylvania Policy, *supra* note 189, at 2–3 (*Giglio* decisions are made by and on behalf of the district attorney's office).

Prosecutor A classifies as *Giglio* Material for Officer X in Case 1 may then be subject to Prosecutor B classifying the same evidence as not *Giglio* Material for the same officer in Case 2. Or Prosecutor A may classify certain evidence as *Giglio* Material for Officer X, but next year might classify the same type of evidence as not *Giglio* Material for Officer Y. Such prosecutor-by-prosecutor, case-by-case designations invite problems.

5. The Jacksonville Policy

Having reviewed law enforcement *Giglio* policies from entire organizations, it is useful now to examine a *Giglio* policy from a single prosecutor's office. The Jacksonville (Florida) State Attorney's Office created its own *Giglio* policy.[212] The Jacksonville Policy was discussed in a media article in 2017, where another Florida state attorney conceded that "not many prosecutors' offices in Florida keep" a *Giglio* policy.[213] The Jacksonville Policy was created in conjunction with 41 criminal cases being dismissed because of police misconduct.[214]

Regarding law enforcement *Giglio* Material, the Jacksonville Policy is an interesting document. The policy only explicitly mentions the police on a single occasion, asking "[a]re any police officers involved in this case on modified duty?"[215]

However, the Jacksonville Policy includes fairly robust *Giglio* inquiries directed at "any witness."[216] These include questions about criminal convictions and pending criminal charges, past acts that reflect dishonesty, adverse credibility rulings, substance abuse and mental health issues, and bias against the defendant.[217] The policy does not include any mention of excessive force or bias/prejudice against identified groups, such as racial prejudice.[218]

The Jacksonville Policy can be viewed as a policy typical of the experimentation that takes place at the level of an individual prosecutor's office. The policy has some obvious deficiencies, including the lack of recognizing bias/prejudice against Constitutionally protected groups.[219]

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212 *See* Jacksonville State Attorney's Office, *Brady/Giglio Checklist*, https://www.documentcloud.org/documents/3892951-Brady-*Giglio*-Checklist.html [hereinafter Jacksonville Policy], *noted in* Ben Conarck, *State Attorney's Office Keeping Tabs on Problematic Cops in Jacksonville, Across First Coast*, FLA. TIMES-UNION (July 13, 2017), https://www.jacksonville.com/news/public-safety/florida/2017-07-13/state-attorney-s-office-keeping-tabs-problematic-cops.

213 *See* Conarck, *supra* note 212.

214 *Id.*

215 *See* Jacksonville Policy, *supra* note 212, at 3.

216 *Id.* at 2–3.

217 *Id.*

218 *Id.*

219 *Id.*

In addition, in identifying only a single category of law enforcement-specific *Giglio* evidence, the policy seems to be lacking necessary details about police misconduct.[220] However, if the Jacksonville Policy is signaling that it will subject the police to the same *Giglio* scrutiny as any civilian witness, the policy may be considered a bold step forward in such policies.

Reviewing the five prosecutors' policies on law enforcement *Giglio* Material, some clear patterns become identifiable. First, prosecutors have a much broader view of what constitutes law enforcement *Giglio* Material than do the police themselves. Second, similar to the police, the prosecutors consider dishonesty and bias/prejudice to be at the core of *Giglio* Material. Third, the prosecutors' policies have some subtle and interesting differences about on-duty v. off-duty conduct, who makes the *Giglio* decision, and other small issues. Fourth, a common area that is missing for prosecutors is a discussion of excessive force, which is only addressed ambiguously in catch-all categories. Fifth, the issue of substance abuse and mental health is starting to migrate from only being considered for civilian witnesses to being considered also for law enforcement witnesses, an issue that will be discussed further below. Sixth and finally, it is clear that prosecutors across the nation are in different evolutionary phases for addressing law enforcement *Giglio* Material. The prosecutors' offices range the gamut from the historically well-developed DOJ Policy to many offices that have no *Giglio* policy at all or only a rudimentary policy.

Remember that this entire discussion started with the complete incoherence of the Supreme Court precedent in the area of *Giglio* Material. Given this lack of guidance from the Court, with opinions that seemed to have been created with the specific purpose of sowing confusion, it is not surprising that prosecutors and police do not have standardized law enforcement *Giglio* policies.

C. Legislative Approaches to Giglio Material

Realizing the vacuum in authority about law enforcement *Giglio* Material, a few legislative bodies have attempted to provide some structure about what constitutes disclosable impeachment material about police witnesses. The proposals have not been subtle, but they are interesting. Below are descriptions of attempts by New York, California, and the United States House of Representatives to tackle this challenging field.

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220 *Id.*

1. New York Legislation

New York state has been experiencing dizzying legislative changes in attempting to deal with law enforcement *Giglio* Material. The New York legislature has taken a two-pronged approach: (1) prosecutors must turn over everything they know about the police; and (2) New York has made every official allegation and finding of police misconduct open to the public.

For New York prosecutors, effective January 1, 2020, a sweeping new automatic discovery rule encompassing law enforcement *Giglio* Material went into effect.[221] The law, Section 245.20 of the New York Criminal Procedure Rules, states that prosecutors "shall disclose" to the defendant all evidence and information that tends to "impeach the credibility of a testifying prosecution witness," among other discovery items.[222] The information must be disclosed "whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the allegation."[223] This latter language makes it clear that the prosecution needs to produce anything that they may have heard from anywhere and must disclose even unsubstantiated or dismissed allegations. The statute does not attempt to define specific areas of impeachment material, instead simply taking the approach that everything must be disclosed.

Paired with this automatic discovery rule, on June 12, 2020, the New York governor signed a bill repealing Section 50-a of New York's Civil Rights Law.[224] Section 50-a, originally passed in 1976, protected from public disclosure "all personnel records" of police officers.[225] The repeal of Section 50-a now makes the personnel records of all 36,000 New York City police officers (and all police officers in the state of New York) subject to public disclosure.[226] This includes any complaint, allegation, or discipline, no matter how large or small, and regardless of whether the complaint was dismissed or substantiated.

The twin effects of the automatic discovery rule and the repeal of Section 50-a essentially mean that there is now an "open file" discovery rule regarding law enforcement *Giglio* Material in New York. Prosecutors have a duty to turn over everything they know about potential police witnesses in every case. And to the extent that the prosecutors might

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221 *See* N.Y. CRIM PROC. § 245.20(1)(k) (2020), https://www.nysenate.gov/legislation/laws/CPL/245.20 [hereinafter "Section 245.20"].

222 *Id.*

223 *Id.*

224 ASSOCIATED PRESS, *New York state lawmakers vote to repeal 50-a, unveil police discipline records*, SYRACUSE.COM (June 9, 2020), https://www.syracuse.com/state/2020/06/new-york-state-lawmakers-vote-to-repeal-50-a-unveil-police-discipline-records.html.

225 *See* N.Y. CIV. RIGHTS § 50-a (1976) [hereinafter "Section 50-a"].

226 *See* S. 8496, 2019-2020 Leg. Sess., at 1 (N.Y. 2020).

miss something, the personnel files of the police officers are open for discovery by any defense lawyer or member of the public.

The United States Supreme Court expressly stated that the Constitution does not mandate "open file" discovery by prosecutors.[227] The New York legislation goes well beyond what is required by Supreme Court precedent. In New York, prosecutors now have an affirmative and open-ended duty to produce everything they know about police witnesses as law enforcement *Giglio* Material.

2. California Legislation

To the extent that New York has decided to go beyond the Supreme Court's requirements for *Giglio* Material by making everything about police witnesses disclosable by prosecutors and publicly available, California has taken an entirely different approach. California's default rule is that nothing about law enforcement impeachment material is discoverable, not even to the prosecutors.[228]

California's process is byzantine. The default rule is that law enforcement personnel files/misconduct findings "are confidential and shall not be disclosed in any criminal or civil proceeding . . . ."[229] This means that neither the prosecution nor the defense knows what is in the police files concerning potential *Giglio* impeachment material.

The general rule of confidentiality is subject to two exceptions. First, the legislature stated that disclosures could be made where: (a) a police officer discharged a firearm at a person or otherwise used force causing death or serious injury; (b) a police officer sexually assaulted a civilian; or (c) there is a sustained finding of dishonesty by a police officer.[230] These carved-out discoverable areas were recently created, passed as an amendment in 2018.[231] Second, and outside of these narrow areas, the only way to obtain *Giglio* impeachment material from a police officer's personnel record is to file a motion with the court asking for disclosure "pursuant to Sections 1043 and 1046 of the Evidence Code."[232] In California, such motions are called *Pitchess* motions, named

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227 *See Kyles*, 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice) . . . .").

228 *See* Ryan T. Cannon, *Reconciling Brady and Pitchess: Association for Los Angeles Deputy Sheriffs v. Superior Court, and the Future of Brady Lists*, 55 SAN DIEGO L. REV. 729, 733–35 (2018) (discussing evolution and political background of California legislation).

229 *See* CAL. PENAL CODE § 832.7(a).

230 *Id.* at § 832.7(b)(1)(A-C).

231 *Id.*

232 *Id.* at § 832.7(a).

after the California Supreme Court decision in *Pitchess v. Superior Court*.[233]

Thus, in a criminal case in California, if either the prosecution or the defense believes that there may be law enforcement *Giglio* Material contained in police personnel records, the attorney must file a *Pitchess* motion with the trial court, *without actually knowing* what might be in the file.[234] Despite not knowing what is in the file, the motion must set forth a description of the records sought and the "materiality" of the evidence regarding the pending litigation.[235]

The trial court then conducts an *in camera*, *ex parte* review of the file.[236] Neither the prosecution nor the defense lawyer is permitted to review the file and argue about disclosure.[237] However, the police officer (as "the person authorized to claim the privilege") and the union representative of the police officer are allowed to confer with the judge about what should be disclosed.[238]

The court then must decide what is relevant and material, *i.e.,* what actually constitutes law enforcement *Giglio* Material in the files that must be disclosed. In making this decision, the California legislature provided a few guidelines. Any law enforcement conduct that is more than five years old is excluded.[239] The conclusions of any police officer investigating a citizen complaint of police misconduct are excluded.[240] Facts that are "so remote as to make disclosure of little or no practical benefit" are excluded.[241] The trial court also should consider whether the information sought is available from some publicly available source;[242] shall make any order necessary to protect the police officer from "annoyance, embarrassment or oppression";[243] and shall limit the use of any disclosed records to the specific case pending before the court.[244] With these outer boundaries, the trial court then must make a decision about what is "rele-

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233 *See* Pitchess v. Superior Court, 11 Cal. 3d 531 (1974); *see also* Cannon, *supra* note 228, at 733–34.

234 *See* CAL. EVID. CODE § 1043(a).

235 *Id.* at § 1043(b)(2–3). The California Supreme Court recently at least decided to allow prosecutors a hint, permitting a law enforcement agency to provide the prosecutors' office with a list of names of officers who might have *Giglio* Material in their file, giving the prosecutors a "tip" to provide the opening basis for making the *Pitchess* motion to the trial court. *See* Association for Los Angeles Deputy Sheriffs v. Superior Court, 447 P.3d 234 (Cal. 2019).

236 *See* CAL. EVID. CODE § 1045(b).

237 *Id.* at § 915(b).

238 *Id.*

239 *Id.* at § 1045(b)(1).

240 *Id.* at § 1045(b)(2).

241 *Id.* at § 1045(b)(3).

242 *Id.* at § 1045(c).

243 *Id.* at § 1045(d).

244 *Id.* at § 1045(e).

vant" law enforcement *Giglio* Material under the precedent of the United States Supreme Court and California courts.[245]

The California *Pitchess* procedures may seem like a fever-dream version of "blind man's bluff" or "pin the tail on the donkey" grafted onto a deadly serious area of criminal procedure. And indeed, more than one commentator has pointed out that these procedures may be contrary to the Constitutional duties of a prosecutor to know and disclose *Giglio* Material.[246]

However, focusing solely on the definitional aspect of law enforcement *Giglio* Material, California provides a couple of notable points. First, unlike all of the other policies described above,[247] the California legislative scheme is the first to mention a sunsetting provision, excluding impeachment information about the police that is more than five years old.[248] Second, intentional or not (and Constitutional or not), there is some procedural genius to the California scheme. As previously discussed, the United States Supreme Court precedent in the area of law enforcement *Giglio* Material is fatally ambiguous and virtually impossible to apply for prosecutors because the Court failed to establish any hard-and-fast rules for defining *Giglio* Material.[249] California's response is to tell the trial courts, "Look, the Supreme Court gave no real guidance, this is impossible for prosecutors, so it is up to you to determine this issue on a case-by-case basis. Good luck." This is almost a dare to the California courts to establish some bright-line rules for what constitutes law enforcement *Giglio* Material, and then perhaps the burden can be returned to the prosecutors. In the interim, the California trial courts must do the messy and time-consuming work of evaluating the potential *Giglio* Material and all of the other evidence, only then making disclosure decisions.

Outside of these two points, the California legislation does almost nothing to provide any definitional clarity about what constitutes law enforcement *Giglio* Material. However, it provides an interesting counterpoint to the New York legislation. New York makes *everything* presumptively disclosable and publicly available. California makes *nothing* presumptively disclosable and publicly available. Once again, the Supreme Court's botching of any attempt to define *Giglio* Material has resulted in wildly disparate results, this time on the two opposing coasts of the United States.

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245 *Id.* at § 1045(a).

246 *See* Abel, *supra* note 22, at 763–64; *see also* Cannon, note 228, at 735–37.

247 *See supra* Part II(A-B).

248 *See* CAL. EVID. CODE § 1045(b)(1).

249 *See supra* Part I.

3. Federal Legislation

This discussion would be incomplete without at least a brief mention of pending federal legislation. Generally, the United States Congress has steered well-clear of any attempt to address law enforcement *Giglio* Material. However, with the protests and controversies surrounding the killing of the civilian George Floyd by a Minneapolis police officer, the House of Representatives made an initial foray into this field.[250] In the Justice in Policing Act of 2020, the House proposed to create a national database of police misconduct, including any allegation or sustained findings, and to make the information in the database publicly accessible.[251] This approach mirrors the New York legislation discussed above.[252] Predictably, the Justice in Policing Act immediately became mired in Beltway politics, but is notable for the fact that the federal legislative branch may be awakening to the fact that the issue of law enforcement *Giglio* Material exists.

D. State Court Opinions

The Supreme Court has left everybody guessing about melody and construct, leaving a critical area of the law sounding like the most avant-garde improvisational jazz fusion. Now we review the opinions of the highest state appellate courts to see how they have dealt with defining law enforcement *Giglio* Material.[253]

For some states, there are absolutely no opinions from their highest appellate court attempting to define law enforcement *Giglio* Material.[254] There are a number of possible explanations for this gap in state court decisions. It is possible that the law enforcement agencies and prosecutors are entirely ignorant of their duties, resulting in no disclosures and no issues to review on appeal.[255] It may be that defense counsel in those

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250 *See* Barbara Sprunt, *Democrats Release Legislation to Overhaul Policing*, NPR (June 8, 2020), https://www.npr.org/2020/06/08/872180672/read-democrats-release-legislation-to-overhaul-policing.

251 *See* Justice in Policing Act, H.R. 7120, 116th Cong. § 201 (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120/text.

252 *See supra* Part II(C)(1).

253 Other commentators have reviewed the opinions of the various United States Circuit Courts regarding *Giglio* Material. *See, e.g.,* sources cited *supra*, note 11. In summary, the Circuit Courts are simply trying to apply the Supreme Court's precedent in *Kyles* and its predecessors, taking a case-by-case analysis of materiality. Each of the commentators has reached the same conclusion: the federal appellate courts are confused and confusing in trying to define law enforcement *Giglio* Material. *Id.*

254 As of the writing of this Article, research has revealed that the highest appellate court for the following states have never addressed a law enforcement *Giglio* Material issue: Kentucky, Idaho, Massachusetts, Minnesota, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Wisconsin, and Wyoming.

255 For instance, Oregon has no reported cases from the state Supreme Court. The police department from its largest city has been criticized for having absolutely no *Brady/Giglio*

states simply are unaware of the requirements of *Giglio* and thus have not raised appellate issues. While making requests for *Giglio* Material may be fairly standard for defense counsel in some states, the practice may not exist in other states. In addition, it may be that the courts themselves are simply not recognizing the independent nature of *Giglio* disclosure requirements for law enforcement, and thus the issue is getting lost in the tide of other criminal appellate issues. Finally, it is always possible that there are significant behavioral differences for police in various states. Whatever the explanation, the fact remains that this is an area of the law that is tremendously underdeveloped in state courts.

For the state appellate courts which have rendered opinions about the disclosure of police impeachment evidence, the decisions fall into three general categories. First, the law enforcement *Giglio* cases have a tendency to fall into the "colossal blunder" category exemplified in the United States Supreme Court cases. Significant decisions are reached only when there is a failure to disclose police impeachment material that is so obvious that it would be ruled a Constitutional violation under any possible standard or policy. For instance, in a Nebraska murder appeal, the court found that evidence that a law enforcement officer had previously been convicted of planting blood/DNA evidence was material under *Giglio*, particularly where the current murder case was built around the same officer recovering incriminating blood/DNA evidence under similar circumstances.[256] In multiple New Jersey DUI cases based on breathalyzers administered by one particular police officer, the appellate court reversed the convictions under the *Giglio* line of cases based on after-discovered evidence that the same police officer was caught and convicted for falsifying the results of breathalyzer tests and stealing money from arrestees.[257] In Arkansas, the police and the medical examiner agreed to change the time of death on the medical report in a murder to rule out the defendant's alibi, but failed to reveal this potential impeachment and exculpatory evidence.[258] In Alabama, the police and prosecutor failed to reveal that a victim had been hypnotized so that he

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policy, and the state has now switched to a public database for all police misconduct. *See generally* Portland Auditor Mary Hull Caballero, *Policy Review: Portland Police Bureau Compliance with Brady v. Maryland*, Introduction Section (April 2017), https://www.portlandoregon.gov/ipr/article/637168 ("The Portland Police Bureau does not have a written policy that defines its *Brady* related duties or provide clear expectations to its officers, despite the efforts of some Bureau members. The Independent Police Review did not receive any records from the Police Bureau documenting that *Brady* related training has ever occurred."); Kyle Iboshi, *Police misconduct information available to public in searchable database*, NBC-KGW8 (July 9, 2020), https://www.kgw.com/article/news/local/database-of-oregon-police-misconduct-up-and-running/283-0892b395-94a5-4244-85f1-8c8f7f21414a.

256 State v. Edwards, 821 N.W.2d 680, 699 (Neb. 2012).

257 State v. Gookins, 637 A.2d 1255, 1258–59 (N.J. 1994).

258 State v. Larimore, 17 S.W.3d 87, 91 and 94 (Ark. 2005).

could identify the defendant at trial, after he was unable to identify the defendant during the investigation.[259] In Arizona, the government did not disclose that a police officer who testified to a murder confession had an extensive history of lying under oath and other misconduct; in fact, the government successfully moved to quash a subpoena from the defense directed at discovering the officer's misconduct through his personnel file.[260] The list goes on and on. Like in the Supreme Court cases, such obvious *Giglio* violations are not particularly helpful to prosecutors attempting to make nuanced disclosure decisions regarding law enforcement *Giglio* Material.

Second, many of the cases where the state courts have examined law enforcement *Giglio* Material are murder convictions.[261] What is the significance of this information? It means that *Giglio* claims are only being examined in cases and proceedings where: (a) the appellate review continues for a lengthy period of time, often decades, permitting the discovery of previously non-disclosed impeachment evidence; and (b) the defense has the resources to search for after-discovered impeachment evidence regarding law enforcement. However, it strains credulity to believe that these same officers are not testifying in standard assault, rape, drug, and fraud cases. Thus, it appears that most police officers are simply given a pass on disclosing law enforcement *Giglio* Material in run-of-the-mill cases. The number of convictions that have been impacted by non-disclosed impeachment material about police officers is therefore both unknown and unknowable.

Third and finally, the state courts that have addressed law enforcement *Giglio* Material all simply follow the Supreme Court's precedent—attempting to apply the Court's *ex post* materiality test to guess after-the-fact whether the suppressed police impeachment information would have

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259 Martin v. State, 839 So.2d 665, 669–70 (Ala. 2001).

260 Milke v. Mroz, 339 P.3d 659, 663–67 (Ariz. Ct. App. 2014).

261 *See, e.g.,* Carter v. State, 439 P.3d 616, 632–35 (Utah 2019) (reversing and granting new evidentiary hearing in capital murder case 34 years after conviction upon discovery that police had threatened primary witnesses with deportation and instructed witnesses to lie in testimony); Ham v. Com. Correction, 201 A.3d 1074, 1088–92 (Conn. App. Ct. 2019) (rejecting *Brady/Giglio* claim 23 years after murder conviction based on failure to disclose impeachment evidence about testifying police officer); State v. Nelson, 715 A.2d 281, 286–88 (N.J. 1998), *cert. denied*, 525 U.S. 1114 (1999) (reversing capital murder conviction for death of police officers in shoot-out based on failure to disclose impeachment evidence that testifying surviving police officer had pending civil suit against prosecutor's office alleging that failure to train police properly caused shoot-out with defendant); State v. Laurie, 653 A.2d 549, 552–54 (N.H. 1995) (first degree murder conviction reversed based on failure to disclose impeachment evidence about detective's "character and credibility"); State v. Sanders, 395 S.E.2d 412, 423–24 (N.C. 1990), *cert. denied*, 498 U.S. 1051 (1991) (declining to reverse capital murder conviction based on *Giglio* line of cases where it was discovered that police officer falsely testified that he recovered victim's jewelry from defendant's bedroom, when civilian actually recovered items; sentencing reversed and remanded on other grounds).

affected the outcome of the trial.[262] There has been absolutely no attempt by the state courts to create a categorical list of law enforcement *Giglio* Material for use by prosecutors, nor has there been any rigorous analysis of existing prosecutor/police *Giglio* policies.

In short, the state appellate court opinions range from absent to inconsistent to amorphous. The state courts can thank the United States Supreme Court for creating this environment. The lack of any strong definitional opinions from the state courts, combined with the lack of guidance from the Supreme Court, has still left the criminal justice system confused about how to define law enforcement *Giglio* Material.

To summarize this survey of policies and opinions about law enforcement *Giglio* Material, there is a complete lack of definitional clarity. Policies are extremely inconsistent. Legislation is remarkably non-standard. Court opinions are absent or opaque. Against this backdrop, the next section attempts to apply these various standards to the specific behavior of law enforcement officers. The results are not pretty, but they are revealing.

III. IS IT GIGLIO?

In an effort to frame the basic question of what constitutes law enforcement *Giglio* Material, the following is a list of factual scenarios involving police conduct that will look eerily familiar to prosecutors throughout the United States.[263] The reader can think of these as individual musical *études,* designed to highlight specific techniques necessary to understand the complexity and scope of the larger issue. Each section

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[262] *See, e.g.,* People v. Garrett, 18 N.E.3d 722, 729 and 733–34 (N.Y. Ct. of App. 2014) (in murder case, non-disclosed evidence that testifying detective had pending civil matter for coercing confession was impeachment evidence favorable to defendant, but held not to be material); Lawlor v. Davis, 764 S.E.2d 265, 271 (Va. 2014) (in capital murder case, impeachment evidence concerning lies about detective's qualifications as an expert does not result in reversal because defendant "cannot show a reasonable probability of a different outcome"); Commonwealth v. Simmons, 804 A.2d 625, 635–37 (Pa. 2001) (in capital murder case, detective's testimony that witness was not shown a mugbook when witness actually was shown mugbook held to be not material); Ben-Yisrayl v. State, 753 N.E.2d 649, 657–58 (Ind. 2001), *cert. denied,* 536 U.S. 918 (2002) (in capital murder case, refusal to disclose relationship between FBI agent and cooperating witness for impeachment purposes held to be not material); Jones v. State, 709 So.2d 512, 518–21 (Fla.), *cert denied*, 523 U.S. 1040 (1998) (in capital case regarding murder of police officer, undisclosed impeachment evidence about testifying police officers held to be not material under *Kyles*); Blake v. State, 373 P.3d 896, 897 (Nev. 2011) (undisclosed allegations of perjury by detective held not to be material for purposes of *Giglio* analysis) (unpublished); State v. Garrison, 711 N.W.2d 732, 734 (Iowa Ct. of App. 2006) (in murder case, refusal to order disclosure of impeachment material regarding law enforcement officer's suspension for misconduct held not to be material given nature of misconduct and officer's role in case) (unpublished table decision).

[263] For disclaimer purposes, none of these factual scenarios are depicting any specific police officers or law enforcement agencies. Any similarity to particular law enforcement officers probably can be duplicated in multiple agencies across the United States.

also includes an analysis of whether the factual issues raised constitute law enforcement *Giglio* Material under Supreme Court precedent and under the *Giglio* policies described above. The most eye-opening results are where the police and prosecutor policies mandate disclosure, but the Supreme Court precedent would permit non-disclosure.

A. The Easy One . . . Or Is It?

The Alpha Township Police Department receives a 911 call for a potential fire on the back deck of one apartment in a building. Three police officers arrive at the scene: two patrol officers and a sergeant. They enter the building and the apartment, finding a small fire on the deck, which they put out with a fire extinguisher. They notice drug paraphernalia around the apartment, including scales, baggies for packaging drugs, and cutting agents for drugs. They also notice a small lock box, which they all agree probably contains drugs and/or money. The sergeant informs the two patrol officers to wait inside while he steps outside to call the local prosecutor's office for a necessary search warrant for the lock box. The sergeant tells the patrol officers not to open the lock box.

After the sergeant calls the prosecutor's office to start the search warrant process, he re-enters the apartment. The sergeant finds the two patrol officers with the lock box now opened, revealing cocaine and $4,500 in currency. The patrol officers tell the sergeant that one of them "tripped over" the lock box and the contents spilled out. Despite this, the sergeant still obtains a search warrant for the lock box, using only the information that he knew before the lock box was "tripped over" by the patrol officers. The sergeant also discovers a video/audio security system in the apartment, obtains a search warrant for it, and eventually discovers that it recorded the occupant selling cocaine from the apartment on multiple occasions. The occupant of the apartment arrives home and finds the police in his residence. He is given *Miranda* warnings and interviewed by the sergeant, all recorded on a body camera, and admits that he was selling drugs from the apartment. He requests a probationary sentence because he was cooperative.

The next day, the sergeant confronts the two patrol officers about their story regarding "tripping over" the lock box. They admit that they lied. When the sergeant left the room to call for a search warrant, they broke the lock box open and discovered the drugs and money. They apologize profusely.

If the occupant of the apartment is charged with drug dealing, do the actions of the patrol officers constitute *Giglio* Material that must be disclosed by prosecutors, and thus would result in the reversal of a conviction if not disclosed? Surely, this is an easy example. The patrol officers engaged in three distinct forms of misconduct: (1) they lied about "trip-

ping over" the lock box; (2) they intentionally violated the Fourth Amendment by opening the lock box without a warrant; and (3) they disobeyed a direct and lawful order from their superior not to open the lock box.

Under every *Giglio* policy discussed above, this conduct by the patrol officers would constitute *Giglio* Material and must be disclosed in a criminal case where the officers are testifying.[264] It is core dishonesty, in the actual case under consideration, involves a clear and intentional Constitutional violation, and has an insubordination angle thrown in as an additional factor. The easiest case possible, right? Every prosecutor, law enforcement officer, defense lawyer, and scholar agrees, correct?

In fact, everybody agrees that the conduct here constitutes *Giglio* Material, except for the United States Supreme Court. In *Bagley*, the Court specifically stated that evidence constitutes *Giglio/Brady* material only if there is a reasonable probability that the non-disclosed evidence would have resulted in a different outcome at trial.[265] The *Kyles* court morphed that standard into a general requirement for "a verdict worthy of confidence."[266] In this scenario, the sergeant made sure that a conviction in this case was air-tight. The sergeant got a search warrant for the box based solely on the lawfully obtained evidence, the defendant confessed to the crime, and there is a video and audio recording of the drug dealing on the security system. There is absolutely no doubt that the defendant was dealing drugs from the apartment. Under current United States Supreme Court precedent, there is no duty for the prosecution to turn over the misconduct of the patrol officers, and the misconduct evidence, if not disclosed, would not result in a reversal of the conviction.

This rather unbelievable gulf between Supreme Court precedent and real-life implications highlights the incomplete nature of the case law governing *Giglio* Material. The Supreme Court clearly needs to re-visit this issue and re-define *Giglio* Material. Unless, that is, the Court is satisfied that the misconduct by the officers described above really should not be disclosed by prosecutors.

B. "Wear Your Chin-Strap in the Back During the Summer"

Police officers are subject to a number of purely administrative rules. For example, State Trooper Noone fell afoul of a number of these rules. First, he wore the chin strap for his hat in the front during the summer months, when the state police rules require wearing the chin strap in the back. Second, he was late for work on three occasions. Third, a citizen reported that he was rude to the citizen during a traffic stop,

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264 *See supra* Part II.A. and B.
265 Bagley, 473 U.S. at 682.
266 Kyles, 514 U.S. at 434.

using a loud voice and calling the citizen a "jerk" (the citizen was a middle-aged white male). Trooper Noone's superior officer wrote him up for all three offenses and his personnel file reflects a reprimand for the offenses. Trooper Noone did not appeal the reprimand and has had no further discipline in the last seven years.

These offenses by Trooper Noone fall into the category of misconduct. They are factual and unchallenged. One was a citizen complaint. Do they constitute law enforcement *Giglio* Material that must be disclosed?

Under the *Giglio* standards created by prosecutors and the police, the reprimands do not fit any of the proposed categories of law enforcement *Giglio* Material. While they are sustained claims of official misconduct, they do not implicate any of the veracity, prejudice, or other concerns traditionally captured by such policies.[267]

By comparison, the Supreme Court's viewpoint about whether Trooper Noone's violations constitute *Giglio* evidence that must be disclosed would simply be, "It depends." Perhaps in a resisting arrest/aggravated assault on law enforcement case, where the defendant was a middle-aged white male who made fun of how Trooper Noone was wearing his chin strap, and the defense was that Trooper Noone became aggressive and initiated the physical scuffle that resulted in the charges, a defense lawyer would want the information about the chin strap violation and might predicate the defense at trial around the fact that Trooper Noone had unresolved psychological issues with his middle-aged white father that resulted in extreme aggression. There might be no video or audio recording of the incident, so the trial would consist of Trooper Noone's word against the testimony of the civilian. It is conceivable that the "cumulative effect" of the reprimand evidence, if not disclosed, might lead to a result that is not "a verdict worthy of confidence," in the words of Justice Souter in *Kyles*.[268] Thus, once again, the Supreme Court precedent appears potentially at odds with mainstream views of what constitutes *Giglio* Material, leading to unpredictability and uncertainty.[269]

Adding another level of confusion, the New York legislative scheme and the federal Justice in Policing Act of 2020 each proposes a database which captures and discloses publicly all complaints about po-

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267 *See supra* Part II.A, II.B.

268 Kyles, 514 U.S. at 420, 434.

269 Of course, if the arrest was for drug trafficking by a Latino defendant and the drug dealing information was captured on a telephone hard wire, the Supreme Court's response would probably be that the reprimands of Trooper Noone were not "material" under *Brady*/*Giglio*. Probably. But that gives little predictive solace to the prosecutor assigned to handle hundreds of cases per year, one of which might involve Trooper Noone.

lice officers.[270] Such legislation would make the reprimand information about Trooper Noone *de facto Giglio* Material, albeit material that was equally available to the defense. In California, on the other hand, because Trooper Noone's infractions were more than five years old, they would be excluded from *Giglio* disclosure under California's *Pitchess* procedures.[271]

One other factor about Trooper Noone's seemingly minor and non-*Giglio* infractions merit discussion. Imagine that Trooper Noone is called on the carpet by his commanding officer about wearing his chin strap in the wrong position and arriving late for work. Instead of simply admitting to the minor offenses, Trooper Noone claims that he was wearing his chin strap correctly and he was never late for work. The commanding officer then recovers video recordings that show that Trooper Noone was wearing his chin strap incorrectly and was late for work on all three occasions. Now, even though the underlying offenses were minor, Trooper Noone has lied during an administrative investigation. Under any of the *Giglio* policies discussed in this Article, such dishonesty is disclosable Giglio Material.[272] Moreover, for many law enforcement agencies, lying in an internal investigation is a terminable offense.[273] So a lie from a police officer during an official proceeding, no matter how minor the underlying offense, can have a catastrophic impact on an officer's *Giglio* status (and career).

C. The Alcoholic/Addicted/Depressed Cop

The next police *Giglio* issue has been entirely ignored in academic literature but represents a revolutionary potential area of legitimate law enforcement *Giglio* Material. It deals with substance abuse and mental health.

Initially, consider the issue as applied to a civilian witness. The Zanesville Police Department is conducting a drug investigation and using a confidential informant named Larry. Larry was a crystal methamphetamine addict for over ten years and was diagnosed with bipolar disorder, but recently has cleaned himself up and tests negative for drugs every week. Larry is engaging in controlled buys of drugs from various drug dealers in the area of Zanesville. All of the drug deals are

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270 *See supra* Part II.C.1, II.C.3.

271 *See* CAL EVID. CODE § 1045(b)(1).

272 *See supra* Part II.A, II.B.

273 *See* Terrence P. Dwyer, *Don't destroy your career: The Brady list and the ruinous impact of a lie*, POLICE1 (Nov. 3, 2016), https://www.policeone.com/legal/articles/dont-destroy-your-career-the-brady-list-and-the-ruinous-impact-of-a-lie-N8hzrj6qsZxZZPbe/ ("[T]ermination of the lying officer is certainly not an unexpected or unusually severe result in some agencies . . . the Arkansas and New York State Police have a zero-tolerance policy once an officer has a sustained finding of untruthfulness following an administrative hearing . . . .").

done under police supervision. Some of the deals are recorded with a body wire and some are not, relying instead on Larry's description of the deals when he is de-briefed by the police. When the drug dealers are arrested and go to trial, the prosecutors are expected to disclose Larry's prior drug addiction and mental health evidence as impeachment material. Under long-standing law, such evidence goes directly to the issue of the witness' ability to recall and communicate accurately, and failure to disclose such information would result in reversal of any conviction.[274]

Now consider essentially the same issue applied to a police officer. Officer Frock originally worked for the Hampton Police Department. He resigned when he was arrested for a DUI, went through an alternative disposition program for first-time offenders, and had the charges expunged. Officer Frock then was hired by the Chester Police Department and became a detective, investigating complex crimes for ten years. What nobody at the Chester Police Department knew was that Officer Frock was still a functioning alcoholic, regularly drinking during work and investigating cases with a blood alcohol level over 0.20, meaning that he was working and driving a Chester Police Department vehicle while legally drunk. The Chester Police Chief eventually suspects that Officer Frock has a drinking problem and subjects him to testing at work, revealing his inebriated state. The chief, an all-around great guy, does not fire Officer Frock. Instead, the chief immediately has Officer Frock admitted into an in-patient substance abuse program. Officer Frock completes the treatment, comes out clean and sober, and has maintained his sobriety for the past three years, albeit suffering from depression. Now, the issue is whether Officer Frock's long-term alcohol abuse and mental health status must be turned over as law enforcement *Giglio* Material every time Frock testifies because his alcoholism and depression may have affected his ability to recall and relate information.

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274 *See e.g.,* Fuentes v. Griffin, 829 F.3d 233, 247–51(2d Cir. 2016) (reversing rape conviction where government failed to disclose impeachment evidence regarding mental depression of victim/witness); Browning v. Trammel, 717 F.3d 1092, 1106–08 (10th Cir. 2013) (reversing murder conviction where government failed to disclose impeachment evidence regarding mental health diagnosis for key witness); Hensley v. State, 48 P.3d 1099, 1103–05 (Wy. 2002) (failure to disclose drug use of cooperating witness requires reversal of conviction for drug trafficking); State v. Yates, 629 A.2d 807, 808–09 (N.H. 1993) (reversing burglary conviction where government failed to disclose impeachment evidence regarding drug use/involvement for prosecution witnesses*). Accord* DePaul College of Law, *Evidence - Refusal to Permit Cross-Examination of Witness as to Drug Addiction for Impeachment Purposes Held Reversible Error*, 5 DEPAUL L. REV 141, 141–43 (1955) (collecting and analyzing early cases); Randall A. Peterman, *Recent Developments, Evidence—Credibility Impeachment and the Drug-Using Witness—State v. Renneberg, 83 Wn. 2d 735, 522 P.2d 835 (1974),* 50 WASH. L. REV. 1006, 1008–09 (1975).

This is a major issue for law enforcement. Police officers are well-known to have struggles with alcoholism.[275] In addition, it is not uncommon for a police officer to get injured in the line of duty, have surgery, be prescribed opioids, and become addicted, like many people in the United States.[276] Moreover, many police officers struggle with depression, anxiety, and other mental health issues and may be prescribed psychotropic drugs to treat these psychological issues.[277]

The issue is whether such substance abuse and mental health issues constitute disclosable law enforcement *Giglio* Material. The argument is that substance abuse and mental health issues affect the ability to recall and relate information accurately, core impeachment issues.[278] Interestingly, many *Giglio* policies specify that such information must be disclosed for civilian witnesses. For instance, the DOJ Policy explicitly states that "[k]nown substance abuse or mental health issues or other

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275 *See, e.g.,* Dr. Indra Cidambi, *Police and Addiction*, PSYCHOLOGY TODAY (March 30, 2018), https://www.psychologytoday.com/us/blog/sure-recovery/201803/police-and-addiction ("Addiction within the law enforcement community across America is a widespread and serious problem. One out of four police officers on the street has an alcohol or drug abuse issue, and substance use disorders among police officers are estimated to range between 20% and 30% as compared to under 10% in the general population."); James F. Ballenger et al., *Patterns and Predictors of Alcohol Use in Male and Female Urban Police Officers*, 20 AM. J. ADDICT. 21 (Nov. 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3592498/ ("In a large sample of urban police officers, 18.1% of males and 15.9% of females reported experiencing adverse consequences from alcohol use and 7.8 % of the sample met criteria for lifetime alcohol abuse or dependence.").

276 *See* Lewis Z. Schlosser & Gerard P. McAleer, *Opioid Use Disorders Among Police and Public Safety Personnel: What Law Enforcement Leaders Need to Know,* POLICE CHIEF MAG., https://www.policechiefmagazine.org/opioid-use-among-police-personnel/ ("Police officers are susceptible to developing an opioid use disorder, perhaps more so than the average person, due to several risk factors specific to law enforcement personnel. First, police work is physically demanding, and officers can get injured on the job. In addition, an officer may develop chronic pain due to wearing a heavy gun belt or driving around in a patrol car for hours at a time. In either of these situations (injury or chronic pain), an officer may be prescribed a prescription opioid painkiller by a well-meaning physician.").

277 *See generally* John M. Violanti et al., *Police stressors and health: a state-of-the-art review*, 40 POLICING 642 (Nov. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6400077/ ("Sources of stress in policing may be classified into two general categories: those arising from 'job content' which include work schedules, shift work, long-work hours, overtime and court work, and traumatic events and threats to physical and psychological health; and those arising from 'job context' also called organizational stressors, which refer to characteristics of the organization and behavior of the people that produce stress (*e.g.* bureaucracy and co-worker relations). These sources of stress often come with a price. Exposure to human suffering and death may also result in a negative view of life, as well as psychological effects such as post-traumatic stress disorder . . . .").

278 *See, e.g.,* Thomas J. Gould, *Addiction and Cognition*, 5 ADDICTION SCI. & CLIN. PRAC. 4–14 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3120118/ ("[R]esearch indicates that addicted individuals have alterations in brain regions including the striatum, prefrontal cortex, amygdala, and hippocampus. These same regions underlie declarative memory—the memories that define an individual, without which it would be difficult to generate and maintain a concept of self. Drugs' capacity to act upon the substrates of declarative memory suggests that their impact on cognition is potentially extremely far-reaching.").

issues that could affect the witness's ability to perceive and recall events" are considered disclosable *Giglio* issues for civilian witnesses.[279] The Jacksonville Policy specifies mental health and drug/alcohol addiction issues as disclosable impeachment material.[280] However, none of the surveyed *Giglio* policies from police or prosecutors discussed above, nor any legislative proposals, identify substance abuse and mental health issues for law enforcement officers as disclosable *Giglio* Material.[281]

The omission of substance abuse and mental health issues for police from all of the policies and academic literature about law enforcement *Giglio* Material is simply wrong. The ability to recall and relate information accurately is a fundamental impeachment issue. Drug or alcohol addiction and mental health issues clearly impact one's ability to recall and relate, both in the short-term and long-term. This is exactly why such issues are so widely recognized as impeachment material for civilian witnesses. The same *Giglio* issue must be recognized for law enforcement officers.

While this is legally accurate, it is problematic. No police officer wants to have it disclosed that they are or were an alcoholic or drug addicted, or that they have mental health issues. Law enforcement officers may try to cover up such information. Some police officers may avoid getting treatment for these problems simply to avoid having to make the disclosures. All of these are negative collateral consequences.[282] But they do not change the hard truth that such information should and must be disclosed under the logic of *Giglio*.

D. Lying to Your Spouse About Your Girlfriend

Officer Morgan is having trouble at home. His wife suspects that he is cheating on her. She accuses him of having a girlfriend. He assures his wife that he does not have a girlfriend. He is lying. His wife later finds evidence of the lie by going through Officer Morgan's phone, and subsequently reports the lie to Officer Morgan's chief. The chief calls Officer Morgan in, who admits that he lied to his wife. The chief tells Officer Morgan to keep his personal life out of the police department, but there is no discipline involved. Officer Morgan and his wife reconcile and there

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279 *See* DOJ Policy, at § 9-5.002.I.B.7.

280 *See* Jacksonville Policy, at 3.

281 *See supra* Part II. The closest any policy comes to the issue is a glancing reference in the DOJ Policy that "information that reflects that the agency employee's ability to perceive and recall truth [sic] is impaired" must be disclosed for law enforcement officers. *See also* DOJ Policy, at § 9-5.100.5.C.vii.

282 The courts will need to determine which mental health issues may affect the ability to recall and communicate. That is an issue for medical expertise that is beyond the scope of this Article and the author's expertise.

is never any written evidence of the lie. Is Officer's Morgan's lie to his wife *Giglio* Material?

Under the various *Giglio* protocols proposed by prosecutors and law enforcement, the results are varied. Some standards require the disclosure of any dishonesty.[283] Other protocols limit the disclosure of dishonesty to lies told in the course of duty or lies told in official proceedings (*e.g.*, criminal proceedings, administrative proceedings, divorce proceedings, etc.).[284]

And, of course, the Supreme Court's response to the question of mandatory disclosure would be the usual, "It depends." The lies told by Officer Morgan to his wife might be material to a particular case depending on the unique facts of the case, and might result in reversal if not disclosed depending on those unique facts and what defenses were raised at trial.[285] Again, doctrinal incoherence leads to predictive pandemonium for prosecutors.

E. The Bar Fight

The following hypothetical about law enforcement *Giglio* Material causes no end of debate when discussed among prosecutors. Officer O'Neal is off-duty and at a bar. He gets into a drunken fight with another bar patron. Nobody gets hurt, no charges are filed, and nobody can even remember how the fight started.

Under this scenario, there is little dispute that *Giglio* is not implicated under the police and prosecutor protocols described above. The conduct is off-duty; no charges were filed; no citizen complaints were made; and the circumstances do not assign any responsibility. None of the *Giglio* protocols previously described capture such conduct.[286]

However, changing a minor fact can turn the analysis on its head. Imagine that all of the other facts remain the same, but Officer O'Neal got into the fight with a Black civilian and used the "n-word" during the fight.

Now, it appears that *Giglio* comes into play. Virtually every prosecutorial and law enforcement *Giglio* protocol discussed above includes a category for bias/prejudice against a Constitutionally protected group.[287] In the case of bias/prejudice, there is no exception for off-duty behavior. Certainly, every lawyer defending a Black client would want to cross-examine Officer O'Neal about his use of a racially derogatory

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283 *See* Baltimore PD Policy, at 3.

284 *See* IACP Model, at 2.

285 Kyles, 514 U.S. at 434.

286 *See supra* Part II.A., II.B.

287 *Id.* Only the Jacksonville Policy and the Illinois Chiefs Model fail to mention bias/prejudice.

term. Just ask former Los Angeles Police Detective Mark Fuhrman about his cross-examination in *People of the State of California v. Orenthal James Simpson*.[288] A very small change in the facts results in a totally different result for classification of evidence as law enforcement *Giglio* Material.

But the hypothetical can be tweaked again. Apply the same facts as above, including the racial slur, but now Officer O'Neal and the civilian are both Black. Is Officer O'Neal's comment a racial slur when directed at another Black man, or is that view the result of a "cultural misunderstanding"? Some prosecutors would classify the comment as an example of racial bias/prejudice and consider it *Giglio* Material, reasoning that a standard encompassing racist terms must apply equally to every law enforcement officer. Some prosecutors would take the "cultural misunderstanding" view and not disclose the comment. These are the subtle factual nuances and judgment calls that can plague this area of the law.

Where would the Supreme Court come down on these variations on a theme? Their usual, "It depends." It depends on the strength of the other evidence, the theories raised by the defense, and the importance of whatever testimony Officer O'Neal is offering in the specific case.[289] The last variation of the hypothetical, regarding the "cultural misunderstanding," could easily result in nine different, lengthy, and convoluted opinions from the Supreme Court justices under the current precedent.

As we have seen, the Supreme Court's answer to every law enforcement *Giglio* Material question posed before a case goes to trial is, "It depends." As pointed out by Justice Marshall in *Bagley*, such a definition is useless to prosecutors.[290] Rather than continue to beat the dead horse that is the amorphous *Kyles* decision and its ancestors, the balance of the hypotheticals will be analyzed under the various *Giglio* policies proposed by other entities in order to see if there are common and predictive themes, with only an occasional mention of the indecisive Supreme Court decisions.

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288 *See* Stephanie Simon Henry Weinstein & Andrea Ford, *Fuhrman Invokes 5th Amendment, Refuses to Testify: Simpson case: Ex-detective is asked three questions, including whether he planted evidence. Jurors aren't present, but defense will seek to have them informed of the action.*, L.A. TIMES (Sept. 7, 1995), https://www.latimes.com/archives/la-xpm-1995-09-07-mn-43219-story.html (describing how in O.J. Simpson murder case, after being impeached on issue of whether he previously used "n-word," LAPD detective invoked Fifth Amendment on answering questions about planting evidence and testifying falsely).

289 *See generally* Kyles, 514 U.S. at 419.

290 *See* Bagley, 473 U.S. at 700–701.

F. Excessive Use of Force and Civil Proceedings

Now it is time to review how excessive use of force claims and civil proceedings can produce some bizarre results for law enforcement *Giglio* Material.

Officer Uno works for the Atlantis Township Police Department. During an arrest, Officer Uno handcuffs Civilian A, who subsequently claims a soft-tissue injury to his wrist as a result of the handcuffing. Civilian X sues Officer Uno, the police department, and the township under 42 U.S.C. § 1983 for excessive use of force. The township's insurance covers the legal defense of the officer, the police department, and the township. For the civil suit, the township's insurer has a well-known policy of making every plaintiff a settlement offer of $10,000, because such a settlement is less than the cost of actually litigating the case. Citizen X takes the settlement offer. The settlement agreement expressly says that the settlement is not an admission of fault by any party.

Officer Dos works for the Birmingham Township Police Department. Officer Dos and three other officers respond to a residence for a potentially suicidal man with mental health problems, Civilian Y. The four officers try to talk to Civilian Y, who is agitated and verbally aggressive, but is unarmed. Civilian Y starts calling the police officers "pigs" and demanding that the officers shoot him. During the course of this verbal exchange, Officer Dos becomes enraged, pulls his service firearm, and shoots Civilian Y once in the leg. None of the other three officers fire their weapons. The bullet causes a "through-and-through" injury to Civilian Y's leg, going through the muscle but not causing any permanent damage. Civilian Y sues Officer Dos, the police department, and the township under 42 U.S.C. § 1983 for excessive use of force. The township's insurance covers the legal defense of the officer, the police department, and the township. The parties are in litigation for three years. Right before trial, the township's insurer realizes that they are going to lose badly in front of a jury and offers Civilian Y a settlement of $1.2 million. Civilian Y takes the settlement offer. The settlement agreement expressly says that the settlement is not an admission of fault by any party, just like the settlement agreement for Officer Uno.

Officer Tres works for the Charlestown Township Police Department. Working alone one night, Officer Tres responds to a call for a domestic disturbance at a residence. When he arrives at the residence, Officer Tres finds Civilian Z in a fight with Civilian Z's girlfriend. Civilian Z is 6'5" and 280 pounds, extremely belligerent, and has been using crystal methamphetamine. Officer Tres is 5'8" and 160 pounds. Civilian Z's girlfriend is bleeding from her mouth and tells Officer Tres that Civilian Z hit her. Officer Tres attempts to arrest Civilian Z, who immediately starts to fight with Officer Tres. During the course of attempting to

subdue Civilian Z, Officer Tres first tries verbal commands, then pepper spray, then a taser, none of which stops Civilian Z. Officer Tres eventually takes Civilian Z into custody by striking him with an extendable baton in the elbow, temporarily incapacitating Civilian Z but also causing nerve damage to Civilian Z's elbow. The criminal charges against Civilian Z are dismissed when his girlfriend refuses to testify against him. Civilian Z then sues Officer Tres, the police department, and the township under 42 U.S.C. § 1983 for excessive use of force. The township and the police department believe that Officer Tres acted appropriately and defend the case vigorously. After four years of litigation and a hard-fought trial, in which three outside experts testify that Officer Tres did not use excessive force, a jury still finds that Officer Tres acted with excessive force and awards Civilian Z damages of $1.2 million.

So how should Officers Uno, Dos, and Tres be treated for purposes of making *Giglio* disclosures of impeachment material about excessive use of force? Interestingly, most of the *Giglio* policies described above simply do not mention excessive force.[291] This is surprising, given how much publicity excessive force by the police has received and continues to receive.[292]

More importantly, some of the underlying administrative rules for the established *Giglio* policies create some strange results here. Officer Uno is the least culpable, as his case settled merely because of the nuisance value of litigation. Officer Dos is the most culpable, having clearly engaged in excessive force for shooting the unarmed man in the leg, but technically is in the same category as Officer Uno, with just a civil settlement that does not admit to any liability. Officer Tres engaged in an arrest that many experts would find to be a reasonable use of force, but a jury verdict found otherwise.

If a *Giglio* policy says that every claim against a police officer must be disclosed,[293] then the underlying conduct for all three officers must be disclosed, despite the radically different underlying facts and results. If a *Giglio* policy says that only substantiated findings of misconduct must be disclosed,[294] then the suit with Officer Tres must be disclosed, but the conduct of both Officer Uno and Officer Dos would not be disclosed.

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[291] *See supra* Part II.A, II.B. Only the IACP Model expressly discusses excessive force as law enforcement *Giglio* Material. *See* IACP Model at 2 (including in required disclosures: "An officer's excessive use of force, untruthfulness, dishonesty, bias, or misconduct in conjunction with his or her service as a law enforcement officer.").

[292] *Cf.* Elizabeth Davis, Anthony Whyde & Lynn Langton, Bureau of Justice Statistics, *Contacts Between Police and the Public*, 2015, 16–18 (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf.

[293] *See, e.g.,* Baltimore PD Policy, at 3; N.Y. CRIM. PRO. § 245.20(1)(k).

[294] *See, e.g.,* DOJ Policy, at § 9-5.100.6; New Jersey Policy, at 5–6.

Under the Supreme Court's materiality test from *Kyles*, disclosure would probably depend more on the type of case where any of the officers might be testifying.[295] If the case had an element of force (such as resisting arrest or a physically coerced confession), then excessive force could be a theme raised by the defense. On the other hand, if the case was a white collar fraud trial where one of the officers was testifying about documents recovered in a search warrant, then it is difficult to see how any disclosure about excessive force in an unrelated case could have any impact on producing "a verdict worthy of confidence."[296]

Once again, we see bizarre, illogical, and inconsistent results triggered by the extreme confusion for everybody in defining law enforcement *Giglio* Material.

G. The Hostile Judge

Our next hypothetical deals with an unreasonable and obstinate judge, which every actor in the criminal justice system will recognize (except possibly the unreasonable and obstinate judge).

Judge Davis does not like drug interdiction traffic stops. In these traffic stops, police officers have been trained to spot potential drug dealers based on a number of factors (*e.g.,* out-of-state license plates from common drug transportation centers, rental cars, etc.), make traffic stops for minor but real traffic violations (*e.g.,* speeding or failure to use a turn signal), then obtain consent to search the vehicle (which is often and surprisingly given).[297] Judge Davis believes that all of this is voodoo and possible racial profiling.

In a suppression hearing before Judge Davis, Officer Gillin from the Fox Chapel Police Department testifies about an interdiction traffic stop that resulted in the seizure of two kilograms of fentanyl. All of the conduct on the stop by Officer Gillin and the defendant driver was captured on video and audio recordings by the officer's vehicle recorder and body camera, including the obvious traffic violation, consent to search the vehicle, and recovery of the drugs. The defendant driver is white. Nevertheless, because he does not like interdiction stops, Judge Davis suppresses the seizure of the drugs. In his written opinion, Judge Davis bases his decision specifically on a finding that Officer Gillin's testimony was "lacking in credibility." The local district attorney's office closely reads the judge's opinion and reviews the evidence again. The prosecutor's

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295 Kyles, 514 U.S. at 434–35.

296 *Id.* at 434.

297 *See, e.g.,* Amary Murgado, *Drug Interdiction for Patrol,* POLICE MAG. (Sept. 5, 2012), https://www.policemag.com/340820/drug-interdiction-for-patrol; Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 653, 670–77 (2002).

office finds Officer Gillin to be entirely credible and the judge to be allowing his personal biases to affect his ruling. However, the office decides not to appeal Judge Davis' decision because such a credibility finding is virtually unreviewable under that state's precedent.

Pursuant to all of the *Giglio* policies described above, Judge Davis' adverse credibility finding about Officer Gillin is clearly disclosable law enforcement *Giglio* Material.[298] It is an explicit finding of dishonesty and has been memorialized in a written opinion by a judge. Despite the fact that Judge Davis was mistaken and unreasonable, this adverse credibility finding must be disclosed every time Officer Gillin testifies. While this result seems clear, it also seems inequitable to Officer Gillin, who has no redress or remedy for the misinformed opinion of a misguided judge.

H. The Borough Manager's Records

One of the largest problems for prosecutors in attempting to define and disclose law enforcement *Giglio* Material is actually finding the material. The following hypothetical demonstrates the problem.

Officer Daniels works for the Avondale Borough Police Department. For the borough, the borough manager is the appointed official who oversees all of the administrative expenses, including police expenses. The police chief runs the borough police department, which keeps a separate disciplinary file on police officers, not accessible to the borough manager.

The borough manager is reviewing medical expenses one day. She discovers that Officer Daniels apparently has been submitting duplicate expense vouchers for medical procedures reimbursed by the borough. For instance, Officer Daniels submitted two expense forms for $100 for a knee evaluation, with the date altered on the second form, and received a total of $200 in reimbursements from the borough. The borough manager calls Officer Daniels in for an explanation. Officer Daniels admits that he falsified some of the expense forms, explains that he was having financial difficulties, and agrees to repay the borough. The borough manager does a memo to her file about Officer Daniels' misconduct, but nothing is sent to the police chief or the police department.

The next time Officer Daniels testifies, the question is whether the prosecutor needs to turn over Daniels' misconduct as *Giglio* Material. The conduct of Officer Daniels appears to fall directly into the category of disclosable material covered by all of the *Giglio* protocols discussed above.[299] Officer Daniels engaged in dishonest conduct (defrauding the borough), admitted to it, and the dishonesty was related to his job. It

298 *See supra* Part II.A, II.B.
299 *See supra* Part II.A, II.B.

appears that everybody agrees that this is law enforcement *Giglio* Material that must be disclosed to the defense.

However, the United States Supreme Court would not agree. Under *Kyles v. Whitley*, the government only must turn over information that is under the control of the prosecutor or "others acting on the government's behalf in the case."[300] The holding in *Kyles* clearly would cover information contained in the files of the Avondale Borough Police Department about Officer Daniels. However, the Avondale borough manager is not within the scope of somebody "acting on the government's behalf" in a criminal case. Thus, while all prosecutors and police agree that the information about Officer Daniels must be turned over, the Supreme Court would not consider such information disclosable law enforcement *Giglio* Material under *Kyles*, absent the prosecutor having actual knowledge of the information. Nevertheless, in a capital murder case, it is not difficult to imagine the Supreme Court stretching *Kyles* to include the borough manager's information if Daniels testified at trial, the defendant was sentenced to death, and the information was not discovered by the defense until post-verdict.

This issue highlights a major problem for prosecutors—the possible scope and location of law enforcement *Giglio* Material is huge and unpredictable. Even within a police department, the information about an individual officer could be stored in his or her police personnel file, medical files, general administrative files, or a plethora of other locations.[301] The information also could be stored in hard copy files (forgotten in some warehouse) or in electronic files (only accessible by a few people). And then outside of the police department files, there are a host of other potential sources of information about individual police officers: civil suits, divorce proceedings, custody battles, prior employers (including other police departments), medical records, social media in all of its forms, and new sources discovered by prosecutors and defense lawyers every day.[302] Some information might not even be reduced to writing (the Avondale borough manager in the above hypothetical could have decided not to write a memo to file). The question is where to draw the line. Are prosecutors responsible for everything they know, everything

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300 Kyles, 514 U.S. at 437–38.

301 Peoria Police Department, *Peoria PD Policy Manual: Policy 1026*, https://www.peoriaaz.gov/Home/ShowDocument?id=4764 (last accessed Nov. 11, 2020).

302 For instance, a white supremacist tattoo on the body of a police officer would have to be disclosed under the bias/prejudice category of most *Giglio* policies. Some police departments have seen this issue coming and now ban any racist tattoos. *See, e.g.,* Durham (North Carolina) Police Department FAQs, https://durhamnc.gov/DocumentCenter/View/13257/Durham-Police-Department-Recruiting-Unit-Frequently-Asked-Questions?bidId= (noting that the display of tattoos "that are vulgar, sexually explicit, [or] racist" are prohibited by the police department).

anybody on the prosecution team knows, or anything that is knowable? To date, the only accurate answer is, "Nobody knows." Adding this to the Supreme Court's "It depends" mantra will keep any diligent prosecutor up at night.

Some *Giglio* policies attempt to deal with this issue of the unknown by requiring prosecutors to have a "candid conversation" with every police officer who is a potential witness in every case, going over every possible detail of impeachable material from every possible facet of the officer's life.[303] The problems with such candid conversations are twofold. First, law enforcement officers have a disincentive to disclose all of their dirty laundry to the prosecutor, instead hoping that the case either will be resolved with a guilty plea or nobody will ever find out what the officer may be hiding. Second, the time required to have such candid conversations with every single potential law enforcement witness in every single case may work for a federal prosecutor handling ten cases per year, but simply cannot be accomplished by a local prosecutor handling hundreds of cases. Bluntly put, because of the enormous volume of potential material that exists, this is an enormous problem.

I. The Permissible Lie

Every law enforcement *Giglio* policy discussed above identifies dishonesty by the police as evidence that must be disclosed as impeachment material.[304] However, the Supreme Court has expressly permitted the police to lie to suspects in the course of a criminal investigation. The Supreme Court upheld a confession and conviction where the police falsely told the suspect that his co-defendant had confessed.[305] The Supreme Court upheld a conviction where the police lied to the suspect and told him that his fingerprints had been recovered at the scene of the crime.[306] A law enforcement officer was permitted to lie about his own identity, posing as an inmate in a prison to obtain a confession from a criminal.[307] The police were allowed to tell a defendant that another witness had identified the defendant as the shooter in a murder in order to obtain a confession, an admittedly untruthful statement.[308]

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303 *See, e.g.,* New Jersey Policy, at 8 ("[T]he prosecutor shall, at the inception of the criminal case or as soon as practical, have a 'candid conversation' with the investigative employee" about all potential *Giglio* information); DOJ Policy, at 6 ("Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues . . . .").

304 *See supra* Part II.A., II.B.

305 *See* Frazier v. Cupp, 394 U.S. 731, 737 (1969).

306 *See* Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (per curiam).

307 *See* Illinois v. Perkins, 496 U.S. 292, 295 (1990).

308 *See* Michigan v. Mosley, 423 U.S. 96, 98 (1975).

These examples are on-duty, documented cases of dishonesty by police. And they are examples of dishonest police conduct that have been expressly approved by the Supreme Court. No agency or court has stated that such conduct should be considered law enforcement *Giglio* Material, disclosable in every case in which the lying officer testifies (of course, the lies would be disclosed in the actual case where the lie was told). However, every *Giglio* policy described above states that on-duty lies should be considered disclosable impeachment material.[309] This little intellectual aside reveals a bizarre clash between the strategic world of law enforcement, Supreme Court precedent, and the sometimes blunt tool of *Giglio* policies.

J. The Recycling Bin

Chief Block likes to think of himself as a forgiving man. He is the chief of the Western Kentucky Police Department, better known to the surrounding police departments as "The Recycling Bin." Over the years, Chief Block has managed to hire three officers who resigned in disgrace from police departments in other counties.

Twenty years ago, Officer Red was the union president for his police department but got caught skimming union money for personal expenses. His union brethren told him to pay back the money and quit, or they would engage in some "frontier justice." His chief told him to quit or be fired. Officer Red paid back the money and resigned.

Ten years ago, Officer White and his rookie partner seized $5,000 from a drug dealer. Officer White pocketed $500 as a "street tax," but his rookie partner refused to play along. When the rookie reported Officer White's theft to their chief, the chief threatened to defenestrate Officer White if he did not immediately quit. Officer White resigned on the spot.

One year ago, Officer Blue engaged in an elaborate cover-up of an off-duty DUI crash by himself and another officer, and resigned after his then-chief told him to quit or be fired. The local prosecutor got wind of the event and placed Officer Blue on that county's "Do Not Use List." Officer Blue quietly resigned.

Chief Block hired Officers Red, White, and Blue within a year of their respective resignations from their prior departments. None have been in any trouble while employed with the Western Kentucky Police Department. For each officer, Chief Block claims that he knew the officers had been in "some kind of personal trouble" with their prior departments, but that his background check did not uncover the circumstances of the resign-or-be-fired incidents. Chief Block thinks "everybody deserves a second chance."

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309 *See supra* Part II.A., II.B.

Does the varied conduct by Officers Red, White, and Blue constitute *Giglio* Material that must be disclosed? The answer is certainly affirmative. Each engaged in acts of clear dishonesty and probable criminal behavior. The real problem for prosecutors is not making the decision to turn over the information about Red, White, and Blue. The real problem is how to capture the information. None of the conduct was documented in any way. Each officer was caught red-handed and resigned before any discipline could be imposed. It is difficult for any prosecutor to know about this information.

The answer (and problem) for defining and tracking law enforcement *Giglio* Material lies with Chief Block. Chief Block's background check should have included two important questions: (1) Have you ever been terminated or resigned in lieu of termination from any prior employment (and if so, describe the circumstances)?; and (2) Have you ever previously been found to have engaged in behavior that requires disclosure under *Brady*/*Giglio* or been placed on any *Brady*/*Giglio* lists? If Chief Block had included such information in his background check of the officers, the information would have been captured.[310] Without Chief Block actually doing a credible background check, he has created a nondisclosure nightmare for a prosecutor's office and potential civil liability for his agency. For defining law enforcement *Giglio* Material, these vignettes involving Officers Red, White, and Blue provide more worthwhile information to seek and include in gathering potential *Giglio* Material.

K. The Union President to the Rescue!

Let's try a different variation of a police officer getting into and out of trouble. Officer Boston occasionally does something stupid when he is on vacation. During his last vacation on the Gulf Coast of Alabama, he had a little too much to drink while out at a bar with friends. He then stole a souvenir t-shirt and mug from the bar and tried to drive back to his hotel. He was pulled over and arrested by the local police department. He was charged with DUI and retail theft.

Because these were first offenses for Officer Boston, he was eligible for a diversionary program. As long as he finished counseling, did community service, and paid for the stolen items, his charges would be dismissed and expunged. Officer Boston calls the police union president where he works and lets the president know about the situation. The president does not even want the diversionary program on Officer Boston's record, so he calls the local police union president for the depart-

[310] Or it would have forced the officers to lie, which both provides a justification for termination and is easily discoverable with a call to the prior chiefs.

ment where the arrest took place, requesting a little "professional courtesy" for a fellow officer. And *voila*, the charges magically are withdrawn entirely.

The question of diversionary programs and dismissed charges raises an interesting *Giglio* issue. If the underlying conduct involved dishonesty, such as Officer Boston stealing items, then the information becomes disclosable under standard *Giglio* rules, whether there is a conviction or not.[311] However, the fact that the charges were dismissed and expunged under the diversionary program, or disappeared after the request of the union president, means that the conduct would not be disclosed or reported under any *Giglio* policy that excludes "exonerations."[312]

It is interesting here to compare what a police officer must disclose in a criminal proceeding where he or she may testify and what any normal civilian must disclose when applying for a job. Standard background requests when applying for a job, especially in law enforcement or anything involving handling money, require the disclosure of: (a) whether the applicant has ever been arrested; (b) whether the applicant has ever been fired or resigned-in-lieu of termination; and (c) whether the applicant is a party to any legal proceedings.[313] The underlying facts for all of these circumstances are something that many employers are interested in knowing about and possibly requesting follow-up information because the underlying facts may reflect upon the applicant's financial situation and credibility. Thus, the standards for employment as a bank teller might also inform disclosure about law enforcement conduct.

The even more interesting question here is about the conduct of the two union presidents. If the two union presidents agreed to have the charges dismissed as a matter of "professional courtesy" when an ordinary citizen would have been required to complete the diversionary program, the union presidents effectively obstructed justice and engaged in dishonest conduct. Such information would have to be disclosed about both union presidents, should they ever testify. That fact may cause some

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311 *See supra* Part II.A., II.B.

312 *See id.*

313 *See, e.g.,* Michael Klazema, *What Background Checks Do Banks Use?*, BACKGROUNDCHECKS.COM (2019), https://www.backgroundchecks.com/community/Post/5992/What-Background-Checks-Do-Banks-Use#:~:text=banks%20will%20use%20criminal%20history,for%20on%20a%20background%20check.; *What are the standard parts of a background check?*, DATA CHECK, https://datacheckinc.com/blog/what-are-the-standard-parts-of-a-background-check/; *see generally* Lester Rosen, THE SAFE HIRING MANUAL: THE COMPLETE GUIDE TO EMPLOYMENT SCREENING BACKGROUND CHECKS FOR EMPLOYERS, RECRUITERS, AND JOBSEEKERS (3rd ed.). Reporting any prior arrests has become controversial for general employment, but is still used for sensitive positions. *See, e.g.,* United States Office of Personnel Management, Standard Form 85P, *Questionnaire for Public Trust Positions* (Rev. 2017), https://www.opm.gov/forms/pdf_fill/sf85p.pdf.

union presidents around the nation to start thinking twice about their role behind the scenes when a police officer is arrested.

L. The Arbitrary Arbitrator

This hypothetical is going to be bitterly familiar to every police chief and prosecutor dealing with a large urban police department where discipline is ultimately decided by an outside arbitrator. Officer Rabbit works for the Big City Police Department. Officer Rabbit and his partner pull over a car for a suspected DUI. The male driver is clearly intoxicated. The individual turns out to be a juvenile, who is also the son of one of Officer Rabbit's friends. Officer Rabbit arrests the juvenile for a DUI, but also finds what appears to be 13 baggies of heroin on the juvenile. Not wanting to see his son's friend get arrested for heroin possession, Officer Rabbit tosses the probable heroin packets down the sewer. Officer Rabbit's partner later reports him to internal affairs. The body cameras of both officers recorded Officer Rabbit finding the baggies and throwing them away. Officer Rabbit's partner is a veteran officer with no disciplinary record and multiple commendations, and he testifies truthfully at each proceeding about Rabbit's conduct.

Officer Rabbit is investigated by internal affairs. Officer Rabbit claims that he did not discard any potential evidence, despite the recordings and his partner's testimony. The internal affairs department recommends that Rabbit be terminated for destroying the evidence and for lying in the internal affairs investigation. Under the terms of Big City Police Department's collective bargaining agreement, the initial firing decision is made by a captain, with potential consecutive appeals (via a grievance) about the firing to the Big City Police Chief, Big City Mayor, and ultimately a "neutral" arbitrator.

The captain fires Officer Rabbit, despite Rabbit claiming that he did not throw anything away. Officer Rabbit grieves the firing to the police chief, still stating that he did not throw anything away. The chief reviews the evidence, finds Rabbit to be totally lacking in credibility, and sustains the termination. Officer Rabbit grieves the firing to the mayor, with the same defense, and with the same result—the mayor upholds the termination.

Officer Rabbit then gets a union attorney and goes to arbitration, now two years after his termination. The arbitrator, as is traditional in police arbitrations, has to be mutually approved by the terminated officer and the police department, and comes from a list of arbitrators who regularly hear police discipline cases.[314] In arbitration, the attorney has

314 *See* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PENN. L. REV. 545, 551–52, 570–71 (2019) (aggregating collective bargaining agreements from around the United States).

Rabbit admit that he threw the baggies away, mostly because it was captured on the body cameras and confirmed by Rabbit's partner. But the union attorney now claims that there is no evidence that the baggies actually contained heroin because they were never tested.

The arbitrator recently upheld two other police officer terminations. He is worried that if he upholds three in a row, he will never be approved again by police union lawyers to hear police discipline arbitrations around the state. Accordingly, the arbitrator issues a decision overturning Rabbit's termination entirely and reinstating him with back-pay, based on the reasoning that the potential heroin was never tested and thus might not have been relevant evidence. The arbitrator does not mention Rabbit's prior lies in the investigation, where he claimed that he never discarded anything from the arrest.

Every large urban police department has horror stories to tell about arbitration decisions that are contrary to any logic.[315] One scholar has aptly described the internal disciplinary process for police departments in the United States as "uneven, arbitrary, and entirely discretionary."[316] The impact on defining *Giglio* Material is tremendous, and tremendously bad.

For instance, the DOJ Policy explicitly states that allegations against law enforcement officers "that are unsubstantiated, not credible, or have resulted in exoneration" are not considered disclosable impeachment material.[317] The allegations against Officer Rabbit "resulted in exoneration." Thus, under the DOJ Policy, despite mountains of evidence, Officer Rabbit's conduct is not going to constitute disclosable law enforcement *Giglio* Material, all because of the illogical, impenetrable, and unreviewable opinion of a single arbitrator. Other *Giglio* policies have similar language, exempting disclosure of evidence where the officer's misconduct has been found to be acceptable or excusable by some decision-maker in the chain of appeals that cover police discipline.[318] This appears to be a significant gap in defining law enforcement *Giglio* Material.

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315 *Id.* at 564–65, 579–81 (showing that in 37 large law enforcement agencies, approximately 24% of terminated police officers were rehired as a result of disciplinary appeals, including over 70% of terminated officers in San Antonio and 67% in Denver); *see also* William Bender & David Gambacorta, *Fired, Then Re-hired*, PHIL. INQUIRER (Sept. 12, 2019), https://www.inquirer.com/news/a/philadelphia-police-problem-union-misconduct-secret-20190912.html (disclosing that formerly-secret records show how the police arbitration system overturned the firings or discipline of more than 100 Philadelphia police officers).

316 *See* Kate Levine, *Discipline and Policing,* DUKE L.J. 839, 842 (2019).

317 *See* DOJ Policy at § 9-5.100.6 (2020).

318 *See* New Jersey Policy, at 4–6 (only ultimately sustained findings considered); IACP Model, at 2 (same).

M. The All-White/All-Black Organizations

Racial bias/prejudice issues consistently are mentioned as disclosable impeachment material by virtually every entity that has addressed law enforcement *Giglio* Material.[319] However, even in this area, prosecutors are going to have to make some difficult calls.

Officer Augusta likes to golf. He belongs to a golf club where his father was a member and his grandfather was a member. The membership actually was given to him in his grandfather's will, so he has never had to pay for the membership. However, the golf club is a private, all-White club. It has never admitted a person of color as a member. Officer Augusta is not on the golf club's board or in any management position; he is simply a member of the club and golfs at the club once a month. Officer Augusta says that if it was up to him, the golf club would admit non-White members, but it is not up to him. By the way, Officer Augusta also was a member of an all-White fraternity in college.

Officer Harley likes to ride motorcycles. He is a member of a motorcycle club that rides on the weekends. The club is made up entirely and exclusively of Black law enforcement officers. The club has no dues; it is simply a bunch of off-duty, Black police officers who like to ride motorcycles. The name of the club is "Black Justice," which is embroidered on the gear that they wear when they ride together. Officer Harley is simply a member of the motorcycle club, not in a leadership position. He thinks that they should let police officers of other races join the club, but his view has not been accepted by the club's leaders. By the way, Officer Harley was a member of an all-Black fraternity in college.

A prosecutor now has to decide whether the off-duty and/or historical affiliations of Officer Augusta and Officer Harley constitute *Giglio* Material. Racial bias/prejudice are central tenets of any *Giglio* policy.[320] Both officers previously belonged to and currently belong to organizations that are exclusionary based on race, albeit private organizations and in an off-duty capacity. Is this the equivalent of a police officer belonging to the Ku Klux Klan? Does racial segregation in an off-duty capacity constitute racial bias/prejudice that must be disclosed if the officers are testifying in a criminal case? Does it matter if the defendant is White or Black? Does it matter if Officer Augusta is testifying against a White defendant or Black defendant? Does it matter if Officer Harley is testifying against a White defendant or Black defendant?

These are uncomfortable questions. Based on *Kyles* and the predecessor cases, the Supreme Court would give its traditional response of "It depends"—it depends on some of the questions asked above, the overall

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319 *See supra* Part II.A, II.B.

320 *See id.*

strength of the evidence in the case, and the role that Officer Augusta/Officer Harley have in the case.[321] Unfortunately, that provides no guidance to prosecutors in deciding what to turn over to defendants in criminal cases. It also provides no guidance to police officers and police agencies in shaping off-duty codes of conduct with reference to what might have to be disclosed about an officer's personal life in criminal proceedings. If such affiliations must be disclosed, it is likely that police organizations would include in their off-duty codes of conduct that membership in such organizations are not permitted. It is also likely that the potential disclosure would affect the off-duty conduct of the officers.

The *Giglio* policies that require turning over any type of conduct that demonstrates racial bias or prejudice would, by their literal terms, require the disclosure of the memberships of Officer Augusta and Officer Harley in these racially exclusive organizations. It is useful to point out here that *Giglio* policies require turning over any evidence of racial prejudice (*i.e.,* animosity towards a group) or racial bias (*i.e.,* favoritism towards a group).[322]

And this naturally raises the broader question of whether this is really the type of disclosures that society and the criminal justice system want from police. The answer from defense attorneys would certainly be that they want the information. The answer from prosecutors would be that they preferred that the officers did not belong to the organizations and they do not know if they have to turn over the information. The answer from courts probably varies from judge-to-judge. This lack of doctrinal clarity confuses the entire criminal justice system, and can be traced back to the incoherence of the Supreme Court in the *Brady/Giglio/Bagley/Kyles* quartet of cases. This is exactly the type of issue that must be resolved.

The above-referenced hypotheticals demonstrate the crashing confusion for prosecutors, police, and the courts in trying to define what constitutes law enforcement *Giglio* Material. Imagine going to hear a new symphony, only to realize that the brass section is playing Sousa marches, the strings are playing rock-and-roll, the woodwinds are playing 12-tone serialism, and the percussion section is playing hip-hop. The resulting noise is the functional equivalent of the governing law and varied policies in the United States on defining law enforcement *Giglio* Material. In the next section, we will try to bring order out of this chaos.

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321 Kyles, 514 U.S. at 434.

322 *See supra* Part II.A.

IV. PROVIDING A DEFINITION OF GIGLIO MATERIAL (OR FORCING THE COURTS TO DO THE JOB)

In this Part, like a conductor with an unruly orchestra, we attempt to provide a solution to defining what constitutes law enforcement *Giglio* Material. There are three possible solutions. First, and ideally, is the creation of a bed-rock list of fundamental categories of law enforcement *Giglio* Material. Second, the law could use an inversion technique, excluding certain well-defined categories about police officers from disclosure but providing "open-file" discovery about the police regarding everything else. Third, legislation could be created that forces the trial courts to make these decisions on a case-by-case basis, until the courts come up with fundamental categories for use by prosecutors. Each of these approaches is discussed below.

A. Bed-Rock Rules for Law Enforcement Giglio Material

The cleanest and most logical solution to defining law enforcement *Giglio* Material is to create a master list of fundamental, bed-rock concepts that should be considered disclosable impeachment material about police officers. Following is an attempt to create such a list. This list synthesizes the existing *Giglio* protocols, amorphous Supreme Court precedent, and perplexing factual scenarios discussed above. In each section, a rule of disclosure for law enforcement *Giglio* Material is stated, followed by an intentionally brief explanation of the reason for the structure of the rule. These rules place the burden for making *Giglio* decisions and disclosures on prosecutors, where the burden has been placed by the Supreme Court.[323]

To be clear, we are suggesting that: (1) the Supreme Court abandon the "materiality" prong of the *Giglio* analysis as a failed experiment; and (2) amend Federal Rule of Criminal Procedure 16 and the parallel state rules on criminal discovery expressly to incorporate the following disclosure categories into the rules themselves, creating a template for prosecutors and courts to follow across the United States.

The proposed Giglio disclosure rules are listed below:

> ***1. Any evidence regarding a law enforcement officer that may be admissible under Federal Rules of Evidence 608 and 609 must be disclosed. This includes any pending criminal case where the law enforcement officer is a defendant and any prior arrests of the law enforcement officer.***

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323 *See supra* note 153 (citing *Brady* and *Kyles*).

Federal Rules of Evidence 608 and 609 are the evidentiary rules that describe what information is admissible to impeach witnesses at trial.[324] Law enforcement *Giglio* Material is defined by what might be used to impeach the credibility of a testifying police officer.[325] Thus, it makes sense to include in the definition of such *Giglio* evidence the actual Federal Rules of Evidence addressing impeachment, which are Rules 608 and 609. Frankly, it is mystifying that neither *Bagley* nor *Kyles* even touched on these basic rules.

The actual content of these rules is useful in multiple contexts for analyzing law enforcement *Giglio* Material. Rule 608 permits evidence of a "witness's reputation for having a character for truthfulness or untruthfulness," and permits cross-examination of a witness using specific instances of conduct "in order to attack or support the witness's character for truthfulness."[326] Rule 609 permits impeachment of a witness for a criminal conviction that is punishable "by death or by imprisonment for more than one year," or for any crime involving a "dishonest act or false statement."[327] Rule 609 generally excludes convictions if more than ten years have passed since the witness's conviction or release from incarceration, whichever is later.[328] The comments to Rule 609 note that the definite time limit imposed by Rule 609 "incorporates basic safeguards, in terms applicable to all witnesses," as well as "giving effect to demonstrated rehabilitation."[329]

Using Rules 608 and 609 as a base provides some immediate concrete guidelines to defining law enforcement *Giglio* Material. First, the rules squarely include evidence related to the police officer's character for truthfulness, a central concern of every *Giglio* policy discussed above.[330] Of course, a more specific definition of dishonesty is required and is discussed in the immediately following section.

Second, for criminal convictions, the rules create some useful and logical structure. To be discoverable, the prior criminal convictions must involve dishonesty *or* be punishable by more than one year in jail (the time frame which constitutes a federal felony).[331] This excludes what the drafters considered less important criminal convictions, unless they involved *crimen falsi*.[332] In addition, criminal convictions are generally

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324 *See* FED. R. EVID. 608, 609.

325 *See supra* Part I.A.2.

326 *See* FED. R. EVID. 608(a), (b).

327 *See id.* at 609(a)(1), (2).

328 *See id.* at 609(b).

329 *Id.*, Notes of Advisory Committee.

330 *See supra* Part II.A, II.B.

331 *See* Fed. R. Evid. 609, Notes of Advisory Committee.

332 *Id.*

subject to a sunset provision if they are more than ten years old.[333] As the drafters explicitly noted in the comments to the rule, it is important that the rules are generally applicable to all witnesses and that demonstrated rehabilitation be taken into account with a time limit of ten years.[334] It is difficult to argue with the logic of these rules being applied equally to police officers for *Giglio* disclosure purposes. In fact, most police officers would be ineligible to serve in law enforcement with such criminal convictions,[335] but the rules should still apply equally.

Rather than just stating that any evidence that would be admissible under Rules 608 and 609 must be disclosed, this definition of law enforcement *Giglio* Material goes a step further to make sure that any potentially admissible information is disclosed.[336] The definition includes anything that "may be admissible" under the rules, forcing the prosecutor to disclose and argue for exclusion, if necessary. In addition, this definition includes any pending criminal charges against a police officer, since overhanging charges of any nature could affect the officer's relationship with the government and thus the officer's testimony. Prior arrests are disclosable because, whether they were dismissed or diverted, the underlying conduct may include some *Giglio* disclosable material.

2. Any evidence of dishonesty in the line of duty as a law enforcement officer or in any official proceeding must be disclosed, excluding conduct specifically permitted by law.

This definition of law enforcement *Giglio* Material contains a core definition of impeachment material regarding dishonesty, supplementing Rule 608, but also provides some important boundaries.

Dishonesty is described as relevant impeachment material by every *Giglio* policy developed by prosecutors or police, albeit without much consideration for what limitations or nuances might exist.[337] For instance, some policies limit disclosable dishonesty to on-duty conduct; some state that all dishonesty is disclosable, on-duty or off-duty.[338] Such policies are both under-inclusive and over-inclusive.

There is an expectation that a police officer acting as a police officer must always be scrupulously truthful. This covers any other official proceeding as well, such as testifying in a civil case or administrative pro-

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333 *Id.*

334 *Id.*

335 *See All You Need to Know About Police Background Check and the Common Disqualifiers*, GO LAW ENFORCEMENT (2020), https://golawenforcement.com/articles/need-know-police-background-check-common-disqualifiers/.

336 *See supra* Part I.V.

337 *See supra* Part II.A, II.B.

338 *Id.*

ceeding. And a police officer must be honest in all communications to courts, prosecutors, and other law enforcement officers.[339] Any dishonest statement or act in these circumstances must be disclosed.

However, to the extent that society demands that a police officer be truthful in every aspect of his or her job, there is no realistic expectation that police officers must be saints in all other aspects of their lives. When police officers are not acting in any official capacity or in any official proceedings, they are recognized as human beings. In short, as human beings, in their personal life, they may lie, just like any other human being. They may tell their significant other that he or she looks good in that outfit, may tell their doctor that they are working out every day and watching what they eat, and may claim that they tallied the winning score in their high school championship game. And in response to the hypothetical posed above, the police officer's lie to his spouse about his girlfriend should not be considered law enforcement *Giglio* Material.[340] The lie is not on-duty, not in any official proceeding, and has nothing to do with his role as a police officer. Law enforcement *Giglio* Material cannot and should not attempt to encompass every aspect of a police officer's personal life.

In addition, this definition takes note of the fact, already discussed,[341] that police officers are permitted to be untruthful with suspects as part of the strategic aspects of law enforcement.[342] Thus, such "permissible lies" are not considered law enforcement *Giglio* Material.

3. Any evidence that a law enforcement officer harbors any bias or prejudice regarding the defendant or any constitutionally protected group must be disclosed.

Along with dishonesty, bias/prejudice is the second aspect of law enforcement *Giglio* Material that almost every policy agrees must be disclosed as impeachment material.[343] However, the policies vary in how they express the scope of this disclosure.[344] Some policies only cover

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339 *See supra* Part I.V.

340 *See supra* Part III.D.

341 *See supra* Part III.I.

342 *Id.*

343 *See supra* Part II.A, II.B. Interestingly, most of the policies articulate the evidence to be disclosed as anything that demonstrates "bias." What the policies are actually addressing is prejudice, often racial prejudice, but everybody is reluctant to use the term "prejudice" because it sounds much more negative. In addition, the Supreme Court has effectively defined bias to include prejudice. *See* United States v. Abel, 469 U.S. 45, 52 (1984). Nevertheless, prosecutors should call a skunk a skunk, using the term "prejudice" in their policies to express accurately the actual concern.

344 *See supra* Part II.A, II.B.

prejudice against the defendant, not specific groups.[345] Some policies only cover prejudice expressed on-duty.[346] Some policies only cover prejudice that has been found explicitly via a formal proceeding.[347]

Bias/prejudice is the nuclear bomb of law enforcement *Giglio* Material. It must be defined broadly, encompassing prejudice against this specific defendant and any other constitutionally protected group.[348] It must cover prejudice that is expressed on-duty or off-duty, because nobody really believes that racism can be turned off simply by putting on a uniform and checking into work as a police officer. In this way, prejudice is unlike honesty; a police officer can reasonably be thought to be capable of making a conscious choice to be honest at all times while on-duty, but cannot be considered capable of deciding only to be a racist while off-duty. And it must be applied broadly and evenly—any evidence of bias/prejudice must be disclosed. The prosecutor and the defense can argue about the significance of the evidence, but it must be disclosed.

In the hypotheticals previously discussed, this means that disclosure is going to apply in every instance. The White officer using a racially derogatory term is subject to disclosure, as is the Black officer, the Latino officer, the Asian officer, etc.[349] Membership in racially exclusive private organizations must be disclosed.[350] The officers and prosecutors can argue to the court why such evidence is not relevant, offering any explanation that they would like, and the defense can argue that it is admissible. Or the officers can change their behavior both on-duty and off-duty to avoid the necessity of such disclosures.

4. If the case or defense includes some element or issue of force exerted by a law enforcement officer, any findings or allegations of excessive use of force by that law enforcement officer must be disclosed.

Out of the *Giglio* policies surveyed, most avoided any discussion of excessive use of force by police officers. In fact, the only policy to address it explicitly was the IACP Policy, which included as law enforcement *Giglio* Material, "An officer's excessive use of force, untruthfulness, dishonesty, bias, or misconduct in conjunction with his or her service as a law enforcement officer."[351]

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345 *Id.*

346 *Id.*

347 *Id.*

348 Using the terminology "any constitutionally protected group" permits for the precedent-guided evolution of this definition.

349 *See supra* Part III.E.

350 *See supra* Part III.M.

351 *See* IACP Model, at 2.

Given the fact that excessive force by the police is a central topic in criminal justice discussions, this gap in the policies is puzzling. It is possible that the policies avoid mentioning excessive force because it is very case-specific—extremely relevant in some cases, utterly irrelevant in others.

The proposed *Giglio* disclosure rule here draws some bright lines to clarify this issue. Where the case or defense includes an issue of force exerted by a law enforcement officer, then evidence of that officer's prior excessive force must be disclosed. For instance, if the defendant is charged with assault on a police officer or resisting arrest, evidence of an officer's excessive use of force on prior occasions is material and disclosable. If there is an allegation that the defendant's confession was physically coerced, evidence of an officer's excessive use of force on prior occasions—particularly in interviewing suspects—is material and disclosable.[352] On the other hand, in a wire fraud case where the allegation is that a corporate executive created a scheme to defraud investors of $42 million and the evidence consists of thousands of pages of financial transactions and communications, a testifying law enforcement officer's history of violence has no relevance whatsoever.[353]

This more refined rule for disclosure of law enforcement *Giglio* Material regarding excessive force, specifying the nature of cases requiring disclosure, provides some simple and consistently predictive rules for prosecutors to follow. It also allows every *Giglio* policy to address the issue of excessive force, an issue most policies currently are missing.[354]

5. If a law enforcement officer has intentionally violated any constitutional rights or intentionally failed to handle evidence pursuant to applicable department protocols, such information must be disclosed.

This *Giglio* disclosure rule captures police officers who are intentionally violating rights or intentionally mishandling evidence. For example, the officers described above who intentionally broke into the lock box without a warrant were both violating the Fourth Amendment and violating their department's policies on handling evidence.[355] An officer who throws evidence away or taints blood evidence is an officer whose

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352 Defense counsel has some burden here. To the extent that the issue is not obvious from the charges filed, defense counsel will need to alert the prosecution to this potential issue to trigger disclosure. This burden on the defense is slight, operates to help the defense, and any competent counsel can easily meet this burden.

353 The fact that federal prosecutions are less likely to arise from the more volatile nature of violent crime and street arrests may explain why the DOJ Policy is silent on this issue. But it does not explain the muteness of the other policies.

354 *See supra* Parts II.A, II.B, III.F.

355 *See supra* Part III.A.

credibility should be subject to impeachment.[356] This category will often overlap with the category of dishonesty, but sometimes will occur in freestanding instances of conduct. Importantly, this category only covers intentional conduct, not the conduct of somebody who makes a mistake as to the law or procedure.

6. Any evidence that a law enforcement officer suffers from some reduced ability to recall and/or relate information accurately, including substance abuse and mental health issues, must be disclosed.

This disclosure rule breaks significant new ground for law enforcement *Giglio* Material. Some policies address this issue for civilian witnesses, some policies completely avoid discussing the ability to recall and relate, and some only glancingly mention the issue.[357] The simple fact is that the ability to recall and testify accurately is a crucial component in virtually every case for testifying law enforcement officers, and substance abuse and mental health issues can impair those abilities.[358] Thus, such information must be disclosed.

Placing this issue into a different context is helpful. Imagine a police officer who suffered a traumatic brain injury as a result of a crash during a vehicle pursuit. If the brain injury caused deficits to the officer's short-term or long-term memory, such deficits could impact the officer's credibility in recalling evidence of what happened in a case. Similarly, a police officer who suffered a stroke may then have to deal with speech aphasia, limiting his or her ability to testify accurately. Substance abuse, whether alcohol or drugs, and mental health issues can create similar deficits in the ability to recall and relate information. Accordingly, such information must be included in any definition of law enforcement *Giglio* Material.

7. If a law enforcement officer has ever been terminated from employment or resigned in lieu of termination, such information must be disclosed.

As previously discussed, there are certain questions that are standard in applications for employment for any sensitive position, such as whether the applicant has ever been fired, arrested, or party to a legal proceeding.[359] An affirmative answer to these questions often reveals damaging information about a person's credibility. Thus, this disclosure

356 *See supra* Part III.L.

357 *See supra* Part II.A, II.B.

358 *See supra* Part III.C.

359 *See supra* Part III.K.

rule applies that reasoning to police officers.[360] Having been terminated or resigned in lieu of termination should be disclosed as standard law enforcement *Giglio* Material.

This *Giglio* disclosure rule has a very specific target. Chief Block and the "Recycling Bin" hypothetical discussed above[361] reveals a common practice for police officers: an officer resigns because of conduct that would result in a termination, then is hired as a police officer in another jurisdiction.[362] Such information must be captured and disclosed. Moreover, such information can be readily accessible to prosecutors, provided that every background check for hiring a police officer includes such information.[363]

> ***8. If a law enforcement officer has ever been placed on a Giglio or Brady list by any agency, or has had their conduct classified as Giglio or Brady material that is subject to disclosure, then such information must be disclosed. This rule includes any state law equivalents to Giglio and Brady.***

There is no national database of law enforcement *Giglio* Material, nor are there widespread state databases.[364] Instead, there is a patchwork of *Giglio* information held by various prosecutors and law enforcement agencies (to the extent that the various organizations even recognize the requirements of *Giglio*).[365] Moreover, when one prosecutor or police chief replaces their predecessor, some organizations discard or "reconsider" prior *Giglio* classifications.[366] In order to avoid losing track of *Giglio* information, if a police officer has previously been classified as

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360 The other proposed rules also capture these standard pre-employment concerns. *See supra* Part IV.A.1 (arrest); *infra* Part IV.A.9 (party to other legal proceedings).

361 *See supra* Part III.J.

362 The risk of this problem is most pronounced in states with a large number of small police departments. For instance, Pennsylvania has over 1,000 separate police departments, and over 70% of those departments employ fewer than ten officers. *See* Pennsylvania Legislative Budget and Finance Committee, *Police Consolidation in Pennsylvania*, at S-2 (2014), http://lbfc.legis.state.pa.us/resources/documents/reports/497.pdf. Without any standard *Giglio* Material definition and without any central database of *Giglio* Material, problem officers can skip undetected from small department to small department.

363 To the extent that a police officer was terminated for a benign reason, such as the disbanding of a police department or staff layoffs at a corporate job, disclosure of such information is harmless and clearly would not be admissible.

364 *See supra* Part III.H.

365 *See supra* Parts II.D, III.H.

366 *See, e.g.,* Kyle Kaminski, *Prosecutors remove Lansing police chief from list of problem cops*, LANSING CITY PULSE (Oct. 12, 2020), https://www.lansingcitypulse.com/stories/prosecutors-remove-lansing-police-chief-from-list-of-problem-cops,15065 (removing the name of current police chief from list, despite the fact that prior chief had found that he had engaged in dishonesty as a subordinate); Amelia Arvesen, *Boulder County DA says Mead asked him to remove cop from Brady list*, LONGMONT TIMES-CALL (Feb. 27, 2018), https://www.timescall.com/2018/02/27/boulder-county-da-says-mead-asked-him-to-remove-cop-

having engaged in *Giglio*-disclosable conduct or been placed on a *Giglio* list, such information must be disclosed. Because some states use the terms *Giglio* and *Brady* interchangeably, and some jurisdictions use a different title for law enforcement *Giglio* Material, the rule is written to encompass the conduct regardless of the legal nomenclature. The prosecutor and defense can argue over the admissibility of such information.

9. If a law enforcement officer is a party to any pending civil, administrative, or other formal proceeding, such information must be disclosed.

This *Giglio* disclosure rule is intended to capture any pending civil matters or internal disciplinary proceedings where the police officer is a party. The disclosure of the fact that the testifying police officer is a party to these other proceedings permits the defense to: (a) pursue discovery of matters that are publicly available and likely to contain impeachment material; and (b) request further information regarding any pending internal disciplinary matters.

If a prosecutor is aware that a police officer testified dishonestly in a civil case, for example, the prosecutor would be required to turn that information over under the previously discussed *Giglio* disclosure rules.[367] However, if the prosecutor merely knows that the testifying police officer is a plaintiff or defendant in a pending civil case, the burden on the prosecutor is only to disclose this information to defense counsel. Defense counsel then has the option of obtaining and reviewing any information from such a civil proceeding, which is equally accessible to the defense. The prosecution may want to look at the same information but does not have a constitutional burden to do so.

For pending internal police disciplinary proceedings, the burden is on the prosecutor to identify the police officer's status and the nature of the proceedings (*e.g.*, "Officer X, pending disciplinary proceeding for reporting late to work on multiple occasions"). The defense then may request or move for additional information, or might review the nature of the proceedings and decide that it is not worthy of further inquiry.

10. If a prosecutor is aware of any other information about a law enforcement officer that is relevant to a prosecution or investigation and that negatively affects the integrity of a prosecution or investigation, the prosecutor must disclose such information. This includes all categories of impeachment

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from-brady-list/ (reporting that an outgoing district attorney revealed that political officials asked him to remove officer from list).

367 *See supra* Part IV.A.2.

material that must be disclosed for civilian witnesses.

This rule of disclosure for law enforcement *Giglio* Material is a necessary catch-all provision. The previously-described definitional rules capture the vast majority of disclosable *Giglio* evidence. However, unique situations can arise and new categories may be discovered. This rule gives prosecutors the flexibility to recognize and disclose such information. The rule does establish some boundaries on such information, focusing on the integrity of the investigation and prosecution. This will allow the prosecutor to focus on specific information and avoid being forced to go on a fishing expedition.

The better *Giglio* policies already include a catch-all provision, or at least acknowledge that their listing of potential *Giglio* Material may not be exhaustive.[368] Conversely, if a policy does not include an "all-other" provision, that policy is almost necessarily designed to limit disclosures rather than foster transparency.

The final clause in this *Giglio* rule, incorporating all disclosable material for civilian witnesses as also disclosable for police witnesses, is simple common sense and equity. If evidence about a civilian is relevant to attack that civilian's testimony, the same evidence about a law enforcement officer is relevant to impeach that officer's testimony. For instance, inconsistent factual statements or testimony from a civilian or officer are fair game for impeachment. The only reason to separate out definitions for civilian *Giglio* Material is because some categories (*e.g.,* plea deals for civilians) simply will not apply to police officers. But the safest definition treats civilian and police witnesses equally for purposes of defining impeachment material.

11. **Other Considerations**

a. For impeachment evidence that qualifies under any of the previous categories, the evidence must be disclosed if: (i) it was ever sustained or upheld in any proceeding, even if the finding was later overturned; or (ii) it is otherwise found to be credible by the prosecutor.

Law enforcement and the public generally acknowledge that the police disciplinary system is badly broken and leads to strange results.[369] The arbitration system often results in police officers getting their discipline overturned and/or their jobs back, in the face of fairly obvious misconduct.[370] Despite this acknowledgement, many *Giglio* policies

368 *See* New Jersey Policy, at 7; Pennsylvania Policy, at 2.
369 *See supra* Part III.L.
370 *Id.*; *see* Bender & Gambacorta, *supra* note 315.

explicitly state that misconduct findings that have been later overturned or resulted eventually in "exoneration" should not be disclosed.[371] Expressed another way, some policies allow disclosure only for potential *Giglio* Material that has been ultimately sustained or upheld, regardless of prior decisions.[372]

The proposed rule here is that if any evidentiary finding of *Giglio* Material was ever sustained, then disclosure is required. This proposal is a much more realistic view of what should be disclosed. If an allegation that a police officer lied was rejected at every stage of the police disciplinary process, then it is not subject to disclosure; nobody found any merit to the allegation. However, if any third party found such an allegation to be meritorious, then it should be disclosed. This will capture a significant amount of actual police dishonesty, regardless of an arbitrator's bizarre eventual holding. The prosecution and defense can argue with the trial court over the import of differing rulings by police command staff and arbitrators, but the information should not be hidden from the defense if it was sustained in any way. The Baltimore PD Policy gets it right, correctly dealing with the arbitrariness of police arbitrators by stating that findings of police misconduct about things like dishonesty must be disclosed "regardless of the outcome of the proceeding or investigation . . . ."[373]

Finally, the provision that potential *Giglio* Material that is "found to be credible by the prosecutor" must be turned over reflects both cold reality and a prosecutor's ethical duties. Many experienced prosecutors can read through a personnel file or have a "candid conversation" with a police officer about an area of potential *Giglio* Material, listen to various excuses and artful evasions, and still find an allegation of dishonesty or prejudice to be entirely credible. The prosecutor needs to have the ability to disclose such information. Moreover, the ethical rules governing prosecutors effectively state that a prosecutor would be required to make such a disclosure, having been convinced of the credibility and relevance of the *Giglio* Material.[374]

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371 *See, e.g.*, DOJ Policy, at § 9-5.100.6.

372 *See* Illinois Chiefs Model, at 2–3.

373 *See* Baltimore PD Policy, at 3.

374 *See* MODEL RULES OF PROF'L. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) For a truly chilling look at how a prosecutor's office can destroy both public confidence in the criminal justice system and a young prosecutor's career, the case of *Hillman v. Nueces County*, 579 S.W.3d 354 (Texas 2019) is instructive. In *Hillman*, the trial prosecutor found certain evidence to be disclosable *Giglio* Material. The prosecutor checked with the State Bar Ethics Hotline and the Texas Center for Legal Ethics to confirm his opinion. However, the prosecutor's supervisors disagreed, ordered the prosecutor not to disclose the evidence, then fired the prosecutor for disclosing it. The court found that the prosecutor's supervisors had qualified immunity to fire him. Thus, this prosecutor was truly caught between Scylla and Charybdis: comply with

b. Conduct of a law enforcement officer that took place more than ten years ago shall not be subject to disclosure, provided no other Giglio Material applies to that law enforcement officer during the intervening time period. This time-bar does not apply to evidence of dishonesty or bias/prejudice.

This *Giglio* sunset provision is controversial. However, it is logical, reasonable, and has well-grounded legal antecedents.

The most obvious precedent here is Federal Rule of Evidence 609, which generally bars the introduction of prior criminal convictions for all witnesses as impeachment evidence after ten years.[375] The otherwise rather bizarre California *Pitchess* procedures and legislation also include a sunset provision, which excludes any law enforcement conduct that is more than five years old.[376]

The reasoning for such time-bars is expressly discussed in the comments to Rule 609. The comments note that the definite time limit imposed by Rule 609 "incorporates basic safeguards, in terms applicable to all witnesses," as well as "giving effect to demonstrated rehabilitation."[377] Thus, according to this reasoning, if a law enforcement officer has maintained a clean *Giglio* record for ten years, the *Giglio* rules should recognize that the officer has demonstrated rehabilitation and changed his or her behavior. If this reasoning applies even to prior criminal convictions for all witnesses, it should equally apply to *Giglio* Material for police officers. In addition, the "ban the box" movement for civilians (not requiring civilians to report prior criminal convictions to potential employers based on the belief that people can change and should be evaluated holistically)[378] applies philosophically to police officers as well—the police can change and should not be considered forever irredeemable.

The only exception to this time-bar is for evidence of dishonesty and bias/prejudice. These issues lie at the core of law enforcement *Giglio* Material under every legitimate policy.[379] Even Rule 609 admits that dishonesty is different, allowing evidence of prior convictions involving

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the Constitutional mandates of *Brady/Giglio* and be fired, or ignore his Constitutional duties and risk being disbarred and arrested if anybody ever found out.

375 *See* FED. R. EVID. 609(b).

376 *See* CAL. EVID. CODE § 1045(b)(1). Similarly, facts that are "so remote as to make disclosure of little or no practical benefit" are excluded. *Id.* at § 1045(b)(3).

377 *See* FED. R. EVID. 609, Notes of Advisory Committee.

378 *See generally* Dallan F. Flake, *Do Ban-the-Box Laws Really Work?,* 104 IOWA L. REV. 1079 (2019); Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801 (2015).

379 *See*, *e.g.*, DOJ Policy § 9-5.100.5(c) (describing all *Giglio* material as relating to dishonesty or bias and prejudice).

dishonesty as impeachment evidence even if the crimes were not punishable by more than a year imprisonment.[380] In the context of capital litigation, the Supreme Court has noted that death is different.[381] In the context of law enforcement *Giglio* Material, the rule-makers should equally find that dishonesty and prejudice are different.

As noted, this sunset provision on *Giglio* Material may be controversial. The Supreme Court has never addressed any statute of limitations on *Giglio* evidence, but that is only the tip of the iceberg for the *Giglio* issues not addressed by the Court.[382] Some may argue that the time-bar should be shorter, perhaps reflecting the California statute's five years.[383] Others will argue that there should be no time-bar, or it should be longer, perhaps 20 years. The choice of a ten-year limitation on *Giglio* Material is based on two main pillars: (1) the specific time-frame established by Rule 609; and (2) the normative belief, supported by decades of real-life experience in the criminal justice system, that a police officer who has been free of any misconduct disclosable under *Giglio* for the past ten years has changed his or her behavior for the better.[384] Regardless of any judge's or scholar's personal belief about the appropriate duration for a time-bar, this is an issue that merits serious discussion and analysis.

c. The prosecutor must disclose all Giglio evidence that is known to the prosecutor or others acting on the government's behalf in the case. If the Giglio evidence was publicly available at the time of the trial, non-disclosure by the prosecutor is not grounds for an appeal pursuant to Giglio.

This is perhaps the singular area where the Supreme Court correctly apportioned the burden of *Giglio* discovery and disclosure for prosecutors. In *Kyles*, the Court held that knowledge about information controlled by the police (or "others acting on the government's behalf in the case") is imputed to the prosecution, whether the prosecutors had actual

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380 FED. R. EVID. 609(a)(2).

381 *See* Furman v. Georgia, 408 U.S. 238, 287–89 (Brennan, J., concurring), 306 (Stewart, J., concurring) (1972) (per curiam).

382 *See supra* Part I.A.5.

383 *See* CAL. EVID. CODE § 1045(b)(1).

384 The only other issue to consider about this time-bar is that certain officers with significant *Giglio* Material are placed on "Do Not Use" lists by prosecutors, but not fired by their police departments. Such officers (known colloquially as the "Rubber Gun Squad" or "House Cats") are generally assigned to desk duties where they will never have to testify and thus are extremely unlikely to run into new *Giglio* issues, even over the course of 10 years. It thus might be necessary to establish a special category for officers who were placed on such "Do Not Use" lists, as they presumptively engaged in egregiously bad conduct to have qualified for such a list. This is yet another example of the necessity of delving deeply into this subject to understand its complexity.

knowledge of the information or not.[385] This standard is workable and logical.

All parties on the "prosecution team" must be responsible for gathering *Giglio* evidence.[386] This clearly means that the prosecutors and police must work together to gather and disclose all available impeachment evidence. However, *Giglio* cannot make prosecutors responsible for discovering everything from everywhere. There are simply too many possible sources of information in today's world. Limiting the prosecutor's burden to what is known by the prosecution team is realistic. The Supreme Court got it right.

Moreover, in a world of exploding resources to obtain impeachment information about police officers, the defense must shoulder some burden as well. Both the prosecution and the defense would be well-served to do a basic open-source search for public information about testifying police officers. If the information is equally available to both parties in a criminal case, then the defense cannot claim a foul if the information was not discovered and disclosed by the prosecution. This means that for the jurisdictions where all police misconduct is being made publicly available, such as New York,[387] the burden of discovering such information now will fall to defense counsel instead of the prosecution. Of course, a competent and well-prepared prosecutor will check the same information to avoid surprises at trial. But the defense will not be able to appeal based on *Giglio* if such publicly available information is not disclosed.[388]

d. What Is Not Included and Why

The proposed categories of law enforcement *Giglio* Material suggested above go well beyond what any current prosecution or police *Giglio* policy encompasses. This is a result of rigorously cross-checking various *Giglio* protocols, exploring the philosophical roots of this area of the law, and examining the real-life issues that involve police officers. However, the careful reader will note that there are certain aspects of police conduct that are not included in law enforcement *Giglio* Material under these proposed categories. As discussed above, these rules exclude evidence such as legally permissible lies, some off-duty conduct, publicly available information, and certain remote-in-time conduct.[389] In addition, the mundane aspects of police discipline—the "wear your chinstrap in the back during the summer" type of administrative viola-

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385 *Kyles,* 514 U.S. at 437–38.

386 *Id.*

387 *See supra* Part II.C.1.

388 There still may be appeals based on ineffective assistance of counsel for defense lawyers who failed to engage in such searches. That raises the issue of strategic ineffectiveness by defense lawyers, which is a worthy topic, but beyond the scope of this Article.

389 *See supra* Part IV.A.

tions—are not covered by these disclosure rules. Simply put, not everything matters, and prosecutors cannot be expected to track everything down. Even under the Supreme Court's "It depends" standard for materiality, certain areas can be categorically excluded for the sake of bringing order to this chaotic area of the law.

The categories discussed above provide a bed-rock framework for prosecutors and courts to make decisions about what material to disclose regarding testifying police officers as *Giglio* Material. This list is notable for three reasons. First, it expands the categories of disclosable material, particularly in the area of substance abuse and mental health. Second, it creates some hard-and-fast rules that reflect the real-life decisions that prosecutors must make regarding disclosures, based on specific prior examples or identified normative concerns. Third, this list allows prosecutors to make coherent decisions about disclosing law enforcement *Giglio* Material before a trial, rather than rolling the dice about what a court might consider to be "material" after a trial. If these standards are employed across the nation in a uniform fashion, then prosecutors, law enforcement, the courts, defendants, and the public might begin to renew respect for the criminal justice process. At the very least, these definitional issues merit a vigorous and informed debate.

B. The Inverted Giglio Policy

The preceding section creates bed-rock definitions about what to disclose as law enforcement *Giglio* Material. In keeping with our musical theme, there is a variation on the bed-rock approach that could be used. Specifically, a *Giglio* protocol could instead define what is *not* required to be disclosed about testifying police officers, leaving the balance to an open-file discovery policy. We call this the "Inverted *Giglio* Policy."

In practice, the Inverted *Giglio* Policy would work as follows. The first necessary step is to define certain categories of information about police officers that are shielded from disclosure. For instance, such non-disclosable information could include: information about the police officer's family members, medical information that does not implicate the ability to relate or recall, home address, social security number, date of birth, etc. Under this *Giglio* proposal, whatever is included in the non-disclosable list of items would not be the subject of discovery in criminal cases. The prosecutor then would have the burden of turning over all other information about the police officer, including all misconduct findings and other potential *Giglio* Material.

There are some distinct advantages to the Inverted *Giglio* Policy. First, the policy mirrors what happens with most civilian witnesses, where prosecutors only protect from disclosure certain tightly defined categories (*e.g.,* addresses and social security numbers, or more broadly,

information protected under rape shield laws).[390] Second, the inverted policy actually reduces the number of decisions that must be made by already overwhelmed local prosecutors. Instead of combing through files for each police officer to discover *Giglio* Material, prosecutors could simply redact the tightly defined information and turn over the balance of the police files. Third, from a legislative and policy-making perspective, categorizing what should not be disclosed is remarkably easier than defining what should be disclosed.

The disadvantages to the Inverted *Giglio* Policy are worth considering as well. The inverted approach might make prosecutors too comfortable simply redacting existing police files, failing to search diligently for other impeachment material for testifying police officers. The inverted approach also might invite police agencies to become very selective about what they maintain in police files, essentially only including information that they know will be shielded from discovery. Finally, this approach is not very flexible. There presumably would be various categories of information that specific police officers believe should not be disclosed and that have no possible relevance to a particular case, but would be swept up in the inverted whirlwind of disclosures. The Inverted *Giglio* Policy would be a blunt instrument, albeit somewhat less blunt that the New York legislative mandate to turn over everything known and knowable about every police officer.

While the Inverted *Giglio* Policy has not been proposed or even discussed in any law enforcement or scholarly literature, it is an interesting idea that bears further examination. By comparison, the next proposal is simply devious.

C. The Devil's Giglio Policy

As discussed throughout this article, the major problem for prosecutors and police in defining law enforcement *Giglio* Material is the complete lack of categorical guidance from the courts, originating with the United States Supreme Court. In order to force the courts to issue clear and binding opinions for the criminal justice system to use for disclosures in criminal cases, legislatures could create a *Giglio* policy that forces the trial courts to make every *Giglio* decision in every case for every testifying police officer. Let's call this the "Devil's *Giglio* Policy."

Under the Devil's *Giglio* Policy, the procedure would work as follows. The prosecution would turn over all of the information that it has regarding every testifying police officer to the trial court for inspection *in camera*. The prosecution would file a general trial memorandum giving a

390 *See* FED. R. EVID. 412 (barring all evidence, admissible under other rules of evidence, pertaining to a victim's sexual behavior and predisposition).

summary of the evidence and the expected testimony of each law enforcement officer. The defense would file an *ex parte* trial memorandum outlining the defendant's theory of the case and proposed defenses. The trial court then would apply the dictates of the Supreme Court in *Kyles* and its predecessors to determine the materiality of any impeachment information about the testifying police officers, identify the relevant information, and order the prosecution to disclose such information to the defense.

The major advantage to the Devil's *Giglio* Policy is that it would allow one party, the trial court, to have all of the necessary information to make a fully-informed *Giglio* disclosure decision. Unlike the prosecutor, the court would have the advantage of knowing what the defense intended to argue at trial, filling in the vast informational gap that Justice Marshall decried in *Bagley*.[391] In fact, the Devil's *Giglio* Policy would allow the trial court to play the role now played by appellate courts, who are reviewing all of the information after a trial, but allows the information-rich disclosure decision to be made *ex ante* instead of *ex post*.

The major disadvantage to the Devil's *Giglio* Policy is that it would rapidly overwhelm the trial courts, who would be forced to review the thousands of pages of documents and various other sources now being reviewed by prosecutors. However, even this disadvantage may turn into an advantage. Faced with the daunting task of reviewing mountains of information, enterprising trial courts would be forced to come up with bed-rock definitions of what constitutes law enforcement *Giglio* Material.[392] Having accomplished this task, the courts could eventually request that the burden of review and disclosure then be returned to the prosecutors, who now would be armed with specific guidance about what must be disclosed as law enforcement *Giglio* Material.

A version of the Devil's *Giglio* Policy currently is playing out in California with its arcane *Pitchess* procedures.[393] The California version lacks the required prosecution and defense trial memos, which would be useful in evaluating materiality under *Kyles*,[394] but in other respects is inflicting the same punishment on trial courts called for by the Devil's *Giglio* Policy. It will be instructive for the entire criminal justice system to see if California's trial courts rise up *en masse* and either issue categorical decisions about law enforcement *Giglio* Material or storm the gates of the Supreme Court to demand such guidance.

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391 *See Bagley*, 473 U.S. at 700–02 (Marshall, J. dissenting).

392 The appellate courts should not think that they are immune from being subjected to the same onerous duties. For instance, one appellate court decided to review a police officer's entire personnel file to check on the review already conducted by the trial court. People v. Collins, 985 N.E.2d 613, 617 (Ill. App. 2013).

393 *See supra* Part.II.C.2.

394 *Id.*

It is an amusing intellectual exercise to discuss the Inverted *Giglio* Policy and the Devil's *Giglio* Policy. But the soundest and most comprehensive approach remains the bed-rock *Giglio* policy approach, setting forth well-defined categories of disclosable law enforcement *Giglio* Material. It may not be the finished mastery of Beethoven's Fifth Symphony. However, it is a vast improvement over the current unfinished legal symphony governing the definition of law enforcement *Giglio* Material.

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In today's climate, the definition of impeachment material regarding testifying police officers should be an area of the law that has been rigorously developed and subjected to well-established rules. Instead, the relevant Supreme Court precedent in the area of *Giglio* Material is an incoherent mess.[395] As a result, prosecutors, police, courts, and legislatures have struggled to find a single consistent melody within the Supreme Court's musical madness. Not surprisingly, the policies and protocols that have been developed across the nation to define law enforcement *Giglio* Material are wildly divergent and inconsistent.[396] Also not surprisingly, this is one of the elements that has led the public to distrust the criminal justice system.[397]

This Article has proposed a fully integrated definitional list of what constitutes law enforcement *Giglio* Material. Such a list was previously lacking in scholarly literature and judicial precedents. While exploring new and expanded areas of disclosable police impeachment evidence, such as substance abuse and mental health issues, the Article also proposes some logical limitations on this material.

It is my hope that this Article can be used as both a finishing line and a starting point for law enforcement *Giglio* Material. It is a finishing line because it is the first attempt to aggregate and synthesize the discordant *Giglio* policies, laws, and precedent from around the nation. It is a starting point because it now permits the courts, scholars, and practitioners to begin to engage in a fully-informed debate on this critical issue for the American criminal justice system. As always, the goal is to improve the system, ensure fairness for all, and increase the trust and respect of the public.

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395 *See supra* Part I.B.

396 *See generally supra*, Part II.

397 *See* Stephanie Wykstra, *The Fight for Transparency in Police Misconduct, Explained*, VOX (June 16, 2020), https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct; Robert Lewis & Noah Veltman, *The Hard Truth About Cops Who Lie*, WNYC (Oct. 13, 2015), https://www.wnyc.org/story/hard-truth-about-cops-who-lie/.