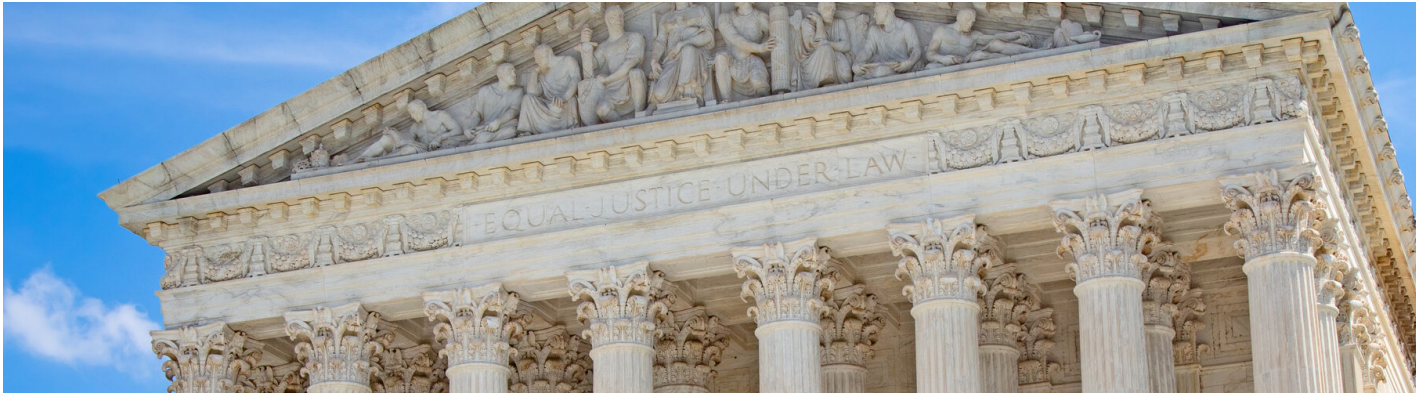


## BRADY AND GIGLIO



The intersection between the Fifth Amendment and policing can be understood through a brief overview of three Supreme Court cases: *Giglio v. U.S.*; *Brady v. Maryland*; and *Garrity v. State of New Jersey*.

In *Giglio v. U.S.*, 405 U.S. 150 (1972), the Supreme Court held that due process is violated if the government fails to disclose an alleged promise of leniency made to a key prosecution witness in return for his testimony. The controversy in the case centered about the testimony of an alleged co-conspirator in a scheme involving forged money orders.

Giglio material (or Giglio information) is a well-known term among law enforcement, but there is often confusion over how and when it applies. *Giglio v. United States*, 405 U.S. 150, is a 1972 Supreme Court case involving the prosecution's obligations regarding criminal discovery and disclosure. Prior to *Giglio*, the Supreme Court had found in *Brady v. Maryland* that due process is violated when the prosecution "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty." In *Giglio*, the court went further and held that all impeachment evidence falls under the *Brady* holding. This means that the prosecution is obligated to disclose all information or material that may be used to impeach the credibility of prosecution witnesses (including situations where police officers act as witnesses for the prosecution).

The court's holding was based upon a number of cases that placed an affirmative obligation upon the government to disclose all evidence favorable to an accused. The leading case on this issue is *Brady v.*

*Maryland*, 373 U.S. 83, 87 (1963), which dealt with a suppressed confession by an accomplice. Brady and Bobbit were involved in a joint misadventure and were tried separately for murder. Brady was tried first. At his trial, he admitted participating in the crime but claimed that Bobbit did the actual killing. Bobbit had made several statements that Brady requested to examine. All but one statement was shown to Brady. The one that was suppressed was Bobbit's admission of the actual homicide. Brady's counsel conceded his guilt of first-degree murder and pleaded for mercy. Brady was convicted as charged. Upon discovering the suppressed evidence Brady petitioned for a new trial. The Supreme Court held that suppression of evidence favorable to the accused violated the due process clause of the Fourteenth Amendment where the evidence is material to either guilt or innocence, irrespective of the good faith or bad faith of the prosecution.

Merely because the prosecution may not have explicitly promised a deal to a government witness or put any such agreement in writing does not relieve it of its duty to disclose such understandings with a witness.

This action, "the suppression by the prosecution of evidence favorable to an accused upon request," the court wrote, "violates due process where the evidence is material." As a result of the purposely withheld confession, the court ordered Brady's sentence be vacated and ordered a new sentencing hearing. Now, more than 50 years later, *Brady's* disclosure requirements are well accepted and strictly followed; however, some attorneys like to quibble about what exactly constitutes a "material" fact.

# BRADY AND GIGLIO

One of the foremost constitutional principles arising from an employer's internal investigative process is the "Garrity rule." *Garrity v. State of N.J.*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

Garrity held that a public employee may not be forced to provide a statement to his or her employer and then have that statement used against the employee in a criminal proceeding. The Garrity doctrine is unquestionably among the most important principles in public personnel administration. The basic rules are as follows:

- A public employee can be ordered to cooperate in an internal administrative investigation to provide statements regarding matters that are specifically, directly, and narrowly related to the employee's official conduct or fitness to serve;
- Statements made pursuant to an order to cooperate in an internal administrative investigation cannot be used against the employee in any criminal proceeding;
- A public employee may not refuse to answer specific, direct, and narrow job-related questions so long as the agency does not seek to compel a waiver of constitutional rights; '
- A public employee can be substantially disciplined or terminated for refusing to cooperate and failing to provide statements in an internal, non-criminal, administrative investigation;
- In order for the statement to be protected by Garrity, it must be ordered or coerced. The statement cannot be voluntary.

The *Garrity* exception to the general rule that one must timely assert the self-incrimination privilege was outlined in three late 1960s Supreme Court decisions:

- In *Garrity v. State of New Jersey*, police officers who were being criminally investigated were given a choice to incriminate themselves or forfeit their jobs. Confessions obtained under this threat were inadmissible under the Fifth Amendment.
- In *Gardner v. Broderick*, the court gave similar effect to a city charter provision that provided for the discharge of officers who refuse to waive immunity from prosecution. Officers cannot be discharged refusing to waive immunity before a grand jury.
- *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York* holds that an employer may ask public employees to answer questions specifically, directly, and narrowly relating to the performance of their official duties, and threaten dismissal if they don't answer, if they do not require that the employees waive the Fifth Amendment privilege.

Consequently, statements made by public employees are coerced if obtained under a threat that invocation of the privilege will result in job termination. In other words, the threat of termination relieves the employee of the obligation to invoke the privilege. Employers may terminate an employee who invokes the privilege relating to specific job-related questioning, but only after providing use immunity.<sup>4</sup> Prosecuting the employee after providing use immunity requires not only proceeding without the statements but also cleansing the case of any derivative evidence.

The government may seek to avoid the attachment of *Garrity* immunity with carefully crafted warnings. A *Garrity* warning tells the employee that the interview is voluntary, and that the employee will not be disciplined solely for refusing to answer questions.



## Questions? KLC is here to help!

Please contact John Clark ([jclark@klc.org](mailto:jclark@klc.org)) or Brian Nunn ([bnunn@klc.org](mailto:bnunn@klc.org)) with KLC Loss Control Law Enforcement at 800.876.4552 or visit [klc.org](http://klc.org) for more information.



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