SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. AM-000275-19

STATE OF NEW JERSEY,	:	Criminal Action
	:	
Plaintiff-Appellant,	:	
	:	ON INTERLOCUTORY APPEAL FROM
	:	AN ORDER ENTERED BY THE
	:	SUPERIOR COURT OF NEW JERSEY,
	:	LAW DIVISION, PASSAIC COUNTY
v.	:	
	:	
DEXTER HUBBARD,	:	
	:	
	:	
Defendant-Respondent.	:	
	:	
	:	Indictment No. 25-02-0111-I
STATE OF NEW JERSEY,	:	
	:	
Plaintiff-Appellant,	:	
	:	
	:	
	:	
	:	
v.	:	
	:	
GUSTAVO ARENAS,	:	
	:	
	:	
Defendant-Respondent.	:	
	:	
	:	Indictment No. 24-12-0898-I

STATE OF NEW JERSEY, Plaintiff-Appellant, v. KYANAZIA DOBSON, Defendant-Respondent.	:	Indictment No. 24-02-0071-I
STATE OF NEW JERSEY, Plaintiff-Appellant, v. KAHDAR HOLMES, Defendant-Respondent.	:	Indictment No. 23-04-0311-I
STATE OF NEW JERSEY, Plaintiff-Appellant, v. MARCUS MORALES, Defendant-Respondent.	:	Indictment No. 25-01-0065-I

STATE OF NEW JERSEY, Plaintiff-Appellant, v. JAMARSCU RUSSELL, Defendant-Respondent.	:	Indictment No. 24-12-0864-I
STATE OF NEW JERSEY, Plaintiff-Appellant, v. JOSEPH PEREZ, Defendant-Respondent.	:	Indictment No. 24-09-0678-I

Sat Below: Honorable Sohail Mohammed, P.J.Cr.

APPELLANT'S BRIEF

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[1][2]

This appeal involves seven defendants, each of whom raised the same issue. Pa0016-0017; Pa0030; Pa0035; Pa0046; Pa0067-0068; Pa0081-0082; Pa0092. In 2024 and 2025, each defendant received a post-indictment letter ("disclosure letter") from the State notifying them that a law enforcement witness who may testify at trial has an allegation of misconduct that bears upon his truthfulness, bias, or integrity that is the subject of a pending investigation. Pa0015, 0029; 0034; 0045; 0065-0066; 0080; 0091. Each disclosure letter was accompanied by a Protective Order that had been entered by a Superior Court Judge on the same day pursuant to R.3:13-3(e)(1) and (2) based on an ex parte written application by the State. Pa0013-0014; 0027-0028; 0032-0033; 0043-0044; 0063-0064; 0078-0079; 0089-0090.

Defendant Dexter Hubbard was charged in Indictment No. 25-02-0111-I with numerous CDS related charges. Dexter Hubbard is represented by the Office of the Public Defender. Dexter Hubbard's co-defendant Mary Hansen, who is not represented by the Office of the Public Defender declined to join the underlying motion. The Honorable Justine A. Niccollai, J.S.C. signed the protective order in Dexter Hubbard's matter.

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[1] Because of the interrelated nature and for the convenience of the reader, the Statement of Facts and Procedural History have been combined.

[2] 1T:June 25, 2025 (MOTION)
2T:July 9, 2025 (DECISION)

Defendant Gustavo Arenas was charged in Indictment No. 24-12-00898-I with numerous CDS and firearms related charges. Gustavo Arenas is represented by the Office of the Public Defender. Gustavo Arenas' two co-defendants Michel Arenas and Hilary Guevara, both who are not represented by the Office of the Public Defender declined to join the underlying motion. The Honorable Barbara Buono Stanton, J.S.C. entered the protective order on Gustavo Arenas' matter.

Defendant Kynazia Dobson was charged in Indictment No. 24-02-00071-I with a single count of fourth degree unlawful taking of a means of conveyance. Kyanazia Dobson is represented by the Office of the Public Defender. She has one co-defendant who is currently a fugitive. The Honorable Barbara Buono Stanton, J.S.C. entered the protective order in Kynazia Dobson's matter.

Defendant Kahdar Holmes was charged in Indictment No. 23-04-00311-I with numerous CDS and firearms related offenses. Kahdar Holmes is represented by the Office of the Public Defender. He did not have any co-defendants. Additionally, Kahdar Holmes through counsel had previously filed a successful Higgs, motion and obtained a significant number of Internal Affairs files. The Honorable Sohail Mohammed, P.J.Cr. granted both the Higgs, motion and entered the protective order.

Defendant Marcus Morales was charged in Indictment No. 25-01-000065-I with numerous CDS related counts. Marcus Moraels is represented by the Office of the Public Defender. Marcus Morales' six co-defendants, none of whom were

represented by the Office of the Public Defender, declined to join the underlying motion. The Honorable Joy-Michelle Johnson, J.S.C. entered the protective order in Marcus Morales' matter.

Defendant Jamarscu Russell was charged in Indictment No. 24-12-00864-I with numerous CDS related charges as well as hindering apprehension. Jamarscu Russell is represented by the Office of the Public Defender. Jamarscu Russell's two codefendants, neither of whom are represented by the Office of the Public Defender, joined the underlying motion. The Honorable Justine A. Niccollai, J.S.C. entered the protective order in Jamarscu Russell's matter.

Defendant Joseph Perez was charged in Indictment No. 24-09-00678-I with numerous firearms and CDS related charges. Joseph Perez is represented by the Office of the Public Defender. He did not have any co-defendants in that matter. The Honorable Joy-Michelle Johnson, J.S.C., entered the protective order in Joseph Perez's matter.

Each Protective Order restricted and limited the use or disclosure of the information in the disclosure letter. Each permitted defense counsel to review and consider the material in the disclosure letter with his or her client, but also restricted the distribution, dissemination, or disclosure of the material with / to any third party, person, or entity. They prohibited defense counsel from disclosing the information "to any other person for any reason" or making the information public "without the

express written permission of this Court." They required the defense attorneys to provide notice to the State if they sought permission to disclose the material to any third party, and stated that any knowing violation of the order "shall be considered Contempt of Court." The Protective Orders, filed under seal, directed that the disclosure letters be provided to defendants by hand-delivery or encrypted electronic transmission. In addition, copies of they had to be served on the named law enforcement officers and their Internal Affairs Units. Id.

Each of the defendants are represented by staff attorneys from the Public Defender's Office. Pa0016-0017; Pa0030; Pa0035; Pa0046; Pa0067-0068; Pa0081-0082; Pa0092. Each defendant filed a "Notice of Motion to Compel and To Vacate or Amend the Protective Order" seeking to compel the State to "comply with its Brady / Giglio obligations", and to vacate or amend the Protective Order. Id.

Several of the defendant's who joined in this motion have co-defendants. These co-defendant's either represented by pool or private counsel declined to join in this consolidated motion. Additionally, one of the defendants, Kahdar Holmes had previously successfully filed a motion to obtain Internal Affairs records that was granted by Judge Mohammed after in camera review.

On June 25, 2025, Judge Mohammed heard oral argument on the consolidated motions. Pa0094. The defense argued that the PCPO policy is "that the substance of the underlying complaint and the investigation does not become Giglio, material

until the investigation is concluded and a substantial finding is made." (1T:14-14 to 18). Defense counsel then argued that the State's position did not have any legal backing. Defense counsel made this argument by claiming that the Attorney General Directive the State relies upon is misinterpreted by the State.

Defense counsel emphasized that "General Directive 2019-6, section 2(a)(2)(b), in the case that the A.G.'s Directive defines Giglio material to include "any allegation of misconduct bearing upon truthfulness, bias or integrity that is the subject of a pending investigation." (1T:15-12 to 16). Defense counsel then argued that this provision could not be satisfied by disclosure of the existence of the investigation. Instead, defense counsel maintained that the substance of the allegations and investigation must be disclosed. (1T:15-17 to 25).

Despite referencing the Attorney General Directive, defense counsel did note "I want to make clear that I am not asking the Court to order that pursuant to the A.G. Directive. I understand that the A.G. Directive uh, is not enforceable by other parties." (1T:17-11 to 14). Defense counsel argued that their claim is, therefore, based directly on Giglio itself.

Defense counsel claimed that "But with no details whatsoever about the nature of the allegation, the defense cannot prof – uh, possible proffer a viable nexus between uh, this allegation and the contents of the file." (1T:21-16 to 19). Therefore, defense counsel argued that "in short the State purports to meet its Constitutional

obligations by issuing a letter that is not usable, not investigable, provides no legal pathways to obtain admissible evi -- evidence and cannot be used in strategic decisions at trial." (1T:22-2 to 6).

Finally, defendant argued that the procedure established in State v. Higgs, 235 N.J. 333 (2023) does not address the defense motion. Specifically, "Higgs created a separate independent material that is relevant, but not necessarily exculpatory or impeachment evidence." (1T:25-7 to 10).

The State argued that its process of providing letters that notified defense counsel of the existence of an Internal Affairs investigation that touched on truthfulness, bias, or integrity properly satisfied the State's Giglio obligations. The State noted that "Giglio material is impeachment material. It is material that could be used to impeach the credibility of a witness on a sta -- on the stand. (1T:29-18 to 20).

After having established what Giglio, material is used for, the State expounded on how the material would be gathered in this context. As a starting point, the State properly noted "Remember, the target officer has employment rights. The target officer has collective bargaining rights." (1T:36-16 to 18). Similarly, "The target officer has due process due process rights and is usually represented by a Weingarten representative or counsel throughout these proceedings." (1T:36-19 to 21).

When a law enforcement officer is accused of conduct that violates departmental rules and regulations, the Internal Affairs process begins. The State noted "A complaint against a police officer can come from absolutely anywhere. Somebody can walk in, fill out an Internal Affairs Complaint Form, alleging uh, the officer lacked candor. (1T:33-8 to 11). Similarly, Any individual can file an Internal Affairs complaint online and the complaints can be filed by civilians, other law enforcement officers or agencies. (1T:33-15 to 17). "There are absolutely no limitations on the way or manner in which an internal can be filed." (1T:33-18 to 20).

The State emphasized that "Once that complain comes in, it must be investigated. And the investigator can't prejudge it. The investigator can't take a look at that Internal Affairs Complaint and say, oh, that officer would never do this." (1T:34-14 to 18). Furthermore, "The investigator can't take out the bodycam or the police or the police report, look at it quickly and say, no. That didn't happen and close the case." (1T:34-19 to 22). This is because "Every Internal Affairs Complaint must be completely and thoroughly investigated, no matter the allegation, no matter the in – manner, not matter how absurd our outlandish the claims made by the complainant are, the ani -- Internal Affairs process begins." (1T:34-23 to 35-2). The ensuing investigation includes the gathering and review of documents, review of bodyworn cameras, review of other video material including surveillance, dash cam

footage, or civilian recorded footage. The investigation also includes interviews that are recorded of both the accused and witnesses. The accused officer does not have the right plead the Fifth Amendment or choose not to cooperate with the investigation. (1T:35-3 to 37-5). If the investigation is substantiated then the accused officer can request a hearing. (1T:38-6 to 10).

The State maintained that on the basis of the Attorney General Directive and the State's ongoing constitutional responsibilities that when an allegation of related to candor is made against an officer, that the allegation has been made is discoverable pursuant to Giglio. (1T:39-1 to 25). The State noted that is because the Internal Affairs files are confidential. The results of the Internal Affairs investigation become public only if they result in a suspension of six or more days. (1T:39-9 to 14). It is because of that confidentiality that the State made a practice of seeking protective orders. (1T:39-17 to 20).

Additionally, aside from confidentiality concerns, the State maintained that logistically the defense argument was not tenable. "We cannot have Internal Affairs units of every local department notify every defense counsel of every defendant on which the target officer is a necessary witness in that prosecution as the investigation goes forward." (1T:40-22 to 41-1). Aside from the logistical challenges presented by the potential need to continually update numerous defense attorneys as to every investigative step, the potential for abuse is significant. "If the defense proffer that

an allegation against an officer warrants the entire disclosure of that Internal Affairs investigation to the defense, if that were true, then the defendant under indictment with a trial looming, could file an Internal Affairs allegation[.]" (1T:45-4 to 9).

Judge Mohammed issued an oral decision on July 9, 2025, followed by a July 31, 2025 written order and decision. Pa0093-0108. In his ruling, Judge Mohammed acknowledged the defendants' arguments that the Protective Orders prohibited them from collaborating internally, using the information contained in the disclosure letter in new or related matters for the same defendant, conducting their own Giglio checks regarding recurring witnesses, and sharing material with experts or necessary staff without leave of the court. (Pa 096-097). He acknowledged that no sustained finding of misconduct had been made in any of the internal affairs investigations at issue; that the State conceded it would make a full and detailed disclosure with supporting evidence if the internal affairs investigation(s) resulted in a sustained finding regarding officer credibility or candor; and that there was no evidence that the State had previously failed to disclose any such information in the past. (Pa 096-097).

Despite that, Judge Mohammed found that if an officer who was expected to testify at trial had a pending internal affairs investigation bearing upon truthfulness, bias, or integrity, evidence related to that investigation had to be automatically disclosed by the State pursuant to Giglio following the return of the indictment. Judge Mohammed held that a defendant did not have to "prove relevance and

materiality in advance" in order for this material to be subject to disclosure. Pa0100-0101. Judge Mohammed found that, "(p)recedent does not support limiting Brady/Giglio to only adjudicated or sustained allegations" and that, "(d)isclosure is required even when an investigation is not sustained or would be excluded at trial." Pa0100. He found the "plain language" of Attorney General Directive 2019-6 "requires substantive disclosure of IA allegations, irrespective of whether they have yet resulted in sustained findings." (Pa 0101).

He found the disclosure letters did not satisfy Giglio as they "did not provide facts, context, or substantive detail as to the alleged misconduct." He found the defense could not "meaningfully exercise its rights without knowing more than the mere existence of an unspecified investigation." (Pa 0100–0101).

He also found the Protective Orders – including the one that he himself entered – were impermissibly and excessively broad. (Pa 0101-0102). He reasoned that they prevented "routine inter-office sharing for coverage or counsel collaboration," and "prevents use in other criminal or collateral matters involving (the) same witnesses or defendants." Ibid. He held that they prevented defendants from sharing the information with staff or potential expert witnesses without the court's permission. He determined they "impair effective assistance and ethical obligations to 'make timely Giglio checks' for witness credibility risks." Ibid.

The State had argued that the Protective Orders minimized the risk that disclosure of unproven allegations would unjustly impugn the reputations of the named police officers. (Pa 095). Judge Mohammed dismissed those arguments and "deem(ed) the state's concerns as generic concerns regarding confidentiality and reputational harm." (Pa 0102). Rather, he found "that the (Protective) (o)rder hinders ethical duties and practical necessities such as intra-office consultation and preparations for other matters involving the same witness." Ibid. He concluded that the Protective Orders were "categorical and overbroad". Ibid.

Based on this analysis, Judge Mohammed vacated the Protective Orders and ordered the State to disclose "substantive information about the nature and context of the pending IA allegations" with redactions permitted only "for privacy or safety". (Pa 0102-0103). He explicitly rejected what he characterized as "the State's practice of withholding Giglio details until after a sustained finding." (Pa 0103).

He stayed his order for thirty days, and then issued a stay pending appeal. (Pa 0106; 0109-0110). He found that this area of law was "complex and unresolved" and also found merit in the State's argument that once the information was disclosed, "the confidentiality cannot be restored and reputational harm to the officers involved may be immediate and permanent." (Pa 0105-0106).

The State filed a "Notice of Appeal" on August 19, 2025 along with a request for a 15-day extension until September 4, 2025 to file its Motion for Leave to Appeal. This Court granted the State's Motion for Leave to Appeal. This brief follows.

LEGAL ARGUMENT

POINT I

THE SUBSTANCE OF PENDING INTERNAL AFFAIRS INVESTIGATIONS ARE CONFIDENTIAL AND SHOULD NOT BE SUBJECT TO AUTOMATIC DISCOVERY PROVISIONS (Pa 0099 to Pa 103)

Judge Mohammed's order compelling the State to disclose confidential information related to pending internal affairs investigations without any showing of cause is contrary to law and an abuse of his discretion. Judge Mohammed's order disregards the totality of the Attorney General Directive 2019-6 and the confidential status of Internal Affairs investigations. Instead of conducting a proper balancing of the equities involved, Judge Mohammed accepted at face value the slogan posited by defense counsel, that Giglio material must be disclosed without any further consideration. This Court should reverse.

The appellate court reviews a trial court's ruling on a motion to compel discovery or a motion for disclosure of privileged or confidential records under an abuse of discretion standard. State v. Broom-Smith, 406 N.J. Super. 228, 239 (App. Div. 2009); New Jersey Div. of Child Protection and Permanency v. M.C., 456 N.J.

Super. 568, 585 (App. Div. 2018). *See also* State v. Williams, 239 N.J. Super. 620, 626 (App. Div. 1990) and State v. Milligan, 71 N.J. 373, 384 (1976).

Information related to pending internal affairs investigations is confidential and may be disclosed to criminal defendants only after the defendant has made a showing of relevance in a motion for in-camera inspection its relevance has been confirmed by the in-camera review. IAPP[3], Section 9.6.1; State v. Higgs, 253 N.J. 333, 358 (2023). There is in fact no dispute that this information is confidential. Defense counsel did not dispute the confidentiality but instead posited that the defendant's due process rights outweigh the confidentiality. Judge Mohammed did not address the question of the confidentiality of this information.

A. There is no legal basis to support Judge Mohammed's Decision (Pa 0097 to Pa 0102)

Here, Judge Mohammed abused his discretion by compelling the disclosure of confidential information without requiring any showing by the Defense. In essence, Judge Mohammed's decision does away with any protections that confidentiality could afford Internal Affairs investigations. While the usage of protective orders is contemplated by Judge Mohammed's decision, left unresolved is the fact that defense counsel is seeking impeachment material on witnesses. The

3 "IAPP" refers to the "Attorney General's Internal Affairs Policy and Procedures Guidelines", available at [redacted].nj.gov/oag//iapp/docs/IAPP_November.2022.pdf

usage of that impeachment material would undoubtedly include use or at least attempted use at trial. The question of whether the usage of this confidential impeachment material would conflict with the open nature of a trial is left unaddressed.

Judge Mohammed's order is not supported by law. There is no statute or case that requires the State to automatically disclose confidential information related to pending internal affairs investigations upon the unsealing of an indictment. In fact, the Legislature, Supreme Court, and Attorney General have all recognized the importance of maintaining the confidentiality of internal affairs records, particularly when the investigation is pending and there has been no sustained finding of misconduct.

Defense counsel argued that the State's position regarding the usage of notification letters under protective order is not backed by any law or statute. However, the classification of Internal Affairs materials as confidential is long standing. A holistic understanding of all legal rights involved in a question is necessary to a just outcome. That holistic understanding was missing in Judge Mohammed's decision.

Internal affairs investigations by law enforcement agencies fall under the supervision of the Attorney General. In 1948, the New Jersey Legislature empowered the Attorney General to "(f)ormulate and adopt rules and regulations"

to administer the Department. N.J.S.A. 52:17B-4(d). Since then, our Supreme Court has recognized that the Attorney General "is charged with adopting guidelines, directives, and policies that bind local police departments in the day-to-day administration of the law enforcement process." O'Shea v. Township of West Milford, 410 N.J. Super. 371, 378 (App. Div. 2009). Based on that authority, our Supreme Court has recognized that Attorneys General have issued various directives that govern the disciplinary process. In re Atty. Gen. Law Enforcement Directive Nos 2020-5 and 2020-6, 246 N.J. 462, 487 (2021). It has also recognized that these guidelines, directives, and policies cannot be ignored and are binding on local law enforcement agencies. O'Shea, 410 N.J. at 378.

In 1991, the Attorney General issued the "Internal Affairs Policy and Procedures" manual ("IAPP") to establish "a comprehensive process to address complaints of police misconduct." Rivera v. Union County Prosecutor's Office, 250 N.J. 124, 142 (2022). In 1996, the Legislature passed a law requiring stating that every law enforcement agency in New Jersey "shall adopt and implement guidelines which shall be consistent with the" IAPP." N.J.S.A. 40A:14-181. Our Supreme Court has acknowledged that the IAPP "carries the force of law for State and local law enforcement." Rivera, 250 N.J. at 150.

Under the IAPP, internal affairs investigations may result in a finding of sustained, unfounded, exonerated, or not sustained. IAPP, Section 2.2.3. An

investigation results in a "sustained" finding if "a preponderance of the evidence shows an officer violated any law, regulation, directive, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol, standard operating procedure, rule, or training." Ibid.

Internal affairs departments functioning under the IAPP are not free to reject complainants – no matter what the allegation, "(e)ach agency must accept reports of officer misconduct from any person, including anonymous sources, at any time" and then must "thoroughly, objectively, and promptly investigation all allegations against its officers." IAPP, Section 1.0.9(b) and (c). If the investigation is not completed within 45 days, investigators must notify the agency's law enforcement executive, who may take steps to ensure prompt resolution. IAPP, Section 1.0.9(g).

Under the IAPP, "(t)he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential and remain exempt from access under (OPRA)." IAPP, Section 9.6.1. Such records shall be disclosed only under limited circumstances outlined in the IAPP. Ibid.

The IAPP requires disclosure of internal affairs reports when an officer is terminated, demoted, or suspended for more than five days; when an officer is charged with any indictable crime; or when there is a sustained finding that an officer engaged in discrimination or bias, utilized excessive force, was untruthful, filed a false report, intentionally conducted an improper search, seizure, or arrest,

intentionally mishandled or destroyed evidence, or engaged in domestic violence. IAPP Sections 9.6.2(a)(1) and 9.11.2.

The State concedes that, under 9.6.2(a)(1) and 9.11.2 of the IAPP, it must disclose internal affairs records when there has been a sustained finding of misconduct. (Pa 096). This is what the PCPO policy mandates and Judge Mohammed acknowledged that the State has not withheld information in those circumstances. However, Judge Mohammed's order went far beyond that; he ruled the State must also automatically disclose information about internal affairs investigations that are pending and have not resulted in any finding of misconduct. See Pa 0102.

Thus, pursuant to Judge Mohammed's order, any allegation made as to the honesty of a police officer, no matter how outlandish or unfounded must be disclosed to defense counsel and each step of that investigation must be disclosed. This coupled with the mandatory investigatory requirements outlined by the State at the hearing creates an unworkable standard.

Neither the IAPP or any other Attorney General Directive or Guidelines requires disclosure of pending internal affairs reports that have not resulted in a finding of misconduct. In fact, this scenario is directly addressed by the IAPP which states, in part that "(t)he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential and remain

exempt from access under (OPRA)." IAPP, Section 9.6.1. Judge Mohammed's ruling thus directly contradicts the IAPP, which has the force of law.

There is good reason to limit the disclosure of information related to pending internal affairs investigations. Our Supreme Court has acknowledged:

> "(c)onfidentiality in internal investigations can be important in certain matters to encourage witnesses to come forward and cooperate, to protect personal information about witnesses, victims, the subject of an investigation, and others; and to avoid impairing the internal affairs process, among other reasons."
> Rivera, 250 N.J.at 147.

Conversely, the public has an interest in the disclosure of internal affairs reports in order to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement. Ibid.

When internal affairs reports are requested by the public, trial courts are required to balance those rights. Id. at 149. Our Supreme Court acknowledged that, in order to perform that analysis, "we do not require judges to review actual internal affairs reports in every case." Ibid.

This is in keeping with other jurisprudence in areas protected by confidentiality. This Court considered the question of disclosure of the identity of confidential informants in State v. Williams, 356 N.J. Super. 599 (App. Div. 2003). This Court noted that "The purpose of the informant's privilege is to encourage

citizens to communicate their knowledge of the commission of crimes to law enforcement officials." Id. at 603. However, this Court also noted that "The informant's privilege is not absolute. A court must "balance the public interest in protecting the flow of information against the individual's right to prepare his defense and contest the State's charges."" Id. at 604. The notion that a claim by a defendant that information is needed to aid their defense is an automatic pathway to disclosure is not present with this form of confidential information.

Even though the right to confrontation is implicated in the question of the identity of a confidential informant, this Court did not mandate automatic disclosure. This is because the law does not only recognize the defendant's right to prepare their defense. Undoubtedly, in the face of the loss of liberty, a defendant's right to prepare their defense is of immense weight. Yet it does not steamroll all other considerations. If it did, then Williams, would have seen a different result from this Court.

That the question of disclosure of Internal Affairs files, like the identity of confidential informants invokes rights that have an inherent tension with the defendant's right to exculpatory or impeachment information. The proper way to resolve that inherent tension is not simply to declare one side the winner without any deeper analysis.

This is further buttressed by the New Jersey Supreme Court decision in Higgs. While it was not in dispute that Higgs, did not address the necessity of a Giglio,

based disclosure, it did deal with confidential internal affairs materials. The Higgs, Court held that "To assess whether the interest in transparency favors disclosure, "the parties should present more than generalized conclusory statements." Higgs, 253 N.J. at 357 (internal citations omitted). The Court went on to note that

> "To ensure that defendants in criminal trials are provided with the discover necessary to adequately prepare for trial, defendants must be allowed under certain circumstances, to access documents in law enforcement's internal affairs files. This is consistent with the State's obligation to produce exculpatory and impeachment evidence, as the Attorney General has conceded in this matter. *That does not, however, mean that defendant should have unbridled access to internal affairs records. To appropriately balance the important interests involved, we adopt the following procedure.*" Id. 357-58 (emphasis added).

The critical aspect of the Higgs, Court's ruling is not what the substance of that process is. The substance of that procedure is explored further below in a separate aspect of the State's argument. As noted above, both parties agree, Higgs, is not the deciding case in this matter. However, what is critical is that there is a process at play. This is because there are competing interests involved. The important interests involved mean that an open book approach as to Internal Affairs materials is not appropriate.

Here, Judge Mohammed's ruling did not even acknowledge the confidential nature of records related to pending internal affairs records. Judge Mohammed also failed to conduct any fact-specific weighing test before ordering that those records

subject to automatic disclosure to the defense. Appellate courts will set aside or modify trial court decisions that do not comport with applicable law or do not give sufficient regard to pertinent considerations. See State v. D.R.H., 127 N.J. 249, 257-59 (1992). Judge Mohammed's failure to consider the confidential nature of the records he was ordering disclosed, and his failure to engage in any type of weighing process, did not comport with the law and amounts to an abuse of discretion.

Had Judge Mohammed conducted this weighing test, the inevitable conclusion would have been that records of not-yet-completed confidential investigations should not be subject to automatic discovery. As established in the IAPP and acknowledged by the Supreme Court, records of internal affairs investigations are confidential. Here, there is even more cause to consider this information confidential as it is related to a pending investigations into unproven conduct. "The need for confidentiality is greater in pending matters than in closed cases." Keddie v. Rutgers, 148 N.J. 36, 54 (1997). Judge Mohammed not only failed to consider the confidential nature of information related to internal affairs investigations; he also failed to consider that the information sought was related to pending investigations, which carry an even greater need for confidentiality.

Other factors also weigh against disclosure; particularly the importance in maintaining the confidentiality of this type of information. Our Supreme Court has acknowledged that maintaining confidentiality of internal affairs investigations is

important to ensure the integrity of those investigations. *See* Rivera, 250 N.J. at 147 (2022). A panel of this Court has gone even further, explaining that:

> "…there are many reasons for maintaining confidentiality of the complainant and officer involved an internal affairs investigation. We identify a few. Disclosure of the complainant and subject officer could: thwart the very purpose of an internal affairs investigation designed to ferret out improper compliance with established policies and procedures by law enforcement agencies; impede further investigation of discovered criminal conduct subject to prosecution; undermine the disciplinary process of the law enforcement agency necessary for its work; unduly taint officers when the basis for an alleged complaint were not established; reveal the name and location of inmates, which may subject the inmate to harm; target informants." Paff v. Bergen Cty., 2017 N.J. Super. Unpub. LEXIS 627[4]; Pa0124.

Here, analysis of the reasons cited by the panel in Paff reveals that the information should not be disclosed. Revealing the substance and contents of an internal affairs investigation before its completion could deter witnesses from coming forward, participating in the investigation, or complying and providing honest accounts. This disclosure would thwart the very purpose of the investigation.

Disclosure would also risk "unduly taint(ing) officers when the basis for an alleged complaint were not established." See Pa 0124. The State has conceded that, if the complaint is sustained, disclosure is required. (Pa 097). Disclosure prior to that, however, would blemish the officer's record in the public's eye without

[4] A copy of this opinion is included in the State's Appendix. See Pa 0119-0126.

justification or due process. This is particularly true given that all internal affairs complaints must be investigated (and are thus, at some point, "pending"), but the great majority do not result in a sustained finding. The Attorney General's Internal Affairs dashboard contains data regarding 64,464 internal affairs complaints investigated statewide between 2021 and 2024[5]. Of those 64,464 complaints, 14,780 were sustained. Even those 14,780 sustained allegations do not all involve Giglio material; that number includes sustained allegations that are not related to truthfulness, bias or integrity, but may be related to a violation of internal regulations as simple as wearing the wrong uniform, or tardiness. See IAPP, Section 2.2.3.

In considering the appropriateness of disclosure of allegations that have not yet been investigated it is also necessary to consider the nature of the complaint process. The Attorney General's Office has deliberately mandated a process that is designed to maximally facilitate the ease of filing a complaint. As the State noted at the hearing, any civilian, law enforcement officer, law enforcement agency, or even the investigated officer themselves can initiate an Internal Affairs investigation. (1T:33-15 to 17).

Then, no matter what the allegation is, the matter must be investigated. The investigation cannot be stopped as it begins because its claims are ludicrous or because the claims are reasonable but easily disproven. Each claim must be

5 Available to download at [redacted].njoag.gov/iadata

investigated. As the State pointed out at the hearing "If the defense proffer that an allegation against an officer warrants the entire disclosure of that Internal Affairs investigation to the defense, if that were true, then the defendant under indictment with a trial looming, could file an Internal Affairs allegation[.] (1T:45-4 to 9). The potential for weaponizing this process is clear.

The ease in which this process can be weaponized provides an opportunity to obtain information about police officers outside the proper channels of discovery. There are channels to obtain information about police officers and their roles in any given case. Higgs, provides an avenue for the access of confidential Internal Affairs materials. Yet here, with one barebones allegation, Judge Mohammed allows defense counsel to obtain confidential material in an end run around the existing discovery rules. The State submits that this is not a proper avenue to revise New Jersey's criminal discovery rules.

Given the ease of filing and the multitude of steps that must be fulfilled in investigating an Internal Affairs complaint, the State now faces a constant deluge of discovery obligations. These obligations are extensive and can be restarted at any time with only the slightest of effort, in the form of the filing of a new complaint. The likelihood of officers involved with high numbers of arrests attracted a significant number of complaints would inundate the State with an unending

discovery process that is not necessarily even connected to the relevant criminal prosecution.

Thus, if Judge Mohammed's order is permitted to go into effect, it would require the State to disclose the substance of allegations, the great majority of which will later be disproven. A police officer who makes frequent arrests is more likely to be subject to an allegation of misconduct, and is also more likely to be a witness in court. The reputation of such an officer should not be marred by the public release of allegations that are unproven and that are unlikely to be proven.

B. Judge Mohammed's Decision Unduly Disregarded the Risk of Labeling as a "Giglio" Officer (2T:30-19 to 24)

Judge Mohammed discounted the concern about officer reputation by finding that the State's concern about the branding of accused officers Giglio, officers was "generic" and "insufficient absent specific, articulated risks."(2T:30-19 to 24). As noted above there are significant risks noted in numerous cases that weigh in favor of the confidentiality of the Internal Affairs process. However, Judge Mohammed's decision neglects to consider the great change in public attitudes towards law enforcement over the past decade.

In a necessary correction, the question of police brutality and police ethics more broadly have become significant aspects of public discourse across the United States. The State submits that the Attorney General's requirements regarding initiating Internal Affairs complaints are reflective of and supportive of this change.

The State is in favor of a robust and detailed Internal Affairs investigation system. The State's position in this case is emphatically not about protecting bad police officers.

The State's takes the position in matter that due process is important not only for the criminal defendant but also for the accused officer. This is explicitly not a call to place the potential loss of liberty faced by a criminal defendant on par with the reputation and career related harms an officer under investigation faces. It is instead to note that this is in fact a question that carries multiple concerns.

It is anathema to the judicial and social tradition of the State of New Jersey and the United States more broadly to tar an individual with claims of dishonesty that are merely alleged. That is precisely what defense counsel has sought in this matter. The ability to get access to allegations, any allegation of dishonesty, against a police officer to use as impeachment evidence. This is in contrast to disclosure procedures regarding a police officer accused of theft for example. A criminal prosecution requires more than a mere allegation, unlike the commencement of an Internal Affairs complaint.

As the State noted at the hearing, police officer's have due process rights. They have a right to be heard in a hearing related to disciplinary matters. They are often represented by counsel in these matters. This all points to a fundamental reality,

that there are competing rights and interests at stake in this matter. Yet, Judge Mohammed discounted the rights of the accused officers in this matter.

The appropriate factors in this analysis that weigh in favor of disclosure are far outweighed by the interest in confidentiality. In general, the public has an interest in the disclosure of internal affairs reports in order to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement. Rivera, 250 N.J. at 147. The public interest in transparency may be heightened if the misconduct is substantiated, was particularly serious, or if the offender was a high-level official or was subject to serious discipline. Id. at 147-48. Analysis of these factors does not favor disclosure. As noted, all of the internal affairs information that Judge Mohammed ordered the State to disclose address pending allegations – not a single case involves sustained allegations – and the likelihood of the allegations eventually being sustained is low. Thus, the public interest in fostering trust in law enforcement and ensuring the internal affairs process is completed properly are satisfied by release of the information only if there is a finding of misconduct. In addition, the allegations are not related to high-level officials, but rather are related to officers who are likely to testify at trial, and any allegations that result in a finding of "serious discipline" are subject to disclosure under Attorney General Directive No. 2022-14. These factors do not favor disclosure, and do not outweigh the State's interest in confidentiality.

The State acknowledges that an analysis of these factors could theoretically be found to be leaning towards greater disclosure. Had Judge Mohammed weighed these factors and found greater disclosure of the confidential Internal Affairs materials appropriate, the State would still disagree. However, Judge Mohammed neglected to even consider these factors, placing this decision in isolation from the appropriate factors.

Judge Mohammed considered defendants argument that recent policy trends favor transparency. (Pa 095). The centerpiece of that policy, however, is Attorney General Directive No. 2022-14, which establishes that certain categories of discipline imposed following internal affairs investigations will always require disclosure. However Directive 2022-14 mandates only disclosure of of incidents of major discipline imposed *after* a finding of misconduct. It does not, nor does any other case, statute, or Attorney General Directive, require, or even permit, disclosure of the substance of pending, unproven allegations.

Thus, the Attorney General's directives, which carry the force of law, have addressed the growing trend towards disclosure and concerns about police conduct. The defense motion in this matter does not exist in a vacuum. That the Attorney General directives and guidance does not provide for default maximum disclosure does not mean that the policies are trapped in an older age where transparency was

disfavored. It simply means, that, there was and continues to be an interest in keeping Internal Affairs material confidential.

Requiring disclosure of pending allegations would also burden the State with an impossible discovery obligation. The IAPP mandates that internal affairs investigations progress quickly. IAPP Section 6.1.4. This timeline means that, if the State were required to produce all internal affairs evidence related to investigations that are pending, the State would be responsible for disclosing evidence on a nearly daily basis as the internal affairs investigation progresses. A discovery rule should set forth a workable standard and should not impose impractical demands on law enforcement. State v. Robinson, 229 N.J. 44, 68 (2017). Judge Mohammed's order would create a new discovery obligation every time a surveillance video is recovered by internal affairs, or a new interview is conducted. To require the trial prosecutor to review and disclose each item of evidence required in every internal affairs investigation is both impractical and unworkable. Not only is that process impractical and unworkable for the State, it is unnecessary from the perspective of preserving the defendant's rights.

C. The Existing PCPO Process Works in Compliance with Constitutional and Ethical Requirements (Pa 0096)

In addition, pretrial motion practice in a matter going to trial is likely to take longer than an internal affairs investigation. The State has conceded that it will produce internal affairs files related to investigations that result in sustained findings.

Pa0096. Judge Mohammed found that there was no evidence the State had ever failed to disclose internal affairs evidence under those strictures. (Pa 097). A defendant's rights to disclosure are more than adequately protected by the disclosure, as required, of evidence related to any sustained findings of misconduct. If defense counsel disagrees, evidently as counsel for Kahmer Holmers did, there is another option available. Kahmer Holmes' counsel filed a successful Higgs, motion and obtained access to Internal Affairs material. There was no further disclosure of Internal Affairs material in Kahmer Holmes' matter beyond the letter provided by PCPO under protective order. Thus, on the basis of that protective order, defense counsel was presented with the choice of filing Higgs motion. Kahdar Holmes' counsel chose to then file the motion. The motion was granted, and defense counsel got access to the Internal Affairs materials.

That this same defendant is joining a motion claiming that the notification provided by PCPO is a legal nullity is curious. Kahdar Holmes through counsel used that legal nullity and obtained access to Internal Affairs materials. The harm that the Office of the Public Defender alleges here is shown to be baseless by their own representation in this matter.

Requiring disclosure only after a sustained finding thus avoids "unduly taint(ing) officers when the basis for the allegation is not established" (Pa 0124), subjecting police officers to unnecessary and unjustified criticism and

embarrassment, and creation of an unworkable discovery process. It also preserves the integrity of internal affairs investigations, provides protection for the complainants, and would still result in the disclosure of any sustained findings well in advance of when such evidence could be used for impeachment at trial.

D. A Rational Analysis of Directive 2019-6 Stands Firmly Against Judge Mohammed's Reasoning (Pa 0099 to Pa 0100)

The Attorney General addressed the way that Brady / Giglio should affect the IAPP in a December 5, 2019 Directive. In that Directive, the Attorney General – whom the Legislature has empowered with oversight of the internal affairs process –specifically exempted from disclosure information related to pending internal affairs allegations. *See* Attorney General Law Enforcement Directive No. 2019-6.

Directive 2019-6 recognized prosecutors are required by Brady / Giglio to disclose exculpatory and impeachment evidence. It directed "County Prosecutors to implement a policy … consistent with this Directive to ensure compliance with Brady and Giglio." The Passaic County Prosecutor's Office ("PCPO") adopted a Brady/Giglio policy that largely mirrors Directive No. 2019-6. (Pa 0111-0118).

Directive No. 2019-6 and the PCPO Brady/Giglio policy identify nine categories of information as "potential Giglio material". AG Directive No. 2019-6 II(A)(2); (Pa 0114-0115). Consistent with the IAPP and Giglio, eight of the nine categories of information acknowledge that disclosure is required when any investigative employee is subject to a sustained finding, a criminal charge, a judicial

finding of fact, or if there is information that may be used to suggest bias for or against a defendant. AG Directive No. 2019-6, II(A)(2)(b)(i), (ii), (iii), (iv), (v), (vi), (viii), and (ix) and Pa 0114-0115. Only one of the nine categories of "potential Giglio material" relates to a circumstance in which there has been no finding against an officer. AG Directive No. 2019-6, II(A)(2)(b)(vii); Pa 0115. That section identifies as potential Giglio material: "Any *allegation* of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation." Ibid. (emphasis added).

The State submits that the fact that of the listed categories of potential Giglio, material, only one references allegations. That only one category is in reference to allegations as opposed to the numerous more detailed subsections is indicative of a difference in the subsections and their treatment. The Directive and the PCPO policy specify that it is the allegation of misconduct, not the substance of the allegation, that is potentially subject to Giglio, and also that inclusion on this list, "does not necessarily mean the information will be disclosed." AG Directive No. 2019-6, II(A)(2); Pa 0115.

Both defense counsel and Judge Mohammed engaged in an overly narrow reading of AG Directive No. 2019-6. That the allegation of misconduct bearing upon truthfulness, bias, or integrity is a piece of potential Giglio information does not end

the analysis that Judge Mohammed should have conducted. The paragraph immediately preceding the list from which that category is extracted clearly states "Thus in developing it *Brady* and *Giglio* policy, each County Prosecutor's Office shall use the following non-exhaustive list of potential *Giglio* material as it relates civilian and investigative State witnesses for guidance on the type of material that must be gathered. Again this does not necessarily mean the information will be disclosed." Attorney General Directive 2019-6 II(A)(2).

It is entirely unclear how the disclaimer that the information that followed that paragraph is not necessarily intended for disclosure was read as mandating automatic disclosure. Defense counsel's argument was hyper focused on one provision of the directive and in so arguing ignored the document as a whole. Judge Mohammed then focused his analysis on that one provision, neglecting to consider that not only were the lists provided for civilian and investigative witnesses were not necessarily for disclosure but that they were listed for gathering. That is, the State had to gather this information and then consider whether based on its ethical and Constitutional requirements had to disclose. This is in stark contrast to Judge Mohammed's ruling.

Additionally, other sections of the directive stand in opposition to Judge Mohammed's decision. As noted by defense counsel, IIIA of the directive states

> "This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes

> limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party." Attorney General Directive 2019-6 III(A).

The defendants in this matter are the very sort of third party for whom there is no enforceable right under the Directive. If, as acknowledged by defense, State, and Judge Mohammed, the Directive controls with the power of law it cannot be that the Directive creates a Giglio obligation that cannot be enforced by defendants. While statutes and regulations may not be perfectly drafted, the State submits that the level of discordancy necessary for that reading is unreasonable.

The Directive also defines the terms used throughout its text. Critically in the context of this case is the definition of sustained findings. As part of that definition, the Directive states "Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee, including where the previous *Giglio* finding has either been vacated, or overturned on the merits in any subsequent action, generally are not considered to be potential impeachment information, subject to the requirements herein." Attorney General Directive 2019-6 I(E).

This definition is critical because as the State argued at the beginning of its oral argument, Giglio material is impeachment material. (1T:29-18 to 20). Thus, "Allegations that cannot be sustained, are not credible, or have resulted in the

exoneration of an employee" are not Giglio material. As the State argued at the motion hearing, the standard of proof during the Internal Affairs investigation is a preponderance of the evidence standard. Thus, if the allegations are not even found to be more likely than not true, the State submits that this would be inappropriate for presentation at trial. This is readily apparent when the efficacy of a cross-examination question about whether an officer was found to have not engaged in dishonesty is considered.

It is similarly unreasonable to conclude that the substance of an allegation is Giglio, material is impeachment evidence from its first utterance until it is disproven. This sort of guilty until proven innocent approach is anathema to the common law.

The definition of sustained finding in the Directive goes on to state that "On the other hand, if the officer negotiates a plea of there is an administrative or civil settlement with the employer whereby the *Giglio*-related charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, or the Superior Court." This is relevant because the outcome of the proceeding impacts the valence of the information for impeachment purposes. This consideration does not comport with Judge Mohammed's decision which mandates automatic disclosure.

The Directive also notes that "A decision to disclose in one case does not dictate the decision to disclose in subsequent cases. The prosecutor, in consultation with the prosecutor's designee or *Giglio* liaison, must evaluate each piece of potential *Giglio* information on a case-by-case basis to determine whether the material must be disclosed under the law or submitted to the court for an ex-parte, in camera review." Attorney General Directive 2019-6 II(C)(2). As demonstrated above, the Directive is replete with emphasis on the importance of reviewing each matter individual and in being opposed to the sort of automatic disclosure mandated by Judge Mohammed. This is in keeping with the approach mandated by the Judiciary in mandating rules for the analysis and potential disclosure of other confidential materials.

Judge Mohammed's ruling takes that responsibility out of the hands of the State. The State cannot conduct a case-by-case determination if all Internal Affairs material related to candor are immediately to be disclosed. This forces the State to be in active disregard of the Attorney General Directive.

Judge Mohammed's reliance on the directive can be narrowed down to one single provision. This is that on the list of potential Giglio material to be gathered one such item is "Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation." Attorney General Directive

2019-6 II(A)(2)(b)(vii). Based on that single provision, Judge Mohammed found that the Attorney General Directive's plain language supports defense counsel's claim.

The State submits an examination of the plain language of the Directive does not at all indicate that automatic disclosure of the substance of uncorroborated allegations is appropriate let alone required. The above referenced quotations from the Directive reveal a far more nuanced situation than the one presented in Judge Mohammed's decision. Instead of applying the framework that seeks to engage in a holistic analysis, Judge Mohammed instead focused on a single sentence. The impulse to focus on a single sentence is not found in our tradition of statutory and regulatory interpretation.

The State's policy, of disclosing the existence of an Internal Affairs investigation relating to honesty, bias, or integrity is in keeping with Directive 2019-6 and prior caselaw codifying Giglio responsibilities and the confidentiality of Internal Affairs materials. The police of notifying the defense of the existence of the investigation but not its substance keeps is the most equitable solution.

Were the State to, as Judge Mohammed ordered provide unbridled access to Internal Affairs materials, the due process rights of the accused officer would be violated. If the State were to not disclose the existence of the investigation then the rights of the defendant would be violated. The disclosure of the investigation but not its substance serves to not violate any party's due process rights.

Despite the plain language and in contravention of decades of legal guidance, Judge Mohammed held that the language of Attorney General Directive 2019-6 and the PCPO's Brady / Giglio policy means that the substance of the allegations – not just the existence of the allegations – is required to be disclosed. (Pa 099-0100). No court has ever interpreted Directive 2019-6 this way. Nor has the Attorney General or the PCPO ever supported that interpretation. The State is not aware of any County Prosecutor's Office state-wide that interprets Directive 2019-6 in the way that Judge Mohammed determined it should be interpreted.

E. Judge Mohammed's Decision is at Odds with Recent Caselaw (2T:13-25 to 21-23)

This lack of any precedent to Judge Mohammed's decision is all the more striking considering how much of a change his ruling heralds. The State submits that if the plain reading of Directive 2019-6 was as Judge Mohammed concluded, a sea change in disclosure policies would have been evident across the State.

Instead, Directive 2019-6 served not as a radical break with prior jurisprudence on the subject of disclosure of confidential materials. Directive 2019-6 provides for a balancing of the interests and due process rights of both criminal defendants and of police officer's accused of dishonesty. In contrast, defense counsel's argument, which centers on the slogan of Giglio material must be

produced, demolishes that balancing of the interests. There is no support for that notion in neither statute, caselaw, nor regulation.

Judge Mohammed further erred by granting Defendants automatic access to internal affairs files upon the return of an indictment, despite the fact that our Supreme Court has ruled criminal defendants cannot gain automatic access to police internal affairs files. *See* State v. Higgs, 253 N.J. 333, 358-59 (2023). Thus, even if the Internal Affairs materials are subject to ultimate Giglio disclosure, Judge Mohammed departed from existing practice in the disclosure of confidential material.

In Higgs, the Supreme Court considered the same question that defendants in this case presented to Judge Mohammed – whether New Jersey law, policy, and procedure "require the disclosure of police internal affairs records to a criminal defendant in pretrial discovery." Id. at 355 (2023). The Supreme Court held:

> "Going forward, a defendant who seeks discovery of information from an internal affairs file must first file a motion with the trial court requesting an in-camera review of the file. The motion shall identify the specific category of information the defendant seeks and the relevance of that information to the defendant's case. A general allegation that the defendant is in search of information relevant to a law enforcement officer's credibility for impeachment purposes would be insufficient to obtain review of the file. The procedure should not be a fishing expedition into the disciplinary records of law enforcement." Id. at 358.

The Supreme Court acknowledged, under certain circumstances, defendants could access documents in internal affairs files, but "(t)that does not, however, mean that defendants should have unbridled access to internal affairs records." Id. at 357. The Supreme Court determined that the process it outlined would balance the defendant's interests in disclosure with the State's interest in confidentiality. Id. at 358.

Thus, the Supreme Court in Higgs answered the same question posed to Judge Mohammed here – whether defendants can access internal affairs records in pretrial discovery. The Supreme Court determined that they could, but only by complying with the process laid out in the decision. That process would be rendered superfluous by Judge Mohammad's ruling that such records are subject to automatic disclosure. The Supreme Court would not have authored Higgs if its intention were for internal affairs records to be subject to automatic discovery provisions.

The procedure presented in Higgs, provides the roadmap for what defense counsel can do upon receipt of a PCPO Internal Affairs investigation disclosure letter. The letter does not provide the substance of the allegations. Yet armed with the knowledge that an investigation is on-going defense counsel can choose to file a Higgs, motion. Curiously, that is what happened in defendant Kahdar Holmes matter. Judge Mohammed himself granted a Higgs, motion in that case.

That the Higgs, motion provides an avenue for defense counsel to obtain Internal Affairs material upon receipt of the PCPO letter serves to rebut defense

counsel's argument about the PCPO letters being a legal nullity. Defense counsel argued at length that the letter only providing notice of an investigation provides no available avenues for advocacy. Yet, it bears repeating, one of these defendant's has already filed a successful Higgs, motion before the underlying motions in this matter.

Despite the Supreme Court's recent guidance on this issue, Judge Mohammed entered an order that requires automatic discovery of information related to pending internal affairs allegations. This order directly contradicts Higgs by giving defendants "unbridled access to internal affairs records." Further, Judge Mohammed granted defendants this access without following the procedure outlined in Higgs. The defendants did not file a motion for an in-camera inspection and did not make a showing as to the specific category of information they sought, or the relevance of that information to their cases. Judge Mohammed did not conduct an in-camera inspection of the internal affairs records and did not balance the defendants' interests in disclosure against the State's interests in confidentiality. Then, after ignoring both the holding and the process outlined in Higgs, Judge Mohammed entered an order that contradicted Higgs by compelling the State to disclose confidential records of pending internal affairs investigations without a showing of need.

Judge Mohammed's decision disregarded any considerations outside of the defendant's argument that Giglio material must be disclosed. Judge Mohammed disregarded the privacy and due process interests of an accused officer. Judge

Mohammed's decision provides no means to consider whether the alleged conduct was substantiated, whether it was serious, whether it was done by a high ranking officer, or was subject to serious discipline. Not only does this decision not consider those factors that our Judiciary has previously enumerated, they cannot be considered under Judge Mohammed's order. This is a manifest abuse of discretion and it is unrelated to any prior precedent.

Judge Mohammed's order is contrary to the IAPP, Directive 2019-6, and our Supreme Court's decision in Higgs. The Supreme Court would not have authored Higgs and created a procedure to be followed prior to the disclosure of records of this nature if its intent was for those records to be disclosed automatically. Rather, Judge Mohammed's order in this case is the type of order the Higgs Court sought to prevent. It ignores the State's interest in confidentiality and allows defendants "unbridled access to internal affairs records." Id. at 357. It should be overturned.

POINT II

THE PROTECTIVE ORDERS ENTERED BY FOUR DIFFERENT SUPERIOR COURT JUDGES WERE APPROPRIATELY TAILORED TO PREVENT UNNECESSARY DISCLOSURE OF CONFIDENTIAL INFORMATION (Pa 0101 to Pa 0102)

The previous protective orders were properly tailored to the nature of the disclosed information. Judge Mohammed vacated those orders without granting proper deference to his fellow trial court judges and without appropriate guidance

for subsequent protective orders. This Court should thus remand for reentry of those vacated protective orders.

The trial court may restrict discovery "or make such other order as appropriate" upon motion for good cause shown. R. 3:13-3(e). In determining the motion, trial courts may consider a number of factors including confidential information recognized by law". R. 3:13-3(e)(1). The showing of good cause can be presented in the form of written statement "to be inspected by the court alone" and "the entire text of" which "shall be sealed" if the order is entered. R. 3:13-3(e)(2).

Here, the State sought to disclose the existence of allegations of certain misconduct in accordance with Directive 2019-6. Given the unproven and confidential nature of these allegations, the State applied for protective orders to restrict the defendants and defense counsel from disclosing the existence of these allegations. The State presented the applications in the form proscribed by R. 3:13-3(e)(2) and they were reviewed by four different Superior Court judges, each of whom independently determined the State had presented the requisite showing of good cause.

Once a judge has made a finding based on proof submitted, a trial court reviewing that finding should pay substantial deference to that determination. State v. Tanzola, 84 N.J. Super. 40, 43 (App. Div. 1964). In fact, another trial judge of

equal jurisdiction "should regard as binding" the finding of another trial judge "unless there was clearly no justification for that conclusion." Ibid.

Judge Mohammed paid no deference to the rulings made by other Superior Court judges and did not regard their findings as "binding". Instead Judge Mohammed – himself a Superior Court judge – summarily vacated the seven protective orders. Judge Mohammed, who had entered one of the Protective Orders himself, offered no explanation as to why he vacated an order that he himself had originally granted. The absolute lack of explanation for why these prior protective orders were improperly entered is an abuse of discretion. The Presiding Judge is not a court of review for other trial court judges.

Curiously, Judge Mohammed did not provide any explanation or comment on the fact that he vacated a protective order he himself had entered. There was no explanation why he was incorrect to impose the protective order previously. As such, this Court is placed at a disadvantage in reviewing the underlying decision,

Here, the Protective Orders function as an important and appropriate tool to balance the Defendant's interest in disclosure with the State's interest in confidentiality. They permit the defendant to know when there is a pending internal affairs investigation against an officer in the case, so that he can seek to determine within a reasonable time whether the investigation has been sustained. Alternatively, defense counsel could decide to file a Higgs, motion.

The protective orders do not unduly restrict the Defendants' right to a defense; they do not prevent defense counsel from discussing matters with colleagues in the abstract, without naming specific officers. Neither defense counsel, nor Judge Mohammed explained how an inability to name an officer in consultation with colleagues is inadequate. It is unclear how they inability to name an officer under investigation precludes other staff attorney's in the Office of the Public Defender to offer practical advice on legal or trial strategy. They also do not prevent the defendants from consulting with experts; they merely require that they make an application to the court before doing so. Also left unanswered is what sort of expert would be consulted in the case of impeaching a law enforcement officer with Internal Affairs materials. Nor is it clear how an expert can be retained to comment on unproven allegations. Regardless, such an application to modify the order, which the State noted during oral argument could be made ex parte, would certainly be granted.

Also, without merit is Judge Mohammed's finding that the Protective Orders, "impair effective assistance and ethical obligations to 'make timely Giglio checks' for witness credibility risks." There is no case law or statute that requires defense attorneys to "make timely Giglio checks" in order to function as effective counsel. Rather, it is the State's obligation pursuant to Brady and Giglio to make timely disclosures of impeachment evidence. Thus, a defense side responsibility to make Giglio, checks is an invention of defense counsel's argument. This aspect of defense

counsel's argument is not sufficient to overrule the Attorney General's Office and the precedent controlling the classification of Internal Affairs materials. Judge Mohammed explicitly found that the defense had made no showing that the State had ever failed to fulfill this obligation.

Conspicuous in its absence from Judge Mohammed's ruling is an explanation of what any future protective order should contain or allow for the dissemination of. By striking out in this decision so far from existing practice and precedent, Judge Mohammed's decision has the left the State without guidance on how it can begin to preserve the confidentiality requirements of Internal Affairs materials while complying with this novel interpretation of Giglio.

Several trial judges, including Judge Mohammed himself signed these protective orders. The work of these trial judges should not be wiped away without proper deference and analysis. In the absence of those, this Court should reverse and remand for the reinstatement of the vacated protective orders.

POINT III

THE STATE'S CONCERNS ABOUT THE STIGMA OF BEING A GIGLIO OFFICER ARE WELL-FOUNDED (2T:28-5 to 8)

The State argued strongly regarding its concern that the dissemination of unverified allegations of misconduct could lead to police officers being unfairly

labeled as "Giglio officers." Judge Mohammed rejected this concern as being generic. This concern is legitimate and was improperly disregarded.

As discussed at length in previous points, police officers accused of misconduct have due process rights. Those due process rights include the right to counsel, the right to be heard, and the understanding that Internal Affairs materials are confidential. All of these rights point to a legitimate concern for both the reputation of the individual officer, law enforcement agency, and law enforcement as a whole.

Simultaneously, the Attorney General's Office has mandated that Internal Affairs investigations have essentially no barriers to their filing. The State, wants reports of bad actors among law enforcement to be investigated and adjudicated. The confidentiality and the ease of filing reports are complementary aspects of the process. They serve to protect the accused and the accuser. They are part of a balanced system that seeks to integrate due process for all involved.

The risk to the accused officer in the event of automatic disclosure is clear. The label of "Giglio officer" can stick to an officer early in their career and can be based on an unverified allegation under the terms of Judge Mohammed's ruling. This is especially true when the fact that Giglio, material is impeachment material, used to attack the credibility of a witness.

Despite that, Judge Mohammed found there was no specific risk. The Public Defender's Office has provided that specific risk when it publicized its appointment of a "Director of Investigations and Police Accountability". This "Director" has acknowledged that, as part of her job, she will create a database of police misconduct. (Pa 0127-0132).

The creation of a statewide database of police misconduct is not merely a goal of this new position in the Office of the Public Director. Danica Rue, Esq. who occupies this position has stated that developing ways to track police and prosecutorial misconduct is one of her key goals. (Pa 0128). She explained in her interview with the New Jersey Observer that "One of the big goals that I want to see is that we have a system where every attorney can see where police misconduct has been found, and have that knowledge while they go forward with their cases in defending their clients[.]" (Pa 0128) Thus, the State's concerns about an officer being unfairly labelled a "Giglio officer" is not a creation of imaginations run amok.

Even more concerning is that Ms. Rue in that same article notes that "We actually have to rely upon the police and the prosecuting agency to give that information to us. This will allow us to make sure that we have that on our own without just relying upon that being reported to us." (Pa 0128). Ms. Rue, with her position of leadership in the Office of the Public Defender is lamenting that the Office of the Public Defender has to go through normal litigation channels. This

process that is presented in a tone of incredulity isthe process laid out in Giglio, and accepted in the State of New Jersey. The State has the obligation to provide Brady/Giglio material to defendants. That a party to a litigation has to make a motion to get information that it is seeking is not an injustice. That the process requires some action or may be viewed as difficult is not a reason to ignore the rights of the accused officers and the interests of the State overall. The Office of the Public Defender cannot set up an alternative investigative structure to circumvent this. The Court Rules are not mere suggestions to be bypassed by staffing decisions in the Office of the Public Defender.

This plan of the Office of the Public Defender is not the issue for consideration before this Court. However, this Court would be remiss if it did not consider the question of what would happen when the Office of the Public Defender is given unbridled access to Internal Affairs materials while this plan is being contemplated or executed.

It is unclear what the statutory basis for this database would be. Regardless, to include in that database unproven allegations of misconduct would be as inappropriate as if a news organization were to compile a database of arrests in order to identify individuals who later have their records expunged. New Jersey policy favors freeing individuals from disabilities tied to a record of misconduct. See N.J.S.A. 2C:52-14(b) It would be unjust and contrary to New Jersey public policy

for an unsubstantiated allegation of misconduct to be documented in a defense database and plague an honest police officer throughout his career. Reinstatement of the Protective Orders that were initially entered in this case would prevent any defense counsel or firm from creating such a database.

The State's concerns about the reputations of accused officers is backed by the Office of the Public Defender's own media outreach. The risk of tarring officers who are statistically unlikely to have a substantiated complaint against them with the tag of "Giglio officer" offends basic notions of fairness. This Court should not allow it.

POINT IV

JUDGE MOHAMMED'S RULING CREATES AN UNWORKABLE DISCOVERY PROCESS (Pa 0102 to Pa 0103)

Judge Mohammed's decision creates a discovery process that is not workable for the State. Nothing in Judge Mohammed's decision addressed the logistic issues created by this unprecedented approach to Internal Affairs Material. Given the unworkability of this new paradigm, this Court should reverse and remand.

By enabling a defendant to obtain automatic access to an officer's Internal Affairs file as a consequence of any complaint relating to candor, Judge Mohammed has created an impossible discovery standard for the State. As noted by the State at the motion hearing, an Internal Affairs investigation involves collection of

documents, media evidence, and interviews. All of these are intended to be completed in forty-five days. All of this material compiled in an expedited manner must be turned over to all defense attorneys on all cases involving the accused officer, all while the investigation must observe the due process rights of the accused officer. Additionally, considering, as the State noted at the motion hearing, complaints are most likely to be leveled at officers who have assignments that involve significant arrest duties, thereby further expanding the logistic difficulties involved.

Judge Mohammed gave no consideration to these difficulties in crafting his decision. The New Jersey Supreme Court considered the question of unworkable discovery previously, in the context of pretrial detention motions, in State v. Robinson, 229 N.J. 44 (2017). In discussing the parameters of discovery in the pretrial discovery context, the Court noted

> "Another important consideration is self-evident. A discovery rule should set forth a workable standard. In light of the law's tight time frame, N.J.S.A. 2A:162-19(D), the rule should not impose impractical demands on law enforcement. The supplemental record before us highlights a matter in Union County in which the trial court, relying on the current rule and the Appellate Division's decision in this case, ordered the State to disclose video footage from 25 body-worn police cameras in connection with a detention hearing. The State may not be able to review all of those videos within days of an arrest or apply for any needed protective orders. It is also difficult to imagine how defense counsel could review, let

> alone use, dozens of videos in connection with a detention hearing." Id. at 68.

Put succinctly, "the administration of justice calls for fair and efficient proceedings." Ibid.

Beyond the logistic challenges, Judge Mohammed's decision creates new criminal practice procedures that are not codified in the Rules of Court. In this new paradigm, by virtue of a single Internal Affairs complaint, possibly filed by the defendant themselves, could create an avenue for ersatz depositions as to credibility. Defendant by virtue of that complaint gets access to sworn interviews as to the officer's tendency to veracity.

Depositions in the criminal process in New Jersey are tightly controlled. Specifically, R. 3:13-2(a) states:

> "If it appears to the judge of the court in which a complaint, indictment or accusation is pending that a material witness is likely to be unable to testify at trial because of death or physical or mental incapacity, the court, upon motion and notice to the parties, and after a showing that such action is necessary to prevent manifest injustice, may order that a deposition of the testimony of such witness be taken and that any designated books, papers, documents or tangible objects that are not privileged, including, but not limited to, writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form, be produced at the same time and place."

Thus, the space presented by the Court Rules for depositions in New Jersey Criminal Practice is very limited.

Judge Mohammed's order creates the opportunity to put police officers under oath and questioned about their truthfulness and then have that transcript at hand for cross-examination. This becomes an analogue for the use of depositions in civil practice. The Court Rules provide that in a civil case "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Rules of Evidence." R. 4:16(a).

Thus, the defense would have the ability to get an extra set of sworn statements regarding the credibility of law enforcement. There are no restrictions on the usage of this information at present because there are no rules governing this new form of ersatz depositions.

These implications and any analysis of same are absent from Judge Mohammed's decision. The changes that Judge Mohammed's decision would enact in criminal practice are significant. These changes run in contradiction with existing practice and should be rejected.

CONCLUSION

For the above reasons, the State respectfully requests that the Court grant the State's requested relief.

Respectfully submitted,

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Dated: November 5, 2025

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DEXTER HUBBARD
GUSTAVO ARENAS
KYANAZIA DOBSON

KAHDAR HOLMES

MARCUS MORALES

JAMARSCU RUSSELL

JOSEPH PEREZ

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET No. A-000223-25

Criminal Action

On interlocutory appeal from:
Superior Court of New Jersey,
Law Division, Passaic County
Sat Below:
Honorable Sohail Mohammed, P.J.Cr.

Indictment Nos.:
25-02-0111-I
24-12-0898-I
24-02-0071-I
23-04-0311-I
25-01-0065-I
24-12-0864-I
24-09-0678-I

PARTICIPATION IN ORAL ARGUMENT REQUESTED

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Date Submitted: December 26, 2025

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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Jersey ("ACLU-NJ") has defended liberty and justice for over 60 years, guided by the vision of a fair and equitable New Jersey for all. Its mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the state and federal constitutions in courts, in the legislature, and in our communities. ACLU-NJ is a non-partisan organization that operates on several fronts—political, legal, cultural—to bring about systemic change and build a more equitable society.

PRELIMINARY STATEMENT

The State's position in this case both infringes on the due process rights of criminal defendants, and seeks to hamper the Office of the Public Defender's ("OPD") ability to zealously and efficiently represent their clients. Both positions fail to comport with the law and the Superior Court's decision in this matter should be affirmed in full.

The State's position that materials it deems confidential may somehow bypass the requirements of due process is fatally flawed. The United States Supreme Court's decisions in Brady and Giglio, and their progeny, amplified by decisions of this Court, create an automatic obligation for the government to turn over any and all exculpatory and impeachment materials to a criminal defendant. That obligation does not depend on the government's assessment of confidentiality. While the New

Jersey Supreme Court's decision in Higgs set forth a discovery process for police internal affairs files, that Court did not—indeed, could not—hold that rights enshrined in the federal Constitution and established by the United States Supreme Court are subject to additional hurdles and restrictions for defendants in New Jersey.

The State's attempt to skirt its obligations by providing "Giglio letters" is constitutionally insufficient. The letters do not provide Defendants with any meaningful detail or essential facts as required by both the federal Constitution and New Jersey law.

The State also attempts to impose unreasonable restrictions on OPD's internal communications through an overbroad protective order. OPD is essentially a law firm and is treated as such for conflicts of interest and other purposes. Generally, no private law firm would be prohibited from having attorneys speak and collaborate internally about cases or evidence, and the State should not be able to impose such restrictions on OPD either.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

ACLU-NJ incorporates by reference the Statement of Facts and Procedural History recited in the brief of Defendants-Respondents.

LEGAL ARGUMENT

I. THE RIGHTS ESTABLISHED IN BRADY AND GIGLIO PROVIDE A CONSTITUTIONAL FLOOR, WHICH CANNOT BE LOWERED OR RESTRICTED BY STATE LAW.

The Supreme Court, through its decisions in Brady and Giglio, set a constitutional floor for material that must be provided by prosecutors to criminal defendants. Because that right flows from the federal Constitution, it cannot be restricted by state law, nor can a state require a defendant to overcome additional hurdles before that right is effective. "In *every* criminal case the prosecution *must* disclose to the defendant *all* evidence that is material either to guilt or to punishment." State v. Nelson, 155 N.J. 487, 497 (1998) (emphases added) (citing Brady v. Maryland, 373 U.S. 83 (1963)). That rule applies to "evidence that can be used to impeach government witnesses" as well. State v. Higgs, 253 N.J. 333, 355 (2023) (citing Giglio v. United States, 405 U.S. 150, 153–54 (1972)); State v. Carter, 91 N.J. 86, 111 (1982) ("Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence."); State v. Carter, 69 N.J. 420, 433 (1976) ("[W]hen the credibility of a State's witness may well be determinative of guilt or innocence, the jury is entitled to know, and the State has the obligation to disclose, material evidence affecting such credibility."). Indeed,

the State has an obligation to turn over Brady/Giglio material "even absent inquiry" by the defense. Id. at 434.

Against this backdrop, the State argues that Internal Affairs files somehow bypass these due process rights and require defendants to meet additional standards before disclosure is required. There is no case that holds as much, nor could a New Jersey state court or state law curtail or restrict a right enshrined in the federal Constitution and recognized by the United States Supreme Court. U.S. Const., Art. VI (Supremacy Clause). That the government views the material as sensitive or "confidential" does not justify any diminution of the defendant's rights. The State must "disclose to defense counsel information it possesses or materials in its file" that "affirmatively tends to establish a defendant's innocence" as well as evidence that "concerns only the credibility of a State's witness." Carter, 69 N.J. at 433 (citation omitted). The Internal Affairs files here fall within Brady and Giglio, and thus, consistent with the precedent of both this Court and the United States Supreme Court, must be turned over without the additional hurdles urged by the State.

The State argues that Higgs places a greater burden on defendants before they can access internal affairs materials that are also Brady or Giglio material. (Plaintiff-Appellant's Brief ("P. Br.") at 39–42.) Not so. Of course, a state court cannot restrict rights provided by the federal Constitution. And the Court in Higgs did not do so. As Judge Mohammed put it, "[t]he Higgs court did not lessen the State's

obligations. Rather, it created a supplemental, not substitute, means for obtaining IA materials. It is clear it did not replace the automatic Brady/Giglio disclosure obligation." (Plaintiff-Appellant's Appendix ("Pa") at Pa0100 (case underlining added).)

The Court in Higgs was focused on the burden that would apply where a defendant is, through the ordinary discovery process, seeking IA materials that do not otherwise fall within Brady or Giglio. Higgs, 253 N.J. at 357–58 ("[A] defendant *who seeks discovery* of information from an internal affairs file must first file a motion with the trial court requesting an in camera review of that file." (emphasis added)).[1] Whether material must be automatically turned over by the prosecution consistent with Brady and Giglio is a separate inquiry from whether the material is otherwise discoverable under New Jersey law. See State v. Marshall, 123 N.J. 1, 182 (1991) (noting that discovery rules "operate[] independently of the prosecution's absolute obligation to reveal exculpatory material, documentary or otherwise, to the defense." (citations omitted)); see also Pressler & Verniero, Current N.J. Court Rules, Rule 3:13-3, Cmt. 3.3.1 (2026) ("[I]rrespective of any rule of court, the prosecutor has an absolute obligation to reveal [Brady material] both to the defendant and to the court."). The Constitutional obligations imposed by Brady and

[1] The State agrees that Higgs "did not address the necessity of a Giglio based disclosure." (P. Br. at 19–20.)

Giglio cannot be reduced or encumbered by a state court's interpretation of discovery rules and Higgs did not attempt to do so. Indeed, had the Higgs Court attempted to make such an impactful change in constitutional law, one would expect it to have done so explicitly.

Applying the Higgs framework to Brady or Giglio material is also inconsistent with the automatic nature of those obligations. Strickler v. Green, 527 U.S. 263, 280 (1999) ("[T]he duty to disclose such evidence is applicable even though there has been no request by the accused." (citation omitted)); Carter, 69 N.J. at 434 (the State has an obligation to turn over Brady/Giglio material "even absent inquiry" by the defense); State v. Desir, 245 N.J. 179, 193 (2021) (Rule 3:13-3 "explicitly renders automatic the turnover of exculpatory evidence mandated by the United States Supreme Court's holding in Brady v. Maryland"). Given the mandatory, automatic nature of Brady and Giglio disclosures under both federal law and the New Jersey Court Rules, the procedure outlined in Higgs, which requires defendants to file a motion specifically identifying the category of information sought and the relevance of that information, and then requires an in camera review by the trial court,[2] cannot

[2] The U.S. District Court, District of New Jersey has held that a prior policy of "submit[ting] items to the trial judge for in camera inspection on the question of whether they constituted Brady material" was improper and "should be discontinued" in part because "if the trial judge decides ex parte that a given item need not be disclosed, that ruling will not protect the government against a claim of denial of due process at trial." United States v. Five Persons, 472 F. Supp. 64, 69 (D.N.J. 1979). The State's argument here calls for the same policy. But the Supreme

apply. Higgs, 253 N.J. at 359; see also Banks v. Dretke, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

The State's position that it need not turn over pending internal affairs files is not only unlawful, but also unworkable and unjust. As a hypothetical, consider a defendant on trial where the State's main witness is a police officer with a pending internal affairs investigation accusing him of falsifying reports. Surely, an official complaint that the officer falsified reports bears on his credibility and must be turned over under Giglio. The State's position is that the defendant is not entitled to know that information, simply because the internal affairs investigation is pending. If the internal affairs investigation is never disclosed, the defendant is convicted based on that officer's testimony, and the claim against the officer is then substantiated, what is to be done?[3] Conversely, a rule which requires disclosure and leaves the admissibility of related evidence to the rules of evidence, and the weight to be

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Court has held that, rather than in camera inspection, "a prosecutor anxious about tacking too close to the wind" should "disclose a favorable piece of evidence." Kyles v. Whitley, 514 U.S. 419, 439 (1995); United States v. Agurs, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

[3] Note also the gamesmanship that could accompany such a rule. If the State were aware of an internal affairs investigation of an officer who was soon to testify as a witness at trial, it could simply slow-walk the investigation until after the verdict. Even without such intentional delay, conditioning a defendant's rights on the timeliness of internal affairs investigations over which they have no insight or control is haphazard and improper.

provided to a pending investigation to the jury, properly protects the defendant's right to a fair trial. That approach is both mandated by the Constitution, by New Jersey law, and comports with common sense.

Even if the internal affairs investigation does not substantiate the complaint, that should not change the analysis on what qualifies as Giglio material (and thus what must be disclosed). If the complaint itself bears on a testifying officer's credibility, it must be disclosed regardless of the eventual finding. A defendant is still entitled to probe the allegations made in the complaint through an independent investigation and / or through cross-examination. See United States v. Bethea, 787 F. Supp. 75, 77 (D.N.J. 1992) ("To adequately prepare themselves for the government's witnesses, defense counsel must have, among other things, a reasonable opportunity to investigate the accuracy of any Brady-Giglio-Agurs material regarding those witnesses"); California v. Green, 399 U.S. 149, 158 (1970) ("[C]ross-examination [is] the greatest legal engine ever invented for the discovery of truth[.]" (internal quotation marks omitted)).

The lower court's decision with respect to the consolidated motion to compel disclosure should be affirmed.

II. THE STATE'S GIGLIO LETTER IS CONSTITUTIONALLY INSUFFICIENT.

Brady and Giglio also require the State to provide substantive evidence, not a cursory statement that vague, undefined evidence exists. Here, the State's letter,

disclosing only that "an allegation of misconduct that bears upon [the officer's] truthfulness, bias, or integrity [] is the subject of a pending investigation" is woefully insufficient. (Pa 0091.) That does not apprise defense counsel of the nature of the allegation, does not allow for proper investigation or cross-examination, and is not a substitute for providing the actual substantive information as required by Brady and Giglio. While in federal court, summaries of Brady or Giglio material may *sometimes* satisfy the State's obligations, such summaries must at a minimum provide "[a]ll the relevant information" and the "essential facts that would enable Defendants to call witnesses and take advantage of any exculpatory testimony." See United States v. Henderson, 250 F. App'x 34, 39 (5th Cir. 2007); United States v. Parnas, 19-CR-725 (JPO), 2021 WL 2981567, at *6 (S.D.N.Y. 2021); see also United States v. Collins, 409 F. Supp. 3d 228, 244–45 (S.D.N.Y. 2019) (government must disclose "the essential facts which would enable [the defendant] to call the witness[es] and thus take advantage of any exculpatory testimony that [they] might furnish" (citation omitted)). Of course, defendants in New Jersey courts are "generally 'entitled to broad discovery.'" State in Interest of A.B., 219 N.J. 542, 555 (2014) (quoting State v. D.R.H., 127 N.J. 249, 256 (1992)). New Jersey's "open-file approach is intended to ensure fair and just trials." State v. Hernandez, 225 N.J. 451, 453 (2016); see also State v. Scoles, 214 N.J. 236, 252 (2013) (holding

that "[t]o advance the goal of providing fair and just criminal trials, we have adopted an open-file approach to pretrial discovery in criminal matters post-indictment").

But even if more restrictive federal discovery rules governed, the State's letters could not satisfy constitutional requirements as they provided no essential facts. See A.B., 219 N.J. at 556 ("A criminal trial where the defendant does not have 'access to the raw materials integral to the building of an effective defense' is fundamentally unfair." (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)). The State cannot satisfy its obligations by merely informing a defendant that Brady or Giglio material exists without providing substantive underlying information.

III. THE PROTECTIVE ORDER'S PROHIBITION ON SHARING INFORMATION WITHIN OPD IS OVERBROAD AND IMPROPERLY TREATS OPD DIFFERENTLY THAN PRIVATE LAW FIRMS.

The State's Protective Order is plainly overbroad insofar as it prevents OPD attorneys from sharing information about their cases with other OPD attorneys. (Pa0101 (the protective order is "excessively broad" and "prevents the defense from routine intra-office sharing for coverage or counsel collaboration").) By comparison, a private law firm generally has no restrictions on its ability to share information internally, and the State would not be able to restrict their ability to do so.[4] Indeed, law firms routinely share information among attorneys to foster

[4] The only exception would be where there is a case-specific or lawyer-specific conflict of interest requiring screening of an individual lawyer(s), see, e.g., R.P.C.

collaboration and create efficiencies. Even when discovery is designated as "Attorneys' Eyes Only," the Court Rules contemplate that it can be viewed by "any attorney in the parties' outside law firms," not just a select few. See N.J. Court Rules Appx. XXX ¶ 5(a) (Form Discovery Confidentiality Order for CBLP Cases). OPD should be treated no differently.

OPD is essentially a law firm, and should be (and already is) treated as such. For instance, Rule of Professional Conduct 1.0(c) defines "Firm" or "law firm" to mean "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services organization or the legal department of a corporation or other organization." OPD certainly constitutes an association of lawyers authorized to practice law and thus, is treated as any other law firm for conflicts and other purposes. See R.P.C. 1.10.

Absent a specific conflict where an ethical wall is appropriate, or a situation where a security clearance is necessary, there is no valid basis to limit OPD lawyers from discussing case specifics or facts with one another or from sharing evidence,

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1.10, but that is not relevant here. Similarly, some information relevant to a case may require a security clearance, meaning it could not be disseminated to those without the clearance. But again, that situation is not relevant here.

as private law firms and prosecutors' offices routinely do.[5] The trial court's decision as to the protective order should be affirmed.

CONCLUSION

For the reasons set forth herein, ACLU-NJ respectfully urges this Court to affirm the decision of the trial court.

LOWENSTEIN SANDLER LLP
Attorneys for Amicus Curiae American Civil Liberties Union of New Jersey

Dated: December 26, 2025

By: _____
Alexander Shalom (021162004)

[5] OPD's contemplated creation of a database of information about officer misconduct is also lawful and proper. Brady and Giglio do not require a defendant to make a showing of how they will use material once it is turned over, nor do those cases or their progeny limit what a defendant can use the material for. And the New Jersey Supreme Court has previously recognized that nothing prevents organizations from publishing material concerning official misconduct. State v. T.J.M., 220 N.J. 220, 232 n.2 (2015) ("We likewise decline the ACLU's invitation to create a registry of prosecutors who have repeatedly been admonished for engaging in prosecutorial error, as the Attorney General would have it denominated. ***Nothing prevents others from publishing views on such issues*** as decided in published and unpublished opinions of the appellate courts of this state." (emphasis added)). Moreover, OPD attorneys are obligated to act as a zealous advocate for their clients, and to "act with reasonable diligence." R.P.C. 1.3. Collecting and organizing information about individuals who may testify in many of OPD's cases comports with those ethical obligations. (Pa0102 (the restrictions in the order "impair effective assistance and ethical obligations" and "hinders ethical duties and practical necessities").) Indeed, as Judge Mohammed recognized, OPD should not be hindered in their ability to "prepar[e] for other matters involving the same witnesses." (Ibid.) The State's concern about the creation of this database is perplexing, since its interest should be "not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0275-19

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	On Appeal from an Interlocutory Order of the Superior Court of
Plaintiff-Appellant,	:	New Jersey, Law Division,
v.	:	Passaic County.
DEXTER HUBBARD,	:	Indictment No. 25-02-0111-I
Defendant-Respondent.	:	
	:	
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	
GUSTAVO ARENAS,	:	Indictment No. 24-12-0898-I
Defendant-Respondent.	:	
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	
KYANAZIA DOBSON,	:	Indictment No. 24-02-0071-I
Defendant-Respondent.	:	

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	
KAHDAR HOLMES,	:	Indictment No. 23-04-0311-I
Defendant-Respondent.	:	
	:	

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	
MARCUS MORALES,	:	Indictment No. 25-01-0065-I
Defendant-Respondent.	:	

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	
JAMARSCU RUSSELL,	:	Indictment No. 24-12-0864-I
Defendant-Respondent.	:	

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	
JOSEPH PEREZ,	:	Indictment No. 24-09-0678-I
Defendant-Respondent.	:	
		Hon: Sohail Mohammed, P.J.Cr.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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December 29, 2025

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PRELIMINARY STATEMENT

The State's opening brief makes complicated what should be a simple constitutional question: when the prosecution knows that a State witness is the subject of a pending internal affairs investigation alleging misconduct bearing on truthfulness, bias, or integrity, does it satisfy its obligations under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and the discovery rules by disclosing the mere existence of the complaint while withholding its substance and the underlying records? As the trial court correctly held, the answer to this question is no. The State does not dispute that the existence of the internal affairs complaint is impeaching and subject to automatic disclosure. That concession is dispositive. If the existence of the complaint is impeachment evidence subject to automatic disclosure, then the substance of the allegation and the evidence supporting it — without which the disclosure is not only incomplete but functionally meaningless — must also be disclosed.

The State protests that the internal records are confidential and that a balancing of interests favors secrecy. But the defense is entitled to all impeachment evidence, irrespective of any confidentiality concerns. When evidence undermines the reliability of a State witness, particularly a necessary or important witness, disclosure is required.

The State's confidentiality concerns are instead germane to the second question before this Court: is a protective order that precludes defense counsel from sharing the disclosure with the rest of the defense team and other members of the Office of the Public Defender, and from using it in other matters or to assist other clients, supported by good cause or overbroad? In considering this question, it was appropriate for the trial court to weigh — as it did — the State's confidentiality interests, and for it to conclude that those interests are outweighed by competing interests.

Although the law recognizes that internal affairs materials are generally confidential, it also recognizes that confidentiality yields in certain circumstances, such as when disclosure is constitutionally required. Officers may have a legitimate interest in preventing public dissemination of such internal affairs information, but they cannot reasonably expect that impeachment evidence will not be disclosed to defense attorneys or members of the defense team.

Nor can the State's confidentiality interests justify a protective order so sweeping that it disables defense counsel from doing the job the Constitution requires. An order that prevents counsel from sharing disclosed information with other members of the defense team, from consulting with colleagues within a public defender's office, or from using information already known to counsel to assist other

clients is not merely overbroad — it is incompatible with the Sixth Amendment, due process, and counsel's ethical duties.

This Court should affirm the trial court's orders requiring the State to disclose the substance of and evidence underlying the internal affairs allegations and vacating the protective order.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

For the purpose of this appeal only, the defense relies on the procedural history and statement of facts included in the State's opening brief. It adds the following comments.

In each of the cases before this Court on a consolidated motion, the State turned over a bare-bones letter, identifying a law enforcement officer who may testify at trial and indicating that the officer is facing a pending internal affairs ("IA") allegation that bears upon the officer's truthfulness, bias, or integrity. (1T 11-21 to 12-7) The letters include no information about the substance of the allegation or any underlying evidence. (1T 12-8 to 10) Each of those letters were accompanied by a protective order that had been entered by a Superior Court judge and was based on an ex parte application of the State. (Ra 94) Those orders precluded the defense from distributing, disseminating or disclosing the material to any third party, person or

[1] Because of the interrelated nature and for the convenience of the reader, the Statement of Facts and Procedural History have been combined.

entity for "any reason," from sharing the information within the office and from using the information for any other case. (Ra 94, 96)

Each defendant filed a notice of motion to compel and a motion to vacate or amend the protective order. (1T 9-9 to 19) The defense explained that although IA records are confidential, the State is still required to disclose those records that are exculpatory and impeaching under Brady and Giglio, the discovery rules and the Attorney General Directive. (Ra 93) The recent case State v. Higgs, 253 N.J. 333, 354-55 (2023), provided criminal defendants with an additional tool to access relevant IA records, including those that are not necessarily exculpatory or impeaching, and to enforce the defendant's Brady/Giglio rights. (1T 24-1 to 26-23) It did not – and could not – replace Brady/Giglio. (1T 24-1 to 26-23) Because an IA complaint that bears upon a State witness's truthfulness, honesty or integrity – and evidence supporting that complaint – undermines the credibility of the State witness and is therefore impeaching, disclosure is required. (1T 28-21 to 29-3) As the State's bare-bones disclosure letters include no particularized information about the substance of the allegations, they are "not usable, not investigable, provide[] no legal pathways to obtain admissible . . . evidence and cannot be used in strategic decisions at trial" and therefore fail to satisfy the State's constitutional obligations under Brady/Giglio and the Attorney General Directive. (1T 12-12 to 24, 13-10 to 20, 22-2 to 6) The defense requested the court order "the State to produce the underlying

materials related to the allegation and the investigation of that misconduct." (1T 12-20 to 24, 55-24 to 55-2)

With respect to the motion to vacate or amend the protective orders, the defense argued that the orders lacked good cause and were overbroad. (1T 58-2 to 8) In support, it contended that the State's confidentiality interests are outweighed by the defense's interests in being able to share the information within the office and to use the information in other cases. (1T 63-18 to 22) The defense pointed out that although the records are presumptively confidential by statute and the officers may have valid reputational concerns, the confidentiality interests are minimal because disclosure would not be to the public but to the OPD.[2] (1T 66-1 to 16) On the other hand, the ability to share the information within the office and to use the information in other cases with the same officer is critical for the attorney to meaningfully and effectively use the information in both the instant criminal case and other criminal cases (1T 71-22 to 72-19), and furthers important goals of promoting compliance with Brady/Giglio obligations (1T 67-23 to 69-8) and increasing transparency and access to IA records (1T 70-25 to 70-18).[3] Most fundamentally, it is not tenable,

[2] The extent of the confidential information and confidentiality interest is particularly minimal if disclosure is limited to the bare-bones disclosure letters provided by the State. (1T 67-9 to 19)

[3] The defense pointed out that there is a particular need for transparency in Passaic as the Paterson police were taken over by the Attorney General's office due to police misconduct and a crisis in confidence. (1T 70-19 to 71-4)

constitutional or in the public interest for defense attorneys to be precluded from asking about or seeking the same impeachment evidence in other cases where the same officer is a necessary witness. (1T 102-2 to 25)

The State, as an initial matter, said it agreed with the defense's "astute analysis of the Higgs decision" and acknowledged at argument that "Higgs does not pertain to this matter." (1T 47-6 to 21) The State said that "any officer with the prospect or reasonable likelihood of being called at trial is going to be subject to [] Giglio vetting and disclosures." (1T 88-5 to 8) In contrast, "[i]f there's five officers involved in the investigation and arrest and a sixth one, who maybe has a Giglio issue is doing crowd control three blocks away," no vetting or disclosure is required as to that other officer. (1T 87-24 to 88-8) The State's position is that in "any case where [an] officer is a necessary witness," it is required to automatically disclose the existence of a pending IA allegation, but not the substance or underlying records, because although "the existence of the [pending IA] investigation is Giglio material," "[t]he steps taken during the process are not." (1T 40-8 to 10, 99-22 to 100-1) The State argued that it need not disclose the substance of an IA complaint pursuant to Giglio unless and until the complaint is sustained because such a rule would impose upon the State an inappropriate and unfeasible continuing obligation to disclose the substance and evidence underlying potentially frivolous and confidential complaints. (1T 33-1 to 35-2, 40-21 to 41-5) When asked by the court to proffer any practical use of the bare-

bones disclosure letters, the prosecutor couldn't; he responded, "I don't represent the defendants, Judge, so it's not my decision to be made. It's counsel's decision how to act on it." (1T 52-8 to 10) The State maintained that the disclosure need not have a "practical use" to comport with Brady/Giglio. (1T 53-22 to 23)

With respect to the protective orders, the State contended that they were supported by good cause because IA records are confidential by law (1T 78-5 to 19) and because the State has an interest in preventing the OPD from labeling the officers as Giglio officers, while the investigations remain pending. (1T 83-19 to 84-4)

The Honorable Sohail Mohammed, P.J.Cr., issued an oral decision on July 9, 2025 and a written order and decision on July 31, 2025. The trial court found that the Higgs Court "did not alter or diminish pre-existing Brady/Giglio obligations and recognized a policy shift toward broader access, with balancing confidentiality and justice" in creating a "supplemental . . . means for obtaining IA materials." (Ra 98, 100) The trial court concluded that any pending allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation is Giglio material subject to disclosure. (Ra 99-100) The court found that disclosure letters that only disclose the existence of the pending IA investigation deny the defense "usable facts" and fail to disclose all exculpatory and impeachment evidence, in violation of the law. (Ra 100-101) Thus, the trial court ordered that the State disclose additional evidence related to the pending allegation "to enable

competent investigation, trial preparation, and application for court review/use as impeachment." (Ra 102-103) It said that the State could "redact information for privacy or safety but must provide sufficient detail" so that the defense can assess the evidence, engage in investigation, present a defense and confront witnesses. (Ra 103, 107-108)

With respect to the motion to vacate the protective order, the court found that the current iteration of the protective order was without good cause and overbroad. (Ra 102) The court noted that any protective order must protect against genuine, concrete harms and account for the rights of criminal defendants to effective assistance of counsel and due process. (Ra 102) It concluded that the State failed to adequately demonstrate the need for all of the restrictions of the protective order and that the State's confidentiality concerns were not sufficiently concrete or specific. (Ra 102) In contrast, the court was persuaded that the protective order "hinders ethical duties and practical necessities such as intra-office consultation and preparations for other matters involving the same witnesses." (Ra 102) Thus, it concluded that "the state's generalized confidentiality concerns and reputational interests are not enough to override the defendant's due process rights and the constitutional imperative for discovery" and vacated the protective order. (Ra 102-103) It said that the State could move for a revised protective order, supported by a fact-specific showing of good cause. (Ra 103) The court further said that the order

must be narrowly tailored to the interest for which good cause is actually shown and could not preclude the defense from sharing the information internally, with experts and in other cases. (Ra 103, 108)

This State's appeal of the trial court's interlocutory order followed.

LEGAL ARGUMENT

POINT I

THE SUBSTANCE OF AND EVIDENCE SUPPORTING PENDING INTERNAL AFFAIRS INVESTIGATIONS BEARING ON A STATE WITNESS'S TRUTHFULNESS, BIAS OR INTEGRITY CONSTITUTES IMPEACHMENT EVIDENCE SUBJECT TO THE AUTOMATIC DISCOVERY PROVISIONS OF GIGLIO AND THE DISCOVERY RULES.[4]

The State argues that it should be required to disclose only the existence of but not the substance or records underlying pending IA allegations bearing on an officer's untruthfulness, bias or integrity. First, it contends that IA records are confidential under the Internal Affairs Policy and Procedures Act (the "IAPP"), N.J.S.A. 40A:14-181. (Pb 12-13) Second, it argues that the defense cannot demonstrate that disclosure is warranted based on a balancing of the interests. (Pb 12-13) Third, and finally, it argues that the defense did not satisfy the requirements

[4] This point responds to Points I, III and IV of the State's brief.

of State v. Higgs, the relatively new case that entitles the defense access to in-camera review and disclosure of IA records in certain circumstances.[5] (Pb 12-13)

Each of these arguments demonstrates the State's misunderstanding of the relevant issue before this Court: whether disclosure is required by Brady/Giglio. First, the defense is not arguing that the records or substance of the pending IA investigations are not confidential; but the fact that the records are confidential does not mean that the State can refuse to turn them over where disclosure is required by Giglio and its progeny. Second, the cases the State cites to for the proposition that a motion for disclosure of privileged or confidential records is subject to balancing and reviewed for abuse of discretion are inapposite. (See Pb 12-13, 18-19 (citing cases)) Those cases do not discuss Brady or Giglio evidence – which the State has a constitutional obligation to affirmatively disclose. They instead concern requests by criminal defendants for other relevant evidence and requests by members of the public for records pursuant the common law right of access. (See Pb 12-13, 18-19 (citing cases)) Third and relatedly, the defense is not seeking IA records pursuant to Higgs; it is arguing that the State is required to automatically disclose the substance of the records pursuant to Giglio and the discovery rules. To refocus, the only issue

[5] At the trial level and at certain points in its appellate brief, the State acknowledges that Higgs "is not the deciding case in this matter." (Sb 20) But at the same time, it contends that the evidence underlying pending IA complaints bearing on truthfulness can only be accessed pursuant to Higgs.

before the trial court and now before this Court is the following: Whether or when the substance of and evidence supporting pending IA investigations alleging misconduct that bears upon truthfulness, bias or integrity constitutes impeachment evidence, subject to the automatic discovery provisions of Giglio and the discovery rules. Because it does, the State should be required to disclose, and the trial court's ruling should be affirmed. U.S. Const. V, VI, XIV; N.J. Const. art. 1, ¶¶ 1, 10.

Case law and our State discovery rules establish that discovery must include all exculpatory and impeachment evidence. In Brady v. Maryland, the United States Supreme Court first held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Then, in Giglio v. United States, the Supreme Court extended Brady to include evidence that impeaches the credibility of a State's witness "[w]hen the reliability of a given witness may well be determinative of guilt or innocence." 405 U.S. at 154 (citation omitted). Whereas exculpatory evidence is "evidence tending to raise a reasonable doubt about defendant's guilt," State v. Marshall, 123 N.J. 1, 107-08 (1991), superseded on other grounds as stated in State v. Troxell, 434 N.J. Super. 502, 512 n.4 (App. Div. 2014); accord State v. Carter, 91 N.J. 86, 111 (1982), impeachment evidence includes "any information that would allow the defendant to impeach the credibility of" a witness when their credibility is

"at issue," State v. Williams, 403 N.J. Super. 39, 46 (App. Div. 2008), aff'd as modified, 197 N.J. 538 (2009).

The prosecution has an affirmative obligation to turn over exculpatory and impeaching information; a defendant need not make a request. State v. Martini, 160 N.J. 248, 268 (1999) (citing, e.g., United States v. Agurs, 427 U.S. 97, 107 (1976)). "[T]he 'prosecution' for Brady purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office . . . , as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." State v. Nelson, 155 N.J. 487, 498-500 (1998). (citation omitted). "The prosecutor is charged with knowledge of evidence in his file, even if he has actually overlooked it," and "has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police." Id. at 498-99 (citations omitted).

Our court rules codified the standards of Brady/Giglio, "impos[ing] on the State an added obligation to produce 'exculpatory and impeachment evidence.'" Higgs, 253 N.J. at 354-55 (citing R. 3:13-3(b)(1)(A)-(K)). Whereas the Brady/Giglio jurisprudence limits reversal to cases where the evidence is material, the discovery rules require that all exculpatory and impeachment evidence be disclosed, without regard to materiality. See R. 3:13-3(b)(1)(A)-(K) (requiring disclosure of all "relevant evidence," including exculpatory and impeachment evidence); see Miller

v. United States, 14 A.3d 1094, 1109 (D.C. 2011) ("[T]here is a duty of disclosure even when the items disclosed subsequently prove not to be material." (first citing Boyd v. United States, 908 A.2d 39, 60 (D.C. Cir. 2006); then citing Strickler v. Greene, 527 U.S. 268, 281 (1999)). Likewise, while federal law requires that Brady/Giglio material be disclosed with enough time that the defense "is able effectively to use it," United States v. Reyes-Romero, 959 F.3d 80, 107 (3d Cir. 2020), under the discovery rules, exculpatory and impeachment material must be disclosed upon the return of the indictment. R. 3:13-3(b)(1)&(f).

Evidence of police misconduct is a common form of Brady/Giglio evidence. In 1991, the Attorney General adopted the Internal Affairs Policy and Procedures Act, which established procedures for addressing complaints of police misconduct. Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 142 (2022); In re Att'y Gen. Directive, 246 N.J. 462, 482-86 (2021) (summarizing the history of the IAPP and related Attorney General directives). In 1996, the Legislature codified the IAPP in N.J.S.A. 40A:14-181, which requires all law enforcement agencies to "adopt and implement guidelines which shall be consistent with the guidelines governing the [IAPP]."

Under the IAPP, every New Jersey law enforcement agency is required to establish an independent IA unit to investigate and adjudicate claims of police misconduct. IAPP §§ 4.0.1 to 4.1.6. When an agency receives a complaint (from a

civilian, another officer, another law enforcement agency, a civilian review board, or an anonymous source), it must conduct a formal IA investigation so long as the complaint contains "sufficient factual information" to do so; however, supervisors are "authorized to informally resolve minor complaints, whenever possible, at the time the report is made." IAPP §§ 5.0.1 to 5.1.14, 6.0.1 to 6.2.7. The IA investigation should comprise all relevant evidence, including, for all civilian-initiated complaints, a recorded statement by the involved officer. IAPP §§ 7.01 to 7.1.6. The IAPP provides that an IA investigation should be completed within 45 days of the date the complaint is received, IAPP § 6.1.2; N.J.S.A. 40A:14-147, but the process is rarely – if ever – completed within this time frame. (1T 50-11 to 19) The burden of proof to substantiate the complaint is "preponderance of the evidence." IAPP §§ 6.2.3, 6.3.8. Generally, discipline is not imposed until the investigation is complete; however, certain serious allegations may warrant immediate suspension pending the investigation. See IAPP §§ 5.2.1 to 5.2.3. The IAPP indicates that there may be potential consequences for filing false reports and "[t]he law enforcement agency should notify the County Prosecutor in any case where a complainant has fabricated or intentionally misrepresented material facts to initiate a complaint of officer misconduct." IAPP §§ 5.1.5 to 5.1.6.

Although "information and records of an internal investigation" are generally confidential, they are nevertheless subject to disclosure under certain circumstances.

IAPP § 9.6.1. Specifically, IA records and information may be shared at the direction of a county prosecutor or the Attorney General, or upon a court order. IAPP § 9.6.1.

For the reasons set forth below, although IA records are deemed confidential by statute, IA complaints and information that bears upon a State witness's truthfulness, bias or integrity constitute impeachment evidence subject to automatic disclosure pursuant to Giglio, its progeny and New Jersey law.

A. That Information and Records of an Internal Investigation Are Confidential and Should Not Be Released to the Public Does Not Mean that They Are Not Subject to Brady/Giglio.

The State contends that the trial court's ruling "directly contradicts the IAPP," which states that the nature and source of the allegations, the progress of the investigation and the resulting materials are confidential (Pb 17-18) and will unfairly tarnish the reputations of officers (Pb 22-25). However, confidential IA records are still subject to disclosure under Brady/Giglio and officers cannot reasonably expect otherwise.

The IAPP itself contemplates that disclosure is required to fulfill constitutional obligations. It specifically states that records and information may be shared at the direction of the county prosecutor or Attorney General, or upon court order. IAPP § 9.6.1.

Further, both the Attorney General and our Supreme Court have previously acknowledged that confidential IA records are disclosed in criminal cases to satisfy

the requirements of Brady/Giglio. In re Att'y Gen. L. Enft Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 502 (2021) ("Among other reasons, the Attorney General contends that appellants' estoppel argument should fail because disciplinary records are disclosed in criminal cases to satisfy the requirements of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), and to respond to civil discovery requests. But no promise of confidentiality could attach to those affirmative legal obligations." (emphasis added)). The fact that the records are confidential in no way absolves the State of its duty to disclose exculpatory and impeachment evidence. See also Pennsylvania v. Ritchie, 480 U.S. 39, 43, 58 n. 15, 61 (1987) (a defendant is entitled to exculpatory and impeachment evidence in child abuse files, even though the files are confidential by statute and highly sensitive).

For similar reasons, the State's concerns that disclosure will tarnish the reputations of officers or violate their due process rights are misplaced. (Pb 22-25 (voicing concerns that disclosure "would blemish the officer's record in the public's eye without justification or due process" and arguing that "[t]he reputation of [] an officer should not be marred by the public release of allegations that are unproven and that are unlikely to be proven")). As the Supreme Court explained, and the Attorney General acknowledged in In re Att'y Gen. L. Enft Directive Nos. 2020-5 & 2020-6, Brady/Giglio disclosures "are not made to the public and can be subject

to a protective order or some other form of oversight by the court."[6] 246 N.J. at 402. Furthermore, because the State is constitutionally required to turn over exculpatory and impeachment evidence, officers cannot reasonably expect such evidence will not be disclosed or used as impeachment. Id. If an IA allegation is unsupported by evidence and does not in fact impeach the credibility of the officer, then it will not be admitted into evidence and no reputational harm will come to the officer. See, e.g., N.J.R.E. 401, 403. Neither the confidential nature of the records, nor officers' expectation in confidentiality allows the State to avoid its disclosure obligations.

B. The Court Need Not Engage in a Balancing Test; It Needs to Apply Giglio.

The State also contends that the trial court was required to engage in a "fact-specific weighing test" prior to ordering disclosure. (Pb 20-21) The State believes that the best balance of interests is struck where the State discloses the existence of a pending IA investigation, but not its substance. (Pb 37) But all impeachment evidence is subject to automatic disclosure; balancing of the interests is inappropriate.

At various points in its brief, the State specifically suggests that the defense needs to satisfy the balancing test set forth in Rivera to obtain access to the substance

[6] Additionally, as discussed in Point II, if the Office of the Public Defender uses the disclosures to conduct "Giglio checks," confidential information within that database will not be disclosed to the public.

of the complaint. (Pb 18 ("When internal affairs reports are requested by the public, trial courts are required to balance those rights." (quoting Rivera, 250 N.J. at 149))). It contends that "[t]he appropriate factors in this analysis that weigh in favor of disclosure are far outweighed by the interest in confidentiality" (Pb 27) and that the trial court "neglected to [] consider these factors." (Pb 28) It cites to the Rivera factors in arguing that disclosure is improper. (Pb 27-28)

Contrary to the State's argument, the balancing test set forth in Rivera v. Union County Prosecutor's Office, 250 N.J. 124 (2022), only applies where a member of the public seeks access to confidential IA records pursuant to the common law of access. In contrast, Brady and Giglio do not make disclosure contingent on a balancing test; because exculpatory and impeachment evidence is so critical to the rights of criminal defendants, the disclosure of all such evidence is automatically required, regardless of any confidentiality interests. See In re Att'y Gen. L. Enft Directive Nos. 2020-5 & 2020-6, 246 N.J. at 502 (acknowledging the State's affirmative obligation to turn over IA records subject to disclosure pursuant to Brady/Giglio); Williams, 403 N.J. Super. at 48 ("'[U]nder Giglio, the State [is] required to turn over any material that could impeach the credibility of any of the State's witnesses.' . . . . We also agree . . . that the State must 'search its own Prosecutor's Office personnel file to investigate whether there is any further information that needs to be turned over to the defense.'"); Jonathan Abel, Brady's

Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team, 67 Stan. L. Rev. 743, 802-03 (2015) 57-60 ("[S]ystems that balance officers' confidentiality interests against Brady's constitutional requirements get it completely wrong[;]" defendants are entitled all exculpatory and impeachment evidence contained in an officer's personnel file file).

The State also cites to a number of criminal cases for the proposition that a criminal defendant is only entitled to impeaching IA records where his interest in the records outweighs the State's interest in confidentiality. (See Pb 12-13, 18-19 (citing cases)) Yet those cases do not discuss Brady or Giglio evidence, which the State has a constitutional obligation to affirmatively disclose.

For instance, in State v. Williams, 356 N.J. Super. 599 (App. Div. 2003), the defendant was seeking access to the confidential surveillance location of the officer that observed purported drug transactions. The defense argued that the location would assist in a cross-examination of the officer and therefore that the right to present a defense and confrontation required disclosure. Id. at 622-25. The trial court conducted in-camera review of the surveillance location, and the Appellate Division found that disclosing the exact surveillance site would "provide him no assistance in presenting his case" and that the defense had been able to effectively cross-examine the witness with the evidence it had. Id. at 634. In contrast, the State's confidentiality concerns are not legally relevant to the question of whether disclosure is required

under Brady/Giglio.[7] See In re Att'y Gen. L. Enft Directive Nos. 2020-5 & 2020-6, 246 N.J. at 502; Williams, 403 N.J. Super. at 48.

Not only is the State's parade of horribles irrelevant, it is also unrealistic. The State complains that the trial court's ruling requires prosecutors to turn over the substance and evidence underlying frivolous and false complaints. (Pb 23-24) The State says that this will allow criminal defendants to file IA complaints in order to "weaponiz[e]" the IA process and obtain additional discovery. (Pb 23-24) However, the IAPP allows for summary disposition of certain frivolous complaints, and if an IA complaint is frivolous or unsupported by any evidence, it will likely not "bear on the truthfulness, honesty or integrity" of the officer and it will be inadmissible in court without any harm to the officer. See N.J.R.E. 401, 403.

The State also protests that requiring prosecutors to disclose the underlying records would be impracticably and unnecessarily tedious. The State complains that prosecutors would have to "disclos[e] evidence on a nearly daily basis as the internal affairs investigation progresses," such as whenever a new video is conducted or a new surveillance video is reviewed. (Pb 24-25, 29, 50-54) Further, it argues that such an obligation is unnecessary because the IA investigation will usually conclude before the criminal pretrial process. (Pb 29)

[7] Instead, the confidentiality concerns are relevant to the question of whether there is good cause for the protective order. See Point II.

If there is additional or new impeachment evidence that develops as an IA investigation unfolds, the State is constitutionally required to turn over that evidence, regardless of how cumbersome it believes their constitutional obligations to be. See Point I.D. While the State suggests that a requirement to investigate frivolous complaints rather than widespread police misconduct is what will make this process untenable, it does not provide evidence to support its claim that most complaints alleging misconduct that bear on truthfulness or integrity are frivolous or even deemed unfounded --- i.e. that they disproven by a preponderance of the evidence --- or that a continuing discovery obligation will require them to turn over new evidence related to the IA complaint on a daily basis. Furthermore, contrary to the State's suggestion that discovery can wait until the IA investigation concludes, as indicated by the trial prosecutor in this very case, IA investigations are almost never decided in an expedited manner. (Pb 29) There is no evidence at all that IA investigations bearing on truthfulness, bias or integrity will ordinarily conclude before trial.

This Court should not balance competing interests in determining whether disclosure is appropriate; when evidence is exculpatory or impeaching, disclosure is required. Any legitimate confidentiality concerns can be governed by an appropriate protective order. See Point II.

C. The Higgs Court Did Not Hold that the State Need Not Affirmatively Disclose Exculpatory or Impeaching IA Records, Nor Could It Have.

At the trial level, the prosecutor agreed that Higgs did not curtail Brady/Giglio obligations and instead provided the defense with an additional tool to search for relevant IA records and to enforce Brady/Giglio violations. (1T 47-6 to 21) For the first time on appeal, the State contends that the Court in Higgs "ruled criminal defendants cannot gain automatic access to police internal affairs files." (Pb 39-40) The State says that upon receipt of disclosure of the existence of the allegation, the defense can file a Higgs motion for the underlying records. (Pb 30, 40) Further, because the defense did not do so, the court erred in ordering the State to disclose confidential records of pending IA investigations with any showing of need. (Pb 41)

In Higgs, the New Jersey Supreme Court considered when and how a criminal defendant could seek independent review of an officer's IA file, if not by defense counsel, then by the court. Id. at 353-60. The Court balanced the rights of criminal defendants to discovery and to present a defense against the State's interest in confidentiality in IA files. Id. at 357. It held that "to ensure that defendants in criminal trials are provided with the discovery necessary to adequately prepare for trial, defendants must be allowed, under certain circumstances, to access documents in law enforcement's IA files." Id. at 357. Nevertheless, because the IA files are deemed confidential by the IAPP, the Court found that defendants should not have "unbridled access" to the entirety of an officer's file. Id. Therefore, to obtain in-

camera review and access to IA records, the defense must identify (1) "the specific category of information [sought]" and (2) "the relevance of that information to the defendant's case." Id. at 358. The Court anticipated that "many defendants" would be able to meet the relevancy standard and noted that records may be relevant, for example, "for impeachment purposes or to support the defense's theory." Id. at 358-59. If the defense makes such a showing, the court must conduct an in-camera review solely to determine whether such records exist. Id. If they do, the trial court must disclose the "relevant" portions. Id.

The Court in Higgs ordered disclosure of "the portion of the [officer's] file related to [two] prior shootings," finding them relevant in two ways. Id. at 360, 362. First, to support the defense theory that the officer fired his gun first, causing the defendant's gun to accidentally discharge. Id. Second, to impeach the officer's "credibility" and demonstrate "bias," which evidently adopted the defense's argument that the prior investigations could have motivated the officer to lie to avoid potential discipline for a third on-duty shooting. Id. Significantly, the Court did not limit relevancy to only "sustained" IA complaints, findings of fault, or results where discipline was imposed. Rather, the Court ordered disclosure of "the portion of the [IA] file related to those prior shootings," including those deemed justified. Id. at 352.

As an initial matter, this Court should not consider this argument because it is argument waived or even invited. This Court will "'decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" State v. Roman-Rosado, 462 N.J. Super. 183, 202 (App. Div. 2020) (citing Chirino v. Proud 2 Haul, Inc., 458 N.J. Super. 308, 318 (App. Div. 2017)), aff'd as modified sub nom. State v. Carter, 247 N.J. 488 (2021); see also State v. Witt, 223 N.J. 409, 419 (2015) (same). Likewise, errors that 'were induced, encouraged or acquiesced in or consented to by [a party] ordinarily are not a basis for reversal on appeal.'" State v. Bragg, 260 N.J. 387, 407, 334 A.3d 184, 196 (2025) (citing State v. A.R., 213 N.J. 542, 561 (2013)). "In essence, a party cannot 'invite' an error and then voice an objection on appeal." Ibid.

Here, the State not only did not make this argument below; it actually affirmatively adopted the defense's "astute analysis of Higgs." (1T 47-6 to 21) It agreed that because the question was whether the State was required to turn over this evidence pursuant to Brady/Giglio, "Higgs does not pertain to this matter." (1T 47-6 to 21)

Although the Higgs Court did not address how the new tool interacts with the State's existing Brady/Giglio obligations to automatically produce IA records that are exculpatory or impeaching, it did not and could not alter the State's existing Brady/Giglio obligations as applied to IA records. Instead, as found by the trial court

and acknowledged by the trial prosecutor, the correct reading of Higgs is that it created a separate, additional procedure through which attorneys can search for and discover relevant IA records, including those that are exculpatory or impeaching and should have been automatically disclosed under Brady/Giglio. See Pennsylvania, 480 U.S. at 43, 58 n. 15, 61 (prosecution has an affirmative obligation to turn over all Brady/Giglio evidence contained in confidential child abuse files, but a defendant must set forth a basis for in-camera review of the confidential records to search for Brady/Giglio evidence that he does not know exists).

The Court should find that the defense need not file a Higgs motion to obtain exculpatory or impeaching IA records for four reasons. First, the Higgs Court did not purport to limit prosecutors' obligations to disclose actually or constructively known Brady/Giglio material, nor could the Court interpret state law more narrowly than the Federal Constitution. See U.S. Const. art. VI (Supremacy Clause); Milke v. Ryan, 711 F.3d 998, 1003-20 (9th Cir. 2013) (holding IA records can constitute Brady/Giglio material and explaining that such "material impeachment evidence isn't just discoverable; under Giglio, it must be disclosed unilaterally as a matter of constitutional right"). Second, the Court did not address the well-established law that no defense request is necessary to trigger Brady/Giglio disclosures, nor could it reject such law. See State v. Martini, 160 N.J. 248, 268 (1999) (no defense request necessary for Brady/Giglio material). Third, the fact that Higgs's relevancy standard

is broader than Brady/Giglio's exculpatory/impeachment standards also indicates that the Court intended to expand, not limit, defense access to IA records and was simply providing the defense with an additional tool to obtain an independent and more exhaustive review of such records. Higgs, 253 N.J. at 359 (declining to adopt a more restrictive standard than relevance; citing New Jersey's "massive shift" away from its historically restrictive approach to IA confidentiality; and explaining criminal defendants' "life and liberty are at stake"). Although the Court listed "impeachment purposes" as an example of how IA records may be relevant, which presupposes that in some circumstances the State may not have already disclosed Giglio material, 253 N.J. at 359, that does not mean that the State's failure to automatically disclose certain evidence would not run afoul of Giglio or Rule 3:13-3(b)(1). Fourth, although the Attorney General Directive 2019-6 requires all prosecutors to review IA records for potential Giglio material, the Court made no mention of disturbing that well-established and constitutionally-based practice. The Court's silence regarding such significant important issues is better read as a tacit assumption that the new procedure was not intended to replace Brady/Giglio but to add to them.

For these reasons, the correct reading of Higgs is that Brady/Giglio disclosures apply the same as always even where the exculpatory or impeachment material happens to be IA records. Although Higgs provides defendants with a means

of discovering relevant evidence -- which may include impeachment or exculpatory evidence -- that does not mean that the State is relieved of its burden to automatically disclose impeachment or exculpatory evidence under Brady/Giglio and the discovery rules. So long as the IA records constitute exculpatory or impeachment evidence, automatic discovery is required.

D. The Nature and Evidence Underlying Pending IA Complaints Alleging Misconduct that Bears on Truthfulness, Honesty or Integrity of a State Witness Is Impeachment Evidence, Subject to Automatic Disclosure.

The question before this Court is whether the substance of the IA complaint and underlying records constitute Giglio or impeachment evidence. Because the answer to that question is "yes," disclosure is required.

Impeachment evidence is "any information that would allow the defendant to impeach the credibility of" a witness when their credibility is "at issue." Williams, 403 N.J. Super. at 46. The State is required to turn over any and all evidence that tends to undermine an officer's credibility, whether that be a civil complaint, a dismissed indictment, an internal affairs complaint, the underlying evidence in support of a complaint or criminal charge, an internal memo, stipulations, judicial findings, a personnel file, or some other kind of evidence. See Williams, 197 N.J. at 540-41 (ordering disclosure of "any and all documents" relating to an officer's use of a racial epithet or other instances of racial animus, including but "not limited to all documents" contained in investigatory or disciplinary files, the officer's

"complete personnel file," "any and all documents" pertaining to the officer's employment, and "all notes and documents relating in any way" to the event during which the misconduct purportedly occurred); Nelson, 155 N.J. at 497-501 (tort claim notice and civil complaint against prosecutor's office alleging inadequate training); United States v. Hayes, 376 F. Supp. 2d 736, 737-42 (E.D. Mich. 2005) (prior dismissed indictment and related records indicating a history of untruthfulness); United States v. Lawson, 810 F.3d 1032, 1038-42 (7th Cir. 2016) (personnel report including reprimands for preventable accident with police vehicle and other "improper conduct"); Benn v. Lambert, 283 F.3d 1040, 1054 (9th Cir. 2002) (police memo concluding officer could not be trusted). Other courts have also found that pending IA complaints and even unsubstantiated IA complaints are subject to disclosure. See People v. Francis, 74 Misc. 3d 808, 822 (N.Y. Sup. Ct. 2022) (holding that pending IA complaints are subject to disclosure because such complaints "tend to impeach"); see also United States v. Kiszewski, 877 F.2d 210, 215–16 (2d Cir. 1989) (remanding for in-camera review, and holding disclosure would be required if evidence was material to outcome, where personnel files included an "exonerated" finding for being "on the take"; a letter of reprimand for appearing as a witness without permission; and other ten-year-old allegations deemed "unfounded"); Hayes, 376 F. Supp. 2d at 742 (where dismissed indictment against officer alleged warrantless searches, excessive force, false reports, and cover-ups; ordering

disclosure of all related IA records without regard to their result); State v. Laurie, 653 A.2d 549, 553–54 (N.H. 1995), modified, Duchesne v. Hillsborough Cnty. Att'y, 119 A.3d 188, 193–98 (N.H. 2015) (ordering disclosure where allegations demonstrated a "pattern of misconduct and untruthfulness"); People v. Pardo, 81 Misc. 3d 858, 873 (N.Y. Crim. Ct. 2023)[8] (holding that the People must turn over impeachment material relating to substantiated and unsubstantiated complaints of police misconduct, which "tend to impeach" the credibility of testifying witnesses and collecting cases); see also People v. Lithgow, 86 Misc. 3d 295, 301 (N.Y. Crim. Ct. 2024) (same); People v. Silva-Torres, 81 Misc. 3d 1121, 1125–26 (N.Y. Crim. Ct. 2023) (same).[9] Furthermore, both the New Jersey Attorney General Directive 2019-6 and the Federal Department of Justice policy specifically acknowledge that "any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation" may constitute Giglio evidence. Attorney General Directive 2019-6 (Dec. 4, 2019); U.S. Dep't Just., Justice Manual §§ 9-5.001, 9-5.100(5)(c) (2018) ("[A]ny allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation."); see

[8] The New York discovery statute requires that the prosecution automatically disclose evidence that "tends to impeach" the credibility of a State witness. People v. Portillo, 73 Misc. 3d 216, 231–32, 153 (N.Y. Sup. Ct. 2021) (citation omitted).

[9] These courts note that the determination of the police department is not binding and does not allow the prosecutor to avoid disclosure of evidence which "tends to impeach" a State witness. Id. at 153.

also O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 382 (App. Div. 2009) (explaining that the Attorney General, as the chief law enforcement, implements guidelines and directives that are binding and "have the force of law" on police entities). It is not necessary for there to be a final judgment, or even a judicial finding that an officer engaged in misconduct. All impeaching evidence must be disclosed, which necessarily includes pending allegations against relevant State witness that bears on truthfulness or credibility.

The State contends that the Giglio determination should be made on a case-by-case basis (Pb 33, 36), but evidence that undermines an officer's credibility should be disclosed in every case where the officer's credibility is relevant. Indeed, the State has acknowledged that in "any case where [an] officer is a necessary witness," it is required to automatically disclose evidence that undermines the officer's credibility, including the existence of a pending IA allegation bearing on the truthfulness, bias or integrity.[10] (1T 40-8 to 10, 99-22 to 100-1; Pb 31-33) The State has already made the requisite determinations: it concluded that the officers

[10] As explained earlier, under New Jersey law, the exculpatory or impeachment evidence need not be material; all exculpatory or impeachment evidence must be disclosed. See R. 3:13-3(b)(1)(A)-(K) (requiring disclosure of all "relevant evidence," including exculpatory and impeachment evidence, without regard to materiality). However, even if this Court were to find that the State is only required to automatically disclose material impeachment evidence (as opposed to all impeachment evidence), because the State determined the officers to be necessary witnesses, the substance and evidence underlying the IA complaints are of that kind and subject to disclosure.

facing the IA complaints are necessary or likely witnesses and that the IA complaints allege misconduct that bears on the truthfulness, bias or integrity of those officers. (1T 40-8 to 10, 99-22 to 100-1) Thus, the only question is whether it necessarily follows that the substance of the IA complaints and underlying records constitute impeachment evidence, too.

As the trial court found, it cannot be that the existence of the complaint, but not the substance, is subject to disclosure. Other courts have explained that because a defendant is entitled to all impeachment evidence, incomplete summaries of the evidence are constitutionally inadequate. In Vaughn v. United States, 93 A.3d 1237, 1243-44 (D.C. 2014), the court held that the State violated its Brady/Giglio obligations when it only disclosed an incomplete summary of an IA investigation into a corrections officer's prior false statements and use of force against an inmate, and that the defense was entitled to "complete and accurate information as to the contents of the OIA Final Report." See also Pardo, 81 Misc. 3d at 874 ("Insofar as the People argue that Giglio disclosure letters, summarizing disciplinary matters, would alone satisfy their obligations . . . , this Court finds that they must turn over the underlying documents, unfiltered through the prosecutor's eyes."); Silva-Torres, 81 Misc. 3d at 1125–26 (ordering disclosure of records underlying unsubstantiated complaints). The court explained that "[e]ven if it is theoretically possible for the government to fulfill its disclosure obligations under Brady by means of summaries

of preexisting documents, such summaries must be 'sufficiently specific and complete'" to be useful. Vaughn, 93 A.3d at 1259 (quoting United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007)). In analyzing the required level of detail in Brady/Giglio disclosures, courts must do so "from the perspective of the defense," such that disclosure must include "every detail that might have been relevant to defense counsel's preparation as counsel viewed the case." Id. at 1259 (citation omitted). Given that "[t]his may be challenging for the government, which presumably is not privy to defense counsel's thoughts and theories pretrial," "the government withholds source documents at its peril." Vaughn, 93 A.3d at 1259.

The State does not satisfy its constitutional obligations by turning over the mere existence of the IA complaint. As explained by the trial court, without having the substance or the records supporting the IA complaint, the defense is still without all of the favorable evidence to which it is entitled and needs to exercise the defendant's constitutional rights to present a defense, due process and to confront the witnesses against him. See id.

Because the bare-bones disclosure letters do not include all impeachment evidence and are not "sufficiently specific and complete to be useful," they are constitutionally inadequate. Thus, the trial court properly held that the State has failed to comply with its obligation to turn over all impeachment evidence, and the

State should be required to turn over any underlying records or evidence that impeaches the credibility of the officers.

POINT II

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER VACATING THE PROTECTIVE ORDERS AS THEY LACK GOOD CAUSE, ARE OVERBROAD, AND VIOLATE THE RIGHTS OF CRIMINAL DEFENDANTS.

Contrary to the State's argument (Pb 42-46), the trial court properly held that the ex parte protective orders lacked good cause and were overbroad.[11] The State's confidentiality interests can be addressed through a much less restrictive order that does not prohibit defense attorneys from sharing the information with other OPD employees and experts, or from using the information in other matters with the same officers. Because the prohibitions are not supported by good cause and in fact are contrary to the constitutional rights of defendants and ethical obligations of defense attorneys, this Court should affirm the trial court's order vacating the protective orders and allowing the State to propose a new protective order without those restrictions. U.S. Const. amends. V, VI, XIV; N.J. Const. arts. I, ¶¶ 1, 10.

[11] The State complains that the trial court did not afford proper deference in vacating the ex parte protective orders (Pb 42-46), but the defense did not have the opportunity to challenge the orders or explain why they were overbroad until after they were entered ex parte. Therefore, upon the filing of the motion to vacate, the court appropriately considered the arguments and the protective orders anew.

"Upon motion and for good cause shown, the [trial] court may at any time order that the discovery sought pursuant to R. 3:13-3(e) be denied, restricted, or deferred or make such other order as is appropriate."[12] R. 3:13-3(e); State v. Scoles, 214 N.J. 236, 251, 252-53 (2013). The State has the burden of persuasion for the issuance of a protective order. Kerr v. Able Sanitary and Environmental Services, Inc., 295 N.J. Super. 147, 155 (App. Div. 1996). The scope of appellate review of a protective order ruling is deferential. State v. Ramirez, 252 N.J. 277, 298 (2022). Appellate courts should affirm the protective order unless the trial court abused its discretion or made its determination based on a mistaken understanding of the law. Ramirez, 252 N.J. at 298.

Whether "good cause" exists to issue a protective order pursuant to R. 3:13-3(e) depends upon the "totality of the circumstances." Ramirez, 252 N.J. at 297. Federal courts have held that a showing of good cause for a protective order requires that the proponent set forth "a clearly defined and serious injury to the party seeking closure." United States v. Wecht, 484 F.3d. 194 (3d Cir. 2007). "The injury must be

[12] According to the court rule, the showing of good cause may be based in whole or in part on an ex parte written statement. R. 3:13-3(e)(2). If a protective order is granted, the entire text of the statement is sealed and only available to the appellate court on appeal. R. 3:13-3(e)(2). According to the trial prosecutor, the entirety of the State's showing of good cause is set forth in in its response to the defense's motion to vacate. (1T 78-8 to 8) If the State had attempted to rely on other justifications set forth in the written statement and not available to the defense, the defense would have challenged the ex parte procedure as improper.

shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." Id. at 211 (emphasis added); see also Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994) (same).

R. 3:13-3(e)(1) provides a non-exclusive list of grounds that may support protective relief. Those concerns include, "protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including protection of confidential relationships and privileges; or any other relevant considerations." R. 3:13-3(e)(1). In determining whether good cause exists, courts should balance any confidentiality interests against countervailing concerns, including the rights of criminal defendants to effective assistance of counsel, compulsory process, due process and confrontation, as well as the public's interest in minimizing Brady/Giglio violations. See Ramirez, 252 N.J. at 303 (balancing the competing interests); Scoles, 214 N.J. at 254-55 (same). Protective orders should not be broader than necessary to address legitimate confidentiality concerns. See Ramirez, 252 N.J. at 310 (instructing lower courts to consider whether there is a less restrictive protective order that would adequately address the confidentiality interest).

In this case, the IA records and information are presumptively confidential under the IAPP,[13] but the State cannot prove that the restrictions imposed by the protective orders – specifically those precluding the defense from sharing the information with other OPD employees and from using the evidence in other matters – are supported by good cause. The confidentiality concerns set forth by the State can be addressed by a less restrictive protective order and are outweighed by countervailing concerns.

To support its argument, the State first contends that the records are confidential under the IAPP and that officers have privacy interests in the records. But, as also discussed in Point I, the IAPP and the caselaw contemplate that the records are subject to disclosure in certain circumstances, specifically pursuant to court order and Brady/Giglio. See also Spinks v. Twp. of Clinton, 402 N.J. Super. 454, 457-64 (App. Div. 2008) (finding no good cause to seal IA records disclosed and used as evidence in a civil case, and explaining the internal-affairs statute, N.J.S.A. 40A:14-181, does not forbid disclosure or require the sealing of IA records filed as part of a court record in a court case and in fact permits disclosure upon court order). For this reason, officers cannot reasonably expect that such evidence will not

[13] Because the bare-bones disclosure letters contained minimal to no confidential information, the confidentiality interest as to the disclosure letters are very minimal to non-existent. The confidentiality interest in any underlying records would be greater.

be turned over to defense attorneys or defendants pursuant to Brady/Giglio. Likewise, officers cannot reasonably expect that other attorneys within the same firm will not use that same information to conduct "Giglio checks" or to procure evidence to which their clients are constitutionally entitled. The officers' sole legitimate interest is in preventing public disclosure, not in avoiding disclosure to the employees of the OPD or in other cases with the same officers. Therefore, there is no good cause for the prohibitions against sharing the information with other OPD employees or from using the evidence in other cases.[14]

The State's concern that officers will be harmed by the sharing and use of the evidence in other cases is also conclusory and unsubstantiated. The State asserted but did not adequately explain how the absence of such restrictions would unfairly harm officers. If an OPD attorney uses the disclosure in one case to seek disclosure in another case with the same officer,[15] and ultimately the IA complaint is deemed unfounded or does not constitute relevant impeachment evidence that case, it will not be admitted in evidence and the officer will not be harmed. See N.J.R.E. 401, 403. In the event a defense attorney is able to use the disclosure from the first case

[14] A less restrictive protective order could require that a copy of the protective order be included with the information anytime it is disclosed.

[15] A revised protective order could direct that these Giglio checks be done confidentially.

to obtain disclosure and impeach an officer in another case, any reputational "harm" to the officer is warranted. See Abel, Brady's Blind Spot, at 46 (opining that an officer's privacy interests are minimal or illegitimate in comparison with other privacy or confidentiality interests because an officer, as a public actor, should be accountable to the public).

The State also contends that certain sensitive information, such as the personal identifiers of complainants, witnesses and officers in pending IA cases, are included in the underlying IA files and that disclosure could therefore impair the integrity of the investigation, but such information can be redacted from the IA records or otherwise omitted from the disclosure, as appropriate.[16] See Rivera, 250 N.J. at 149-51 (deferring to the trial court on remand to "assess any potentially legitimate confidentiality concerns by reviewing the report in camera and making appropriate redactions," including certain personal identifiers and other personal or medical information). The defense only seeks impeachment evidence -- that which tends to undermine the credibility of the State's witness -- not necessarily other sensitive information included within the records. Because those confidentiality concerns can be minimized or eliminated with appropriate redactions, id., they do not provide

[16] The State discusses these concerns as reasons against disclosure, rather than as justifications for a protective order. (Pb 21-22) Although the burden is on the State to prove good cause for the protective order, the defense addresses this confidentiality concern for the sake of comprehensiveness.

good cause for precluding Giglio information from being shared with other attorneys in the office or from using the information in other cases.

In addition to the fact that any confidentiality concerns can be addressed by a less restrictive protective order, other considerations weigh heavily against or preclude the restrictions the State seeks.

First, the protective orders undermine the rights of criminal defendants to due process, to present a defense, effective assistance of counsel and confrontation. Defense attorneys, investigators, support staff and experts must be allowed to fully investigate and prepare a defense. See State v. Mingo, 77 N.J. 576, 581-82 (1978) ("To safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude."); State v. Nunez, 436 N.J. Super. 70, 74-75 (App. Div. 2014) ("A thorough defense investigation is also part of the right to counsel."); see also Scoles, 214 N.J. at 258 ("That right [to effective assistance of counsel] clearly extends to the assistance of experts to aid in the accused's defense."); State v. Bellucci, 81 N.J. 531 (1980) ("A defense attorney's representation must be untrammeled and unimpaired . . . ." (internal quotations and citations omitted)). Generally, individuals within the same law firm or public defender's office are permitted to share confidential information in order to provide that representation. See R.P.C. 1.6, cmt.5 ("Lawyers in a firm may, in the course of the firm's practice,

disclose to each other information relating to a client of the firm."); State v. Bell, 90 N.J. 163, 174 (1982) (acknowledging that members of the OPD generally share access to confidential client information); State v. Bellucci, 81 N.J. 531, 541 (1980) ("There is ready access to confidential information among members of a law firm.").

The protective orders unduly hamper the defense's representation by prohibiting defense counsel from discussing or sharing the evidence with other OPD employees and experts. Under the protective orders, defense counsel could not email the records or information relating to the records to a support staff member, ask an administrative assistant to make copies, have an investigator look into the allegations, ask another attorney to stand in on a case, or even share discovery or briefs with other OPD employees to collaborate without invoking the possibility of criminal sanctions for everyone involved. Furthermore, by precluding defense counsel from discussing the information with other OPD employees, the protective orders hinder defense counsel's ability to determine whether the State has turned over everything to which the client is entitled. Thus, an order precluding defense attorneys from sharing this information with other OPD employees violates the rights of criminal defendants to effective representation, present a defense, confrontation and due process. See United States v. Nobles, 422 U.S. 225, 237 (1975) ("Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal

theories and plan his strategy without undue and needless interference."); see also Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966) (noting the constitutional "requirement that the prosecution not frustrate the defense in the preparation of its case").

The provision of the protective orders that precludes defense attorneys from using the information in any other matter or case creates constitutional problems that may be even more alarming. The law precludes the State from actively interfering with a defense attorney's representation, such as by creating a conflict of interest that materially limits the defense attorney's representation. See State v. Fritz, 105 N.J. 42, 62 (1987) (noting that reversal is required where the State or court actively interferes with defense counsel's representation, such as where a trial court told defense counsel that his "future appointments to represent indigents would be jeopardized if he pressed too hard during trial" (citing Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985)); R.P.C. 1.7 (stating that an unlawful conflict exists where "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer"). The protective orders threaten defense attorneys with contempt of court for using the impeachment evidence in other matters or other cases, even though the same evidence may further or be critical to another client's defense. Under the proposed protective orders, defense attorneys

would be left with an untenable choice: either violate their constitutional and ethical obligations to their clients or violate the protective orders and potentially be held in contempt of court. See United States v. Levy, 25 F.3d 146, 156 (2d Cir. 1994) (explaining that a conflict of interest results when defense counsel has a competing personal interest in avoiding prosecution or consequences that may materially limit the attorney's representation). A protective order that creates such conflicts and materially limits a defense attorney's representation in this way cannot be sustained.

The protective orders are also contrary to the Rules of Professional Conduct. Rule of Professional Conduct 3.4 states that a lawyer shall not "unlawfully obstruct another party's access to evidence . . . having potential evidentiary value, or counsel or assist another person to do any such act," or "request a person other than a client to refrain from voluntarily giving relevant information to another party." R.P.C. 3.4(e)&(f). Because the protective orders prohibit defense counsel from sharing the evidence or using evidence in another case, even where the evidence is relevant or material to impeach the same officer, it violates both of these ethical rules.

Finally, unduly concealing Brady/Giglio material that establishes affirmative police misconduct is directly at odds with this State's public policy and increasing trend toward greater public transparency, police accountability, community trust in policing, and, ultimately, deterrence of such misconduct. See Higgs, 253 N.J. at 359 ("At a time when the Attorney General's Directives have signaled a massive shift in

policy regarding the confidentiality of internal affairs records and this Court has held that the general public, under certain circumstances, can obtain internal affairs files through the common law right of access, there is no logical reason why criminal defendants, whose life and liberty are at stake, should have less access to those records than the general public."); In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. at 495 (explaining, of the Attorney General's directive to publicly disclose major discipline, "[h]e acted to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the internal affairs process, and to prevent officers from evading the consequences of their misconduct"). Relatedly, precluding internal sharing of impeachment evidence exacerbates the risk of Brady/Giglio violations and undermines the public's interest in disclosure of Brady/Giglio material. See Jonathan Abel, Brady's Blind Spot, at 802-03 (describing how protective orders that prevent information sharing from case to case undermine Brady's requirement to disclose impeachment evidence). Thus, the proposed protective orders are contrary to the public interest in exposing police misconduct and Brady/Giglio violations.

This Court should find that the trial court properly found that the protective orders lacked good cause and were overbroad. Other courts have rejected protective orders that entirely preclude a party from sharing information and found more limited orders more appropriate. See McCready v. City of Chicago, No. 98-C-1613,

1999 WL 409935, at *1 (N.D. Ill. June 7, 1999) (permitting the plaintiff, who was suing the City of Chicago for police misconduct, to disclose police misconduct materials to attorneys who had pending cases or were preparing complaints against Chicago police officers and to criminal defense attorneys who "represent a defendant or defendants in a criminal case where he or she is either contemplating, in good faith, to litigate, or is litigating, on motions, at trial, on appeal, or for other collateral relief, the issue of police use of excessive force or other police misconduct[.]"); Escobar v. Foster, No. 99-C-4812, 2000 WL 631312, at *3 (N.D. Ill. May 16, 2000)[17] (permitting the plaintiffs to contact federal and state prosecutors to share activities of police officers that plaintiffs believed to be unlawful and potentially to share the protected materials with prosecutors so long as the prosecutors ask for the materials and acknowledge the protective order). On remand, the State can propose an amended protective or confidentiality order and the trial court can consider whether the new order continues to lack good cause or is overbroad. Any revised protective order should, at minimum, allow: (1) defense counsel to share the evidence with other employees of the OPD and experts; and (2) to allow OPD attorneys handling cases with the same officers to use the Giglio disclosure to seek discovery and admission of the evidence in other matters.

[17] Both of the unpublished cases in this paragraph are cited in accordance with the court rules. (Da 1-6)

CONCLUSION

This Court should find that the trial court properly found that the State's disclosure letters did not satisfy the State's discovery obligations and that the protective orders lacked good cause and were overbroad. Accordingly, the trial court's orders should be affirmed.

Respectfully submitted,

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Dated: December 29, 2025

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-000223-25T3

STATE OF NEW JERSEY, Plaintiff-Appellant, v. DEXTER L. HUBBARD, Defendant-Respondent.	On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Passaic County. Indictment Nos. 25-02-0111-I, 24-12-0898-I, 24-02-0071-I, 23-04-0311-I, 25-01-0065-I, 24-12-0864-I, 24-09-0678-I Sat Below: Hon. Sohail Mohammed, P.J.Cr. Criminal Action (Consolidated*)

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*Caption Continued on Following Pages

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

GUSTAVO ARENAS,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

KYANAZIA DOBSON,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

KAHDAR HOLMES,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MARCUS MORALES,

Defendant-Respondent.

STATE OF NEW JERSEY,

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PRELIMINARY STATEMENT

For many years, the State of New Jersey has provided a mechanism for individuals to lodge complaints about law enforcement officers. Subject to important confidentiality constraints, the complaints can then be investigated, and sustained allegations can lead to disciplinary actions. By design, this mechanism makes it relatively simple to lodge a complaint, and the system even allows complaints to be made anonymously. One predictable consequence of this, however, is that the system yields numerous complaints that are ultimately found not to be meritorious.

This appeal concerns misconduct complaints that have been lodged but have not yet been resolved, and that relate to a law enforcement officer who might be a witness in a criminal case. The trial court, taking a particularly expansive view of the State's disclosure obligations under the Brady/Giglio line of cases, adopted a categorical rule that would require the State to disclose the substance of all misconduct allegations under active internal-affairs (IA) review when those allegations bear upon truthfulness, bias, or integrity—regardless of the allegations' relevance, credibility, or materiality, and regardless of any other case-specific factors or confidentiality concerns. And to reach that broad conclusion, the court relied on an Attorney General Directive, which the court claimed supported its understanding of the State's disclosure obligations.

The Attorney General submits this brief to explain that this was error, and that this Court should reverse. As a threshold matter, Attorney General Directive No. 2019-6 (Directive) expressly states that it creates no substantive rights enforceable by third parties. So, the trial court should not have relied on the Directive as an independent basis to compel disclosure. Even putting that aside, the trial court also misread the Directive. The Directive's plain text calls for a case-by-case assessment of IA allegations and material, rather than the trial court's categorical approach. The Directive even specifically cautions that the mere existence of an allegation—including one involving truthfulness, bias, or integrity—does not automatically warrant disclosure, especially when the allegation is speculative or incomplete. The trial court failed to grapple with these clear aspects of the Directive. Instead, it appears to have been confused by a section of the Directive about gathering potential impeachment material for evaluation by a prosecutor—a section that does not even address the actual disclosure obligation itself.

The trial court also misapplied governing case law. Neither the U.S. Supreme Court's decisions in Brady and Giglio, nor any Court Rule or precedent, requires the automatic disclosure of preliminary or unverified accusations that have not yet been investigated or tested for credibility.

Meanwhile, a wealth of precedent shows why, at least in some circumstances, such information need not (and should not) be disclosed.

That point is especially true considering the State's compelling interests in maintaining the confidentiality of IA investigations, as embodied within the State's Internal Affairs Policy and Procedures (IAPP), which carries the force of law. Confidentiality encourages reporting, protects the integrity of investigations, and prevents reputational harm to officers from allegations that may ultimately be unfounded. Such confidentiality should not be breached categorically, and should instead be an important factor in how courts evaluate disclosure obligations in these circumstances.

To be clear, criminal defendants must receive material impeachment evidence where constitutionally required. But in applying that principle to the cases before them, courts should use a tailored, case-specific approach. Such an approach, akin to the basic framework discussed in State v. Higgs, 253 N.J. 333 (2023), protects defendants' rights while preserving the integrity of ongoing IA investigations. And such a framework would reaffirm that disclosure of pending IA allegations is neither automatic nor categorical, and would also clarify the safeguards, timing considerations, and in-camera procedures that should govern these requests moving forward.

PROCEDURAL HISTORY & STATEMENT OF FACTS[1]

The Attorney General incorporates and largely relies on the procedural history and statement of facts recited in the State's November 5, 2025, Appellant Brief, with the following additions.

A. Attorney General Law Enforcement Directive No. 2019-6.

The Criminal Justice Act of 1970 authorizes the Attorney General to adopt guidelines, directives, and policies to ensure the uniform and efficient enforcement of criminal law and the administration of criminal justice in the State. N.J.S.A. 52:17B-97 to -117; see also N.J.S.A. 40A:14-181; Bulur v. New Jersey Off. of Att'y Gen., 261 N.J. 275, 287-88 (2025). Exercising that power, in 2019 the Attorney General issued Law Enforcement Directive No. 2019-6 to all County Prosecutors. Off. of the Att'y Gen. (OAG), Law Enf't Directive No. 2019-6 (Dec. 4, 2019). The Directive was designed simply to guide prosecutors' conduct, and it does not create any substantive rights enforceable by third parties.[2] See id. at 9.

The Directive's express purpose is to "ensure compliance" with the U.S. Supreme Court's decisions in Brady v. Maryland and United States v. Giglio,

[1] These related sections are combined for the Court's convenience.

[2] At oral argument below, counsel for Defendants correctly observed that the Directive "is not binding on a Court" and could not be enforced or relied on to

and to safeguard "the integrity of criminal prosecutions" by requiring each County Prosecutor's Office to adopt "written guidelines" that "incorporat[e] the best practices and procedures." Id. at 1-2. To that end, the Directive sets out specific best practices to be followed, and "direct[s] all County Prosecutors to implement a policy ... consistent with th[e] Directive to ensure compliance with Brady and Giglio" through the collection and review of "potential" Brady/Giglio information. Id. at 2; see also id. at 6 ("Each county's policy shall establish and maintain procedures for prosecutors to gather and review potential Brady and Giglio information prior to any plea offer, testimonial hearing, or trial.").

Most relevant here, the Directive explains that "there are three separate and distinct processes" prosecutors need to consider when complying with their disclosure obligations. First, prosecutors should "gather[] potential Brady and Giglio information … for the prosecutor's review only." Id. at 6 (emphasis in original). Second, after the prosecutor has finished his or her review and identified the disclosable material, the prosecutor should disclose that material to the defense or the court. Id. at 6-8. Third and finally, once a criminal matter advances to trial, the court must determine whether Brady/Giglio material is admissible. Ibid. The Directive emphasizes that "[g]athering" potential

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determine the obligations of the State. See 1T15-4 to -8; 1T17-11 to -14 ("I understand that the A-G Directive … is not enforceable by other parties.").

Brady/Giglio material for purposes of prosecutorial review "does not mean that the information will be disclosed to the defense or the court," nor does it "mean that it will be admitted at trial." Id. at 6; see also id. at 3 (observing that after gathering potential Brady/Giglio material, prosecutor must make the "decision whether to disclose").

Separately, the Directive provides some examples of Brady materials "for guidance," such as evidence linking a State witness to a specific crime charged, and prior inconsistent and exculpatory statements made by a State witness. Id. at 3-4. The Directive also has a section addressing Giglio materials, and directs County Prosecutors to use a specific "non-exhaustive list of potential Giglio material as it relates to civilian and investigative State witnesses for guidance on the type of material that must be gathered," while reiterating that merely because such information is gathered "does not necessarily mean the information will be disclosed." Id. at 4 (emphasis added). One type of "potential Giglio material" that must be "gathered" consists of "allegation[s] of misconduct bearing upon truthfulness, bias, or integrity" that concern an investigative employee and "that [are] the subject of a pending investigation." Id. at 4-5.

The Directive further states that if it is ultimately determined that the prosecutor needs to disclose a particular piece of evidence, whether "to the

defense directly or after the court orders disclosure," the prosecutor must "seek redactions to protect the privacy interests of third parties and investigative personnel," and the prosecutor must "also seek protective orders to limit the use and further dissemination of the material." Id. at 8.

B. The IAPP.

Since the early 1990s, complaints about law enforcement officers in New Jersey have been governed by some form of the IAPP. See In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 483 (2021) (In re Directives). As originally issued by Attorney General Robert Del Tufo in 1991, the IAPP "established a comprehensive set of procedures to address allegations of officer misconduct or the improper delivery of police services." Ibid. (internal quotation marks omitted). Under the Law Enforcement Officers' Protection Act of 1996, the IAPP now establishes statewide rules governing internal affairs and carries the force of law. See id. at 483, 488; see also N.J.S.A. 40A:14-181. The current version of the IAPP explains that the policy seeks "to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services, and assure the people of New Jersey that complaints of police misconduct are properly addressed." OAG, Internal Affairs Policy & Procedures § 1.0.1 (Nov. 2022) (IAPP).

Relevant here, the IAPP requires each agency governed by it to "accept reports of officer misconduct from any person, including anonymous sources, at any time." Id. § 1.0.9. The IAPP acknowledges that by making it quite easy to lodge misconduct complaints, the process will yield both legitimate complaints and complaints that are "contrived and maliciously pursued, often with the intent to mitigate or neutralize the officer's legal action taken against the complainant." Id. § 5.1.6. The IAPP nonetheless establishes as a general policy that a law enforcement agency should "thoroughly, objectively, and promptly investigate all allegations against its officers." Id. § 1.0.9. Each investigation may result in one of four findings: sustained; unfounded; exonerated; or not sustained. Id. § 2.2.3.

The IAPP further requires law enforcement agencies to report certain IA information to the County Prosecutor, who must then determine whether disclosure is appropriate in a particular criminal case. Id. § 9.10. The IAPP acknowledges that defendants "may be entitled" to information arising from IA investigations, such as information "concerning the credibility of prosecution witnesses, including police officers." Id. § 9.10.3. For that reason, the IAPP stresses that IA investigators must "assist prosecutors with their legal duty to review and, if necessary, disclose evidence" as required. Ibid. (citing Directive No. 2019-6).

The IAPP also has important confidentiality provisions. It recognizes that the "nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." Id. § 9.6.1 (emphasis added). To ensure that confidentiality, the IAPP requires that "[t]he contents of an internal investigation case file, including the original complaint, ... be retained in the internal affairs function and clearly marked as confidential." Ibid. Even when a law enforcement executive may believe there is "good cause" for disclosure, the IAPP provides strict protocols, making clear that access should be granted "sparingly, given the purpose of the internal affairs process and the nature of many of the allegations against officers." Id. § 9.6.3. The IAPP also underlines that it is ultimately for prosecutors, on a case-by-case basis, to "conduct an independent review of the information provided to determine whether it needs to be disclosed." Id. § 9.10.4.

C. This Appeal.

In each of these consolidated criminal cases, the State sent post-indictment disclosure letters to the defendants. Those letters stated that it had come to the attention of the Passaic County Prosecutor's Office that certain specified members of law enforcement "have an allegation of misconduct that bears upon their truthfulness, bias, or integrity that is the subject of a pending investigation." Pa15, Pa29, Pa34, Pa45, Pa65-66, Pa80, Pa91. The State's

position was that if "a sustained finding" eventually occurs, "full disclosure with supporting documentation will be made at that time." Pa96.

In response, and without awaiting the outcome of the investigations, Defendants moved both to vacate the protective orders under which those disclosure letters had been sent, and to compel the State to disclose the substance of the allegations that were pending investigation. Pa16-17, Pa30, Pa35, Pa46, Pa67-68, Pa81-82, Pa92. Defendants argued that the State was required to disclose the substance of all allegations, even "without a prerequisite sustained finding of misconduct." Pa96.

The trial court granted Defendants' motions. Pa93-108. The court found that Directive No. 2019-6 "is unambiguous" that "[a]ny 'allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation' is Giglio material," and the substance of such allegation must be disclosed. Pa99-100. The court further found that "[d]isclosure is required even when an investigation is not sustained or would be excluded at trial," dismissing the State's concerns about the need for confidentiality of pending internal-affairs investigations as "generic." Pa100-02. In the court's view, "requiring disclosure only upon a 'sustained' [internal-affairs] finding would improperly delay and limit" the Defendants' access. Pa101. The court

also deemed the protective orders under which the disclosure letters had been sent "to be categorical and overbroad." Pa102.

The trial court thus required the State to "disclose to the defense, under a revised and appropriately tailored protective order, substantive information about the nature and context of the pending [internal-affairs] allegations." Pa102-03. The court also held that Defendants could "use the disclosed … material intra-office, with experts, and in related cases involving the same witness and defendant, subject to any … tailored restrictions." Pa108. The trial court nonetheless stayed its decision to permit the State to move for leave to appeal. Pa106, Pa109-10. This Court granted leave.

STANDARD OF REVIEW

Although a discovery order is generally reviewable for an abuse of discretion, see State v. Broom-Smith, 406 N.J. Super. 228, 239 (App. Div. 2009), where, as here, the issue turns on the interpretation of the law and the legal consequences that flow from established facts, a trial court's ruling is subject to de novo review. See, e.g., In re Subpoena Duces Tecum on Custodian of Recs., Crim. Div. Manager, 214 N.J. 147, 163 (2013); State v. Lora, 465 N.J. Super. 477, 492 (App. Div. 2020), certif. denied, 246 N.J. 224 (2021).

ARGUMENT

POINT I

THERE IS NO BASIS FOR AUTOMATIC DISCOVERY OF PENDING INVESTIGATIONS.

The trial court's order was founded on a misunderstanding of the controlling legal framework. By concluding that the State must automatically disclose thus-far-unsustained allegations of misconduct bearing on truthfulness, bias, or integrity—even though they are subject to pending IA investigations—the court missed the critical distinction between gathering potential impeachment material and determining whether disclosure is in fact legally required. Neither the Directive, Brady/Giglio caselaw, nor any statute or Rule imposes a blanket obligation on prosecutors to turn over preliminary, untested, and speculative accusations that may be irrelevant to a criminal matter. Yet the trial court's ruling effectively presumes that every allegation bearing upon truthfulness, bias, or integrity that is under active IA review (no matter how unrelated or uncredible) is necessarily material information that must be disclosed to a criminal defendant. The court misread the Directive, and erred in disregarding the case-specific assessment that has long been required.

Indeed, while Directive No. 2019-6 requires prosecutors to gather a broad range of potential impeachment information, it simultaneously makes clear that disclosure turns on a contextual, case-by-case analysis grounded in "the

circumstances of the case" and established "case law and court rules." Nor does precedent support the sweeping disclosure rule adopted by the trial court here. Instead, courts frequently hold that pending, unsubstantiated allegations (which by definition are preliminary and unverified) are not automatically subject to disclosure. And New Jersey law likewise rejects unfettered access to IA records, recognizing both the State's compelling interest in preserving investigative confidentiality, and the need for trial courts to conduct controlled in-camera review before ordering disclosure.

A. The AG Directive Does Not Require Automatic Disclosure Of Pending, Unsustained Allegations.

The trial court's reliance on Directive No. 2019-6 was misplaced. In the court's view, that Directive mandates automatic disclosure of all pending, unsustained misconduct allegations bearing on an officer's truthfulness, bias, or integrity whenever that officer is involved in a criminal case. See Pa99-100 (holding that the Directive is "unambiguous" and requires disclosure of "[a]ny 'allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation'"). That reading is contrary both to the Attorney General's interpretation and to the Directive's plain terms.

As an initial matter, the trial court erred by treating the Directive as an enforceable source of discovery rights. The Directive expressly provides that "[n]othing" in it "shall be construed in any way to create any substantive right

that may be enforced by any third party." Directive 2019-6 at 9. Our courts likewise have long recognized that Attorney General directives and guidelines cannot themselves define the metes and bounds of constitutional obligations, even as they carry the force of law for law enforcement agencies in the State. See, e.g., State v. Henderson, 208 N.J. 208, 278 (2011); State v. Bruzzese, 94 N.J. 210, 228 (1983). Defendants recognized as much below. See supra at 4 n.2. So even if the Directive required automatic disclosure of pending misconduct allegations related to truthfulness, bias, or integrity—which it does not—criminal defendants could not properly invoke it to compel disclosure.

Setting aside its non-enforceability, the Directive's text demonstrates that it promotes the broad collection of potential Brady/Giglio material by prosecutors (including allegations of misconduct), see Directive No. 2019-6 at 4-7, for the purpose of enabling the prosecutor to "review the potential Brady and Giglio material" for possible disclosure, id. at 7—not reflexive disclosure of any particular category of information. In conducting that review, the Directive plainly requires a case-by-case assessment rather than imposing a categorial rule. See, e.g., id. at 3 ("It is … the prosecutor's responsibility to decide, based on their professional judgment, what evidence is covered by Brady and Giglio and must be disclosed to the defendant."). Indeed, that Directive specifically clarifies that the "require[d] analysis" must consider "the

circumstances of the case" along with "relevant case law and court rules." Id. at 1, 7. It contemplates that this review by the prosecutor can lead to "three possible outcomes: (1) no disclosure; (2) disclosure will be made to the defense; or (3) disclosure will be made to the court"—making clear none of these three results could be the only permissible result under the Directive. Id. at 8.

The need for that case-by-case assessment is also underscored by the provisions specific to Giglio material. The Directive provides, "for guidance," a "non-exhaustive list of potential Giglio material" that "must be gathered" as it "relates to civilian and investigative State witnesses." Id. at 4 (emphases added). The Directive then expressly states that inclusion on this list "does not necessarily mean the information will be disclosed," only that it must be "gathered." Ibid. And the list includes nine different categories of information that should be gathered about investigative employees, one of which is "allegation[s] of misconduct bearing upon truthfulness, bias, or integrity that [are] the subject of a pending investigation." Id. at 4-6.

Other parts of the Directive underscore the idea that the mere existence of pending misconduct allegations, without more, should be considered on a case-by-case basis rather than subject to an automatic disclosure rule. For instance, the Directive sets out, as an entirely separate category of information to be gathered, various "sustained finding[s]" about an investigative employee (such

as that they filed a false report or demonstrated lack of candor).[3] Id. at 5-6. By distinguishing sustained findings from mere pending allegations, the Directive reinforces that the two are not equivalent, and that any case-specific analysis would need to account for that relevant difference. Similarly, the Directive warns that even when a decision to disclose potential Giglio information is made in one case, that decision "does not dictate the decision to disclose in subsequent cases," which further reinforces the case-by-case nature of this review. Id. at 8. The Directive then adds that "because a Giglio determination requires a case-by-case determination, promulgating a 'do-not-call' list of individuals" has "not [been] a preferred means of complying with Brady and Giglio obligations" and has been "avoided." Id. at 8-9.

The trial court's reading also cannot be reconciled with the Directive's explicit instruction that "[a]llegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee … generally are not considered to be potential impeachment information." Id. at 3. If a prosecutor is not required to disclose misconduct allegations after an investigation has

[3] The Directive defines a "sustained finding" as a "finding where a preponderance of the evidence shows an officer violated," among other things, the law, regulation, directive, or standard operating procedure, "following the last supervisory review of the incident(s) during the internal affairs process or a ruling by a hearing office, arbitration, Administrative Law Judge, or the Superior Court." Id. at 2-3.

concluded they are unfounded or unsustained, there is no principled reason to automatically require disclosure of the same allegations before the investigation is complete and the allegations' credibility has been fully assessed. As our Supreme Court has advised in other contexts, the "need for confidentiality" may in fact be "greater in pending matters than in closed cases." Keddie v. Rutgers, 148 N.J. 36, 54 (1997). And in both situations, the allegations have not been sustained or proven credible, so one certainly cannot assume across the board that they are Brady/Giglio material affecting the employee's credibility.

The plain text of the Directive thus makes clear that a case-by-case assessment is needed, and that should resolve the matter. But at a minimum, this Court should accord substantial deference to the Attorney General's interpretation of his own order. See, e.g., Gormley v. Lan, 88 N.J. 26, 38 (1981) ("In evaluating the statement drafted by the Attorney General and issued by the Secretary of State we should accord great deference to their determination …."). And the trial court's reading certainly cannot overcome that deference.

In short, the trial court erred twice over: first, by treating the Directive as an enforceable source of Defendants' rights, contrary to its non-enforceability clause; and second, by adopting an interpretation of the Directive that conflicts with both its plain language and salutary purpose. The Directive does not "unambiguous[ly]" require the automatic "disclosure" of "[a]ny 'allegation of

misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation,'" Pa99-100, and the trial court was wrong to hold otherwise.

B. Precedent Does Not Require Automatic Disclosure Of Pending, Unsustained Allegations.

In Brady v. Maryland, the U.S. Supreme Court held that the prosecution must disclose "evidence favorable to an accused … where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). Subsequently, in Giglio v. United States, the Court extended Brady to impeachment evidence of prosecution witnesses, holding that "when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within" the Brady rule. 405 U.S. 150, 153-54 (1972) (cleaned up). Rule 3:13-3(b)(1) currently "codifies the standards" in Brady and Giglio. Higgs, 253 N.J. at 354-55.

These authorities safeguard important constitutional interests. But they also have important limits—one of which is that they do not extend to speculative and immaterial allegations. Thus, the U.S. Supreme Court has long recognized that prosecutors have no "obligation to communicate preliminary, challenged, or speculative information." United States v. Agurs, 427 U.S. 97, 109 n.16 (1976) (citation omitted). And federal appellate courts have repeatedly rejected claims that Brady/Giglio necessarily requires disclosure of unverified,

unsubstantiated, or otherwise unreliable accusations connected to an ongoing investigation. See, e.g., Gumm v. Mitchell, 775 F.3d 345, 364 (6th Cir. 2014) ("Prosecutors are not necessarily required to disclose every stray lead and anonymous tip[.]"); Downs v. Hoyt, 232 F.3d 1031, 1038 (9th Cir. 2000) ("Brady does not require a prosecutor to turn over files reflecting [investigatory] leads and ongoing investigations where no exonerating or impeaching evidence has turned up."); United States v. Locascio, 6 F.3d 924, 948-49 (2d Cir. 1993) (affirming a district court's conclusion that prosecutors did not violate Brady, in part because the reports they allegedly withheld contained "untrustworthy and unsubstantiated" allegations about a State witness).

Under that principle, it is easy to see why an unsustained, still-to-be investigated allegation about a law enforcement witness may not be Brady/Giglio material. To give just a few (non-exhaustive) examples, the unsustained allegations may be completely contrary to irrefutable evidence (e.g., video or body camera evidence); the allegations may be patently frivolous or clearly lacking in merit; there may be other reasons to doubt that the allegations will ever be substantiated; and there may be case-specific reasons why the allegations are not material in light of the law enforcement witness's particular role at trial relative to the crime charged. Moreover, as the State notes, a minority of IA complaints lead to a sustained finding, and many of those clearly

do not involve Giglio material, such as those related to violations of internal regulations as simple as wearing the wrong uniform, untidiness, and tardiness. IAPP § 2.2.2(i). So, there is a very real possibility that any given allegation that has not yet been fully investigated will ultimately prove unsubstantiated, or irrelevant to the criminal case. At the least, because unsubstantiated allegations are inherently of uncertain veracity, there is no basis to presume that they are automatically all accurate (or even likely to be accurate), and thus to treat them as such for purposes of Brady/Giglio.

That understanding accords with how federal courts have treated Brady/Giglio claims (often raised in motions for a new trial) premised on the government's failure to disclose that a witness was the subject of a pending investigation. Although the factual contexts vary, these decisions hold that such information is frequently immaterial, did not have to be disclosed, and would not have altered the outcome had it been disclosed. See, e.g., United States v. Souffront, 338 F.3d 809, 823 (7th Cir. 2003) (new trial not warranted where witness "was being investigated for allegedly stealing narcotics," and holding that "[t]he failure to disclose untrustworthy and unsubstantiated allegations against a government witness is not a Brady violation"); United States v. Diaz, 922 F.2d 998, 1006 (2d Cir. 1990) (no Brady violation where the Government did not disclose that a government-paid informant "had stolen approximately

$18,000 … during his work in another case" because, though the Government "may have had suspicions, it did not have knowledge … until after the trial had concluded"); United States v. Hill, 483 F. App'x 195, 196-97 (6th Cir. 2012) (new trial not warranted under Giglio when the Government did not disclose that a detective who testified at trial was being investigated for "misus[ing] the resources of a government facility to harass his wife," because such information was not materially favorable under the circumstances); United States v. Trapp, 241 F. App'x 148, 152 (4th Cir. 2007) (no Brady/Giglio violation where the Government did not disclose that an officer was being investigated "for a misdemeanor offense" because the defendant "failed to demonstrate how the information was material and favorable," and "speculation" that an officer who broke "the law in one instance … might also be willing to break the law in other instances" was "not enough"); see also United States v. Bulger, 816 F.3d 137 (1st Cir. 2016) (finding no abuse of discretion where trial court did not require prosecutor to disclose anonymous letter alleging misconduct, both during the active investigation or after investigation discredited allegations).

Tellingly, the trial court did not point to a single precedent—in New Jersey or elsewhere—holding that unsustained misconduct allegations subject to pending IA investigations are automatically Brady/Giglio material that must be disclosed to a criminal defendant. Instead, the trial court essentially

concluded that because unsubstantiated allegations might be relevant to guilt or innocence in particular circumstances, a blanket rule requiring some form of disclosure for all pending allegations involving truthfulness, bias, or integrity was appropriate. But that does not follow, as the mere fact that disclosure may be needed in some circumstances does not prove that it is needed in all circumstances, particularly in view of the countervailing interests in maintaining the confidentiality of allegations that may end up proving frivolous. Cf. State v. Chambers, 252 N.J. 561, 571 (2023) (just because some criminal defendants may be constitutionally entitled to discovery of sexual-assault victims' pre-incident mental-health records under certain circumstances does not entitle all or even most defendants to these materials). And the trial court gave no reason to think otherwise.

C. The Trial Court Disregarded The Countervailing Confidentiality Interests At Stake.

The trial judge's ruling is also problematic because it disregards the important interest in preserving the confidentiality of IA investigations, as embodied in the IAPP. As noted above, the IAPP currently establishes statewide rules governing internal affairs and carries the force of law. See In re Directives, 246 N.J. at 483; N.J.S.A. 40A:14-181; supra at 7. And in its current form, the IAPP reflects a deliberate balance: it ensures that prosecutors can satisfy their disclosure obligations while safeguarding the IA process and those who

participate in it. The trial court's order disrupts that balance because it fails to meaningfully consider the State's compelling interest in preserving the confidentiality of IA investigations, especially pending investigations and ultimately unsustained allegations.

That important balance can be seen in the IAPP's confidentiality provisions. The IAPP expressly recognizes that the "nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." IAPP § 9.6.1 (emphasis added). The IAPP also requires that "[t]he contents of an internal investigation case file, including the original complaint, ... be retained in the internal affairs function and clearly marked as confidential." Ibid. Even when a law enforcement executive may believe there is "good cause" for disclosure, the IAPP provides strict protocols, making clear that access should be granted "sparingly, given the purpose of the internal affairs process and the nature of many of the allegations against officers." Id. § 9.6.3. And the IAPP expressly recognizes that it is ultimately for prosecutors, on a case-by-case basis, to "conduct an independent review of the information provided to determine whether it needs to be disclosed," id. § 9.10.4, which provides yet another opportunity to ensure that confidentiality needs are properly accounted for.

These confidentiality protections serve a range of compelling and well-established interests. They protect the identities of those who report and witness misconduct; they ensure that complainants and witnesses can cooperate without fearing that their identities or allegations might be disclosed; they guard the sensitive personal information that IA files often contain; and they shelter officers from the reputational harm that can result from the release of allegations that are unsubstantiated, unfounded, or still under investigation. And our courts have consistently recognized the importance of these interests, emphasizing that premature or unwarranted disclosure can undermine the IA process, chill cooperation, and compromise the very system designed to detect and remedy misconduct. See, e.g., Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 147 (2022); Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 106 (2020).

Rivera underscores the interest in maintaining the confidentiality of pending IA investigations. While the Court's primary holding was that IA reports could be disclosed under the common law right of access, 250 N.J. at 149, the Court emphasized that, before any such disclosure, trial courts must "balanc[e] the public interest and the need for confidentiality" to determine if disclosure should occur. Id. at 146-47. And while the Court held that the so-called Loigman factors were "not a complete list of relevant considerations," it

still affirmed the importance of this "side of the balancing test," observing that "[c]onfidentiality in internal investigations" is "important … to encourage witnesses to come forward and cooperate; to protect personal information about witnesses, victims, the subject of an investigation, and others; and to avoid impairing the internal affairs process, among other reasons." Id. at 147. On the other side of the ledger, meanwhile, the Court specifically stressed that "[u]nsubstantiated or frivolous allegations of misconduct present a less compelling basis for disclosure." Id. at 148.

Our Supreme Court's recent decision in Higgs is also illustrative. There, the Court applied Brady/Giglio to determine whether the State is required to disclose "police internal affairs records to a criminal defendant in pretrial discovery." 253 N.J. at 355. Although the Court noted that the "Attorney General's Directives have signaled a … shift in policy regarding the confidentiality of internal affairs records," and found that "defendants must be allowed, under certain circumstances, to access documents in law enforcement's internal affairs files"—"consistent with the State's obligation to produce exculpatory and impeachment evidence"—the Court did not adopt an automatic disclosure rule.[4] Id. at 357-59. To the contrary, the Court rejected the idea that

[4] The "shift" referenced by the New Jersey Supreme Court relates to a pair of Attorney General Directives, No. 2020-5 and No. 2020-6, which allow for the public disclosure of the names of officers who are found to have committed

"defendants should have unbridled access to internal affairs records." Id. at 357-58. Instead, "[t]o appropriately balance the important interests involved," the Court adopted a careful procedure under which a defendant seeking IA discovery must first move for in-camera review, identifying "the specific category of information" and its relevance to the case. Id. at 358. General allegations are insufficient, and such a motion "should not be a fishing expedition into the disciplinary records of law enforcement." Ibid. And even when a court allows "access to the relevant portion of the internal affairs file," and even if there is evidence in the file "relevant to the case," the trial court "must balance its relevance against potential undue prejudice." Id. at 359-60. That bolsters the importance of confidentiality in IA files as a countervailing interest, and the unavailability of automatic disclosure of pending, unsubstantiated allegations in this context. Rather, where a party seeks to pierce the confidentiality of these materials, the proper process weighs the interests in

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serious disciplinary violations—i.e., serious and substantiated allegations. See Higgs, 253 N.J. at 356-57. These two directives have little relevance to the issues in the present matter, which concern unresolved complaints of varying seriousness. These 2020 directives also expressly acknowledge all the "good reasons why internal affairs records are not generally disclosed," namely, "the need to protect those who report and witness police misconduct," and the fact that most complaints "are ultimately determined to be unsubstantiated or unfounded." Directive No. 2020-5 at 1. And as discussed above, Directive No. 2019-6 directly addresses the relevant circumstances and makes clear that automatic disclosure of misconduct allegations is improper.

confidentiality against the specific need for disclosure as applied to that case and the specific materials at issue. See ibid.; Rivera, 250 N.J. at 147-48.

The trial court's order failed to give adequate weight to the confidentiality side of the ledger—and, even worse, as to pending allegations that have not been (and may never be) substantiated. It categorically requires the State to make automatic disclosures to the defense of significant amounts of "substantive information about the nature and context of the pending" IA allegations. Pa102. And while the court allowed the State to make some redactions "for privacy or safety," and kept open the possibility a protective order could apply in some form, the court still required the State to provide "sufficient detail for the defense to assess relevance and materiality." Pa102-03. Such a categorical approach is in deep tension with the interests embodied by the IAPP, as it essentially guarantees that the IAPP's confidentiality promises will be breached through disclosure without regard for whether there is a case-specific need for such a disclosure. A more case-specific approach, by contrast, would much better ensure that confidential IAPP information is disclosed only to the extent necessary to comply with the State's disclosure obligations.

POINT II

CLEAR SAFEGUARDS AND PROCEDURES ARE WARRANTED IN THIS CONTEXT.

As discussed above, the trial court erred in ordering the State to automatically disclose allegations of misconduct bearing on truthfulness, bias, or integrity, that are subject to pending IA affairs investigations. That order is untethered to Directive 2019-6, precedent applying Brady and Giglio, and the important confidentiality interests embodied in the IAPP. To provide the guidance needed and promote consistency in future cases, the Attorney General respectfully urges this Court to clarify the procedures and safeguards that should apply in these and analogous circumstances. To that end, the Attorney General suggests the following framework.

First, when, as here, the prosecution notifies a criminal defendant that a potential government witness is the subject of a pending IA allegation that concerns truthfulness, bias, or integrity, or any other IA allegation that would otherwise merit disclosure if sustained (and the prosecution further acknowledges that disclosure will occur if the allegation is sustained), but the defendant nevertheless insists on immediate disclosure, the defendant should be required to file a motion with the trial court requesting in-camera review. In that motion, the defendant must, at a minimum, identify the information sought, explain its relevance to the defense, demonstrate why that relevance overcomes

the State's confidentiality interests in thus-far-unsubstantiated IA records, and show why disclosure cannot await the investigation's conclusion. This procedure would be akin to the procedure established by our Supreme Court in Higgs, which gave the defense the initial burden to demonstrate need and relevance before IA information can be reviewed in-camera for potential disclosure. See Higgs, 253 N.J. at 358 ("Going forward, a defendant who seeks discovery of information from an internal affairs file must first file a motion with the trial court requesting an in-camera review of that file."). Such a process ensures a trial court does not become a conduit for a "fishing expedition" into sensitive IA information. Ibid.

Second, in deciding such a motion, the trial court should first assess the timing of the request and determine whether immediate disclosure of untested allegations is in fact necessary, or whether a final decision on disclosure can be deferred until the investigation is completed. This threshold step is essential because premature disclosure of pending, unsustained allegations can compromise the integrity of ongoing investigations, risk unfair reputational harm to officers later cleared, chill candid reporting and discipline, and undermine the balance struck by policy and precedent between defendants' rights and legitimate law enforcement interests. See supra at 24-27. Disclosure during an active investigation creates concrete risks: witnesses may be exposed

to the statements, accurate or not, of other witnesses; may learn of the existence or nonexistence of evidence; or may be subject to intimidation by third parties. Just as troubling, premature disclosure may deter complainants and witnesses from coming forward at all. Premature disclosure can also unfairly tarnish the reputation of investigative employees who have not yet had an opportunity to respond to allegations and who may ultimately be cleared. These dangers should never be ignored or minimized, because they erode the foundations of the IA system and subvert the ultimate quest for truth, fairness, and accountability.

In practice, moreover, IA investigations often conclude far faster than most criminal cases and are likely to be completed before trial, eliminating the need to rule on untested allegations. See IAPP § 6.1.2 ("Most internal affairs complaints are straightforward, and most of these routine complaints can be investigated and resolved quickly. In many cases, an internal affairs investigation will take no more than 45 days from the receipt of the complaint to the filing of disciplinary charges."); id. § 6.1.6 (explaining that it will be a "rare" case where a decision on filing disciplinary charges has not been made within 180 days from complaint filing, and providing for additional process and authority for County Prosecutor when that happens); see also N.J.S.A. 40A:14-147 (requiring certain complaints generally to be filed "no later than the 45th

day after the date on which the person filing the complaint obtained sufficient information to" do so, subject to exceptions).

Under this framework, before the court reviews the substance of any misconduct allegations in camera, the court would thus first need to evaluate the propriety of immediate disclosure. And to do that, the court would assess (1) whether the case is scheduled for trial or likely to be scheduled soon; (2) whether the IA investigation is already underway and, if known, when it is expected to conclude; (3) whether the investigation is likely to end before trial; and (4) whether the defendant has demanded a speedy trial and would be prejudiced by a brief delay to allow the investigation to proceed until completion. Only if the court finds that the defendant would be prejudiced absent immediate disclosure—and that this need outweighs the State's confidentiality interests—should the court proceed further.[5]

Third, <u>if</u> the court finds that immediate disclosure could be potentially warranted due to the impending nature of trial and case-specific prejudice that would result to the defendant from a brief delay to await the outcome of the

[5] If a trial judge denies a defendant's motion for immediate disclosure of an allegation of misconduct that is the subject of a pending investigation, based on a finding that immediate disclosure is unnecessary to prevent prejudice to the defense, the defendant could of course move for reconsideration if there is a material change of circumstances, such as the scheduling of a trial date.

investigation, the court should consider whether, under the totality of the circumstances, the allegations sought are sufficiently substantial to the case to warrant in-camera review and potential disclosure before the IA investigation has concluded. Relevant considerations include: (1) whether the State intends to call the witness to testify; (2) whether the witness, if called, will testify as to a material matter in actual dispute; (3) whether any other witness is available and expected to provide the same or similar testimony; and (4) any other pertinent facts and circumstances. If the court finds, under the totality of the circumstances, that the allegations of misconduct against a witness are not sufficiently substantial to the case, it should deny disclosure.

Fourth, only after satisfying the foregoing prerequisites should the court conduct an in-camera review to determine whether disclosure of these IA allegations should be required. During this review, the court should assess whether the substance of the allegations is in fact material to the criminal case and if disclosure to the defense is mandated by the constitutional protections embodied in the Brady/Giglio line of cases. When conducting this analysis, the court should consider the State's compelling confidentiality interests; whether the allegations are "preliminary, challenged, or speculative," Agurs, 427 U.S. at 109 n.16; and whether the IA information suggests that the allegations will not be sustained. Ultimately, disclosure of such pending, unsubstantiated

allegations should be granted sparingly, particularly given the vital purpose of the IA process, and to avoid any perverse incentive for frivolous allegations to be made against officers in order to unfairly undermine cases against criminal defendants. See, e.g., IAPP § 9.6.3; see also IAPP § 5.1.6.

Finally, if a trial court determines that immediate disclosure of pending allegations is necessary, any disclosure should be narrowly tailored and subject to a protective order under Rule 3:13-3(e). The State's compelling interests in preserving the fairness and integrity of its IA investigations, protecting officers' due-process rights, minimizing unfair reputational harm, and maintaining the confidentiality of unsubstantiated allegations, readily satisfy the good-cause requirement for such an order. And the protective order should limit disclosure of pending allegations to the defendant and defense counsel for use in defendant's case, and prohibit dissemination to third parties absent a further, express court order. Moreover, even where allegations are disclosed, the court should make clear that they are not necessarily admissible at trial: in the final analysis, the trial court "must balance [their] relevance against potential undue prejudice, as required in N.J.R.E. 403, prior to allowing that evidence in at trial." Higgs, 253 N.J. at 359-60.

These recommended procedures and safeguards would serve to protect both the fairness of criminal proceedings and the integrity of IA investigations.

They would ensure that defendants have necessary access to material impeachment evidence when required under Brady/Giglio, while preventing premature disclosure that can distort investigations, expose witnesses to improper influence, deter reporting of misconduct, or cause unwarranted reputational damage to officers later cleared of wrongdoing. Defendants are not automatically entitled to unfettered access to confidential, untested allegations. And any potential interference from third parties during active investigations risks compromising the very search for truth that the IA process is designed to promote. By adopting the structured, balanced approach outlined above, this Court can provide clear guidance, safeguard essential interests on all sides, and reinforce the principled framework governing disclosure of sensitive internal-affairs material.

CONCLUSION

This Court should vacate the trial court's discovery order.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
AMICUS CURIAE

By: /s/ *Daniel I. Bornstein*
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Dated: January 5, 2026

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Re: State of New Jersey (Plaintiff-Appellant)
v. Dexter Hubbard, Kyanazia Dobson, Kahdar Holmes, Marcus Morales, Jamarscu Russell, and Joseph Perez, and (Defendants-Respondents)
Docket No. A-000223-25

Criminal Action: On Leave to Appeal an Order Entered by the Superior Court of New Jersey, Law Division, Passaic County.

Sat Below: Hon. Sohail Mohammed, P.J. Cr.

LETTER IN LIEU OF REPLY BRIEF FOR PLAINTIFF-APPELLANT

Submitted: January 5, 2026

Your Honors:

Pursuant to R. 2:8-1, the State of New Jersey, through the Office of the Passaic County Prosecutor, respectfully submits the instant letter-brief in lieu of a formal reply brief, in support of Plaintiff-Appellant's appeal of the trial court's July 31, 2025 order compelling discovery.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

The State adopts the procedural history/statement of facts from its initial brief.

LEGAL ARGUMENT

POINT I: THE ORDER DIRECTING THE STATE TO AUTOMATICALLY DISCLOSE CONFIDENTIAL INTERNAL AFFAIRS RECORDS RELATED TO ONGOING INVESTIGATIONS SHOULD BE VACATED

The Defendants and the State share an interest in providing Defendants with a fair trial. A defendant does not receive a fair trial when a prosecutor violates Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). In addition to ethical violations, a decision by a prosecutor to withhold evidence that is subject to Brady or Giglio will jeopardize any subsequently obtained conviction. Thus, withholding evidence that is subject to Brady / Giglio would be a bad decision and it is not in the interest of any prosecutor to do so. In fact, the United States Supreme Court has commented that, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976).

Prosecutors assigned to Defendants' cases could not err "in favor of disclosure" as to the contested issue. To do so would be inconsistent with the law, and also contrary to the significant interests supporting nondisclosure of pending internal affairs records.

The State concedes that it will disclose to the defense all internal affairs reports and investigative materials of any completed investigations related to misconduct bearing upon truthfulness, bias, or integrity that resulted in a sustained findings, including any sustained finding that a police officer filed a false report, submitted a false certification, was untruthful or demonstrated a lack of candor, intentionally mishandled or destroyed evidence, or is biased against the defendant or against any particular class of people. AG Directive 2019-6, (II)(A)(2)(b)(i), (ii), (iv), (viii), and (ix); Pa0114-0115. The State will disclose the arrest and conviction of a law enforcement witness for any crime. AG Directive 2019-6, (II)(A)(2)(b)(iii); Pa0114. In addition, the State will disclose any finding of fact by a judicial authority which concludes a police officer was intentionally untruthful in a matter, either verbally or in writing. AG Directive 2019-6, (II) (A)(2)(b)(iii)(v); Pa0114.

But Defendants are not requesting internal affairs investigations that resulted in sustained Giglio findings. Rather, Defendants demand the automatic production, without any independent court review, of mere allegations of misconduct against police officers that are unproven and have not yet been fully investigated.

The State's position is not that internal affairs files cannot be disclosed under any circumstances. The State's position is that internal affairs records are not impeachment evidence if they are not sustained, or if they have not yet been full investigated. "Allegations that cannot be sustained, are not credible, or have resulted

in the exoneration of an employee … generally are not considered to be potential impeachment information." AG Directive No. 2019-6 (I)(E).

To require disclosure of untested allegations of misconduct would cause every trial to descend into a mini trial of the allegations made against the police, rather than the accused. "In keeping with the historical rationale for the common law rule now codified in N.J.R.E. 608, we disfavor using the trial of charged offenses as the forum for an extended mini-trial for the collateral determination of a prior criminal accusation." State v. Guenther, 181 N.J. 129, 156-57 (2004).

Instead, this Court should find that any disclosure of internal affairs records should be preceded by the conclusion of the internal affairs investigation. Any sustained internal affairs allegation related to misconduct bearing upon truthfulness, bias, or integrity will be immediately disclosed. Records related to investigations that are not sustained will not be subject to Brady / Giglio.

Defendants mis-state the State's position when they contend the State conceded that "the existence of the internal affairs complaint is impeaching and subject to automatic disclosure". Def. Br., p. 1. Defendants fail to cite any portion of the State's brief when they allege this concession took place[1]. Defendants are

[1] It is possible Defendants are referencing p. 32 of the State's merits brief which states, in part, "The Directive and the PCPO policy specify that it is the allegation of misconduct, not the substance of the allegation, that is potentially subject to Giglio, and also that inclusion on this list, does not necessarily mean the information will be disclosed." That portion of the State's merits brief is discussing the policies, not Giglio itself.

mistaken. The State *does not* concede that the existence of an internal affairs complaint is impeachment evidence subject to automatic disclosure. Rather, an allegation that has not yet been investigated to determine its merit is not impeachment evidence and is not subject to automatic disclosure.

In each of Defendants' cases, the State disclosed the existence of this type of investigation. The State did not make this disclosure because it is "subject to automatic disclosure", but rather, out of fundamental fairness and fair play to alert the accused of the existence of this type of investigation. Having been made aware of that information, Defendants could take whatever action he or she felt necessary.

There will be, and have been, cases where a defense attorney takes no action after receiving this disclosure. As mentioned in the State's merits brief, that is the course of conduct that has been taken by every privately retained attorney thus far in Passaic County; only members of the Office of the Public Defender have sought release of these records. Contrary to Defendants' assertions, taking no action does not mean that those attorneys committed malpractice, and it does not render their assistance ineffective. Some valid trial strategies simply do not rely on credibility challenges to investigating officers. For instance, if an accused concedes the facts, but asserts an affirmative defense, such as self-defense. In such a case, defense counsel would not be ineffective for failing to seek out impeachment evidence that would be meaningless, or even contrary, to his or her client's defense.

In cases that do rely on credibility challenges, the notification provided by the State permits the accused to inquire further, or to await the results of the investigation before going to trial. If the investigation results in a sustained finding, the accused will be given the internal affairs materials. Internal affairs investigations are doubtlessly concluded prior to the time it would take a non-detained defendant's case to reach trial. If an accused wishes to obtain these materials. counsel may choose to adjourn the proceedings to await the conclusion of the investigation.

There may be cases in which an accused cannot wait until the completion of the investigation. For instance, if an accused is detained and a hearing or trial is imminent and cannot be delayed. If that is the case, and the accused can meet the Higgs standard, the trial court will perform an in-camera review of the pending file and disclose any relevant information. *See* State v. Higgs, 253 N.J. 333, 358 (2023).

In this case, Defendants were notified of the existence of the internal affairs investigations so that they could evaluate whether information in that file would be relevant to their defense. In the event one of the Defendants contends the investigating officers are lying, defense counsel may then choose to follow-up with the State as to the status of the investigation and, while the internal affairs investigation is pending, litigate any portions of the case that do not rely on credibility challenges, such as a motion to dismiss indictment.

None of the Defendants have asserted that they are detained, or have hearings that are imminent, so it is unlikely that they need these files immediately. Still, if Defendants can identify a specific category of relevant evidence and show a need for the internal affairs material before the completion of the investigation, they can request that the trial court perform an in-camera review, evaluate the allegations, and disclose any relevant evidence. *See* Higgs, 253 N.J. at 358.

By insisting that unproven allegations of misconduct against police officers are subject to automatic discovery, Defendants ask this Court to extend the definition of Brady / Giglio further than any higher court has extended it before. Defendants cannot cite any case, from New Jersey or any other higher court, in which Brady / Giglio was interpreted in this way.

Confidential evidence is not subject to automatic disclosure merely because it is relevant. For instance, the identity of an informant involved in an investigation would be relevant to an accused. As would the surveillance location where police observed a defendant's illegal activity, or the interviews of witnesses conducted by DYFUS workers. All of that would be relevant evidence, yet none of it is subject to automatic disclosure. *See* State v. Williams, 356 N.J. Super. 599. 6-4 (App. Div. 2003); State v. Garcia, 11 N.J. 67, 80-81 (1993); N.J.S.A. 9:6-8.10a(a) and Division of Youth & Family Servs. v. J.B., 120 N.J. 112, 126-27, 576 A.2d 261 (1990).

Rather than subject confidential information to automatic disclosure, New Jersey Courts have held that a trial court must, "balance the public interest in protecting the flow of information against the individuals' right to prepare his defense and contest the State's charges." Williams, at 599. "(T)rial courts must consider 'possible disclosure' … on a case-by-case basis." Garcia, at 80. Here the trial court, at the urging of Defendants, abandoned this established, individualized analysis in favor of a blanket rule mandating disclosure in all circumstances. Neither Defendants nor the trial judge make clear why confidential internal affairs records related to pending investigations should be subject to automatic disclosure when other relevant, confidential information is not.

Defendants contend they are entitled to automatic production of those records under two U.S. Supreme Court cases: Brady and Giglio. However, the U.S. Supreme Court has found, "(t)here is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977). In addition, "(N)either Brady nor Giglio grants the defendant a general right to pretrial discovery of impeachment or bias evidence in the government's possession." United States v. Presser, 844 F.2d 1275, 1284 (6th Cir. 1988).

The Brady rule is based on the requirement of due process. United States v. Bagley, 473 U.S. 667, 675 (1985). Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage

of justice does not occur. Id. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. Id. The possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial, however, does not establish materiality in the constitutional sense. Id.

The U.S. Supreme Court has held that a defendant does not have a right to obtain confidential information within the State's possession absent a showing of need and a trial court's decision to disclose that information following an in-camera review. *See* Pa. v. Ritchie, 480 U.S. 39 (1987).

In Ritchie, the U.S. Supreme Court overturned a decision by the Pennsylvania Supreme Court holding that Ritchie, who was charged with raping his daughter, be given access to a confidential Children and Youth Services ("CYS") investigation. Pa. v. Ritchie, 480 U.S. 39, 60 (1987). The U.S. Supreme Court reasoned:

> "The (Pennsylvania Supreme) Court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. We cannot agree." Id. at 58.

The Court found that Ritchie had no right to statutorily confidential information, unless the trial court first determined that it contained material, exculpatory

evidence. Id. at 58. The Court pointed out that it has never held that a defendant alone may make the determination as to the materiality of the information. Id. at 58-59. It found, "Ritchie's interest in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for in-camera review." Id. at 60.

Like Ritchie, the due process rights of Defendants can be fully protected by requiring that the pending internal affairs files be submitted to the trial court for in-camera review, if Defendants can make the requisite showing under Higgs. Defendants contend that the mere existence of an investigation proves that the files related to that investigation contain impeachment evidence. The State disagrees and finds support from the U.S. Supreme Court, which "has never held that a defendant alone may make the determination as to … materiality." *See* Id. at 58-59.

Here, the trial court made the same error as the Pennsylvania Supreme Court in Ritchie when it determined that Defendants were entitled to "full access to the disputed information, regardless of the State's interest in confidentiality." *See* Id. at 58. Consistent with the U.S. Supreme Court's decision in Ritchie, this Court should find that the trial court erred.

The Supreme Court of Massachusetts has applied similar reasoning to a defendant's request for internal affairs records. Commonwealth v. Wanis, 426 Mass.

639, 645 (1998). In Wanis, that Court held that the conclusions of an internal affairs investigation should not be disclosed absent an in-camera review following a showing by the requesting party "that there is a specific, good faith reason for believing the information is relevant to a material issue." Id. at 644-45.

The New Jersey Supreme Court agreed with the reasoning of Ritchie and Wanis. In Higgs, the N.J. Supreme Court considered whether New Jersey should, "require the disclosure of police internal affairs records to a criminal defendant in pretrial discovery." State v. Higgs, 253 N.J. 333, 355 (2023). The N.J. Supreme Court determined that a defendant who seeks discovery from an internal affairs file must first file a motion for an in-camera review identifying the specific category of information he or she seeks and the relevance of that information to the defendant's case. Id. at 358. The N.J. Supreme Court held that defendants should not have unbridled access to internal affairs records, and that its approach would balance the defendant's interest in disclosure with the State's interest in confidentiality. Id.

Defendants' contention that Higgs is "just another way to access internal affairs materials" is without merit. Defendants' contend that confidential internal affairs records related to pending investigations are subject to automatic disclosure. But, if that contention were correct, defendants would already be in possession of all relevant internal affairs records, and there would be no need for the process

introduced in Higgs. The N.J. Supreme Court would not have created this process if defendants were already in possession of the protected information.

Defendants cite numerous cases alleging that they stand for broad concepts related to their arguments. Defendants cite cases in which trial courts conducted in-camera reviews of internal affairs records. *See* Milke v. Ryan, 711 F.2d 998 (9th Cir. 2013); Ritchie, 480 U.S. at 43; State v. Martini, 160 N.J. 248 (1999); State v. Williams, 197 N.J. 538, 539 (2009); and United States v. Kiszewski, 877 F.2d 210 (2d Cir. 1989). Defendants also cite cases where courts ordered disclosure of information that New Jersey prosectors are already required to disclose. *See* United States v. Hayes, 376 F.Supp.2 736 (E.D. Mich. 2005) and Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002). But Defendants fail to cite any New Jersey or higher court case in which the court found that confidential records of a pending internal affairs investigation should be subject to automatic discovery.[2]

The N.J. Supreme Court's holding in Higgs is consistent with the approach taken by other courts. *See* Riley v. Taylor, 277 F.3d 261, 301 (3d Cir 2001) (A defendant seeking an in-camera inspection to determine whether files contain Brady material must at least make a plausible showing that the inspection will reveal

[2] Defendants cite four New York State trial court cases (Pardo, Francis, Lithgow, and Silva-Torres), which rely on a New York State law (CPL Article 245) to conclude that pending disciplinary complaints are discoverable. Those trial court decisions are addressing the specific factual scenarios presented, and are not precedential. In addition, Defendants cite no New Jersey equivalent to CPL Article 245, but instead contend that the records are discoverable pursuant to Brady / Giglio rather than any New Jersey law.

material evidence. Mere speculation is not enough.); United States v. Dent, 149 F.3d 180, 191 (3d Cir. 1998) (When a defendant has made the requisite showing necessary to trigger a search of the files, "the government need only … submit the files to the trial court for in camera review.); and Wanis, 426 Mass. at 643. (We reject any suggestion that all records of an internal affairs division investigation, even if arguably relevant and material, are to be produced automatically.)

Defendants proposed approach is not harmless. Rather, the disclosure of pending internal affairs allegations in the way contemplated by Defendants would hinder the efforts of internal affairs investigators to identify "bad" police officers – a goal shared by both the State and Defendants. The decision to make internal affairs records confidential was not made arbitrarily. Rather, those records are confidential in order to protect the integrity of the investigations. As explained in Wanis, internal affairs investigations often require the cooperation of people who may be reluctant to provide information against a police officer, and who may be more willing to cooperate if they are assured that the information will remain confidential, except on a court order. Wanis, 426 Mass. at 645. As the Massachusetts Supreme Court stated, confidentiality can re-assure reluctant victims and witnesses, and "can help preserve the integrity of the investigation and the morale of the police." Id.

In sum, Defendants demand that confidential information related to pending internal affairs investigations be disclosed automatically without any in-camera

review and without any consideration of competing concerns. Defendants approach is not supported by law, and would be detrimental to internal affairs investigators efforts to properly complete important investigations. The statement made by the U.S. Supreme Court in Ritchie is equally application to Defendants demand: "(N)either precedent nor common sense requires such a result." Id. at 60.

POINT II: THE PROTECTIVE ORDERS SHOULD BE REINSTATED

The "Protective Orders" entered in this case serve an important purpose – they help protect Defendants' rights to a fair trial and help the State protect the confidentiality of internal affairs records. They permit the State to disclose to Defendants the existence of an internal affairs investigation that, if eventually sustained, may be part of their defense, while still protecting both the integrity of the investigation process and police officers who have not committed misconduct.

A police officer who is wrongfully accused of misconduct should not be forced to confront that wrongful accusation throughout his career. But, absent the protective orders, that is exactly what will happen. Absent the protective orders, defense counsel will share the fact that the officer was accused of misconduct, even if that accusation is later determined to be meritless. The Office of the Public Defender has made no secret of its intent to create a database of such accusations. Pa0127-Pa0130. Thus, even if the internal affairs investigation results in a full exoneration, the harm will already have occurred. New Jersey cannot expect to

retain experienced, honest police officers if it permits disproven accusations of misconduct to be publicized and entered into a statewide database. We would not treat criminals in that way. We should not damage the reputations and careers of honest police officers by spreading and publishing false allegations.

New Jersey also cannot expect witnesses to cooperate with internal affairs investigators when confidentiality has been compromised. As a panel of this Court recognized in Paff v. Bergen Cty., "(D)isclosure of the complainant and subject officer could: thwart the very purpose of an internal affairs investigation." Pa0124.

The protective orders serve these important purposes while causing no harm to Defendants. Defendants contend it is vitally important that they share what they characterize as the "bare bones" information in the State's disclosure letters when consulting with colleagues about cases. Defendants do not explain why they cannot consult about the facts of cases in general terms without specifically naming police officers subject to investigation. Defendants also contend they need to supply the information to expert witnesses. Defendants do not explain what type of expert would offer an admissible opinion on an unproven allegation of untruthfulness, or why they would need an expert witness to opine on information that they repeatedly claim is "for impeachment". "Experts may not opine on the credibility of a particular witness." State v. Henderson, 208 N.J. 208, 297 (2011). In any event, even if

Defendants identify a potential expert witness, the protective orders explicitly permit modification upon application to the issuing court. *See* Pa0079.

Defendants' contention that they need to perform what they term "Giglio checks" is also without merit. It is the State's responsibility to identify and disclose Giglio information. If the State fails in that duty, it risks the overturning of any conviction entered. Defendants have failed to show that the State has failed to submit Giglio material in any of these cases. In fact, the trial court explicitly found, "(T)here is no evidence before the Court that the State has previously failed to disclose such findings upon their occurrence." Pa0097. Defendants cannot upend the law and the internal affairs process to combat an imagined fault.

CONCLUSION

For the reasons listed above, and the reasons outlined in the State's initial briefs, the State respectfully requests that this Court (1) vacate the trial court's order holding that confidential records of pending internal affairs investigations are subject to automatic disclosure to the defense, and (2) reinstate the protective orders.

Respectfully submitted,
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By: /s/ Timothy P. Kerrigan
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Dated: January 5, 2026

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Re: State of New Jersey (Plaintiff-Appellant)
v. Dexter Hubbard, Kyanazia Dobson, Kahdar Holmes, Marcus Morales, Jamarscu Russell, and Joseph Perez, and (Defendants-Respondents)
Docket No. A-000223-25

Criminal Action: On Leave to Appeal an Order Entered by the Superior Court of New Jersey, Law Division, Passaic County.

Sat Below: Hon. Sohail Mohammed, P.J. Cr.

LETTER IN LIEU OF BRIEF IN REPLY TO BRIEF SUBMITTED BY AMICUS-CURIAE THE AMERICAN CIVIL LIBERTIES UNION

Submitted: February 27, 2026

Your Honors:

Pursuant to R. 2:8-1, the State of New Jersey, through the Office of the Passaic County Prosecutor, respectfully submits the instant letter-brief in lieu of a formal reply brief, in response to the December 26, 2025 brief submitted by amicus-curiae the American Civil Liberties Union.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

The State adopts the procedural history and statement of facts from its November 11, 2025 merits brief.

LEGAL ARGUMENT

POINT I: THE ACLU'S PROPOSED APPROACH IS CONTRARY TO LAW AND PUBLIC POLICY

Records related to pending internal affairs investigations are confidential, and confidential records are not subject to automatic disclosure.

The ACLU erroneously contends that this matter involves a dispute over the disclosure of internal affairs records, "(t)hat the government views … as sensitive or 'confidential'." Brief for the ACLU as Amicus Curiae, p. 4[1]. The ACLU thus seeks to frame the issue by suggesting that it was the unilateral and arbitrary decision of the trial prosecutor to deem these records non-discoverable.

However, that is not the case. Rather, the materials at issue have been deemed confidential by New Jersey law. "(T)he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential." N.J.S.A. 40A:14-181 and IAPP[2], Sect. 8.6.1; *See Also* State v. Higgs, 253 N.J. 333, 356 (2023). "The contents of an internal investigation case file,

[1] The ACLU amicus brief is hereinafter cited as "*Amicus br.*"
[2] "IAPP" stands for the New Jersey Attorney General's Internal Affairs Policy and Procedures which was codified by N.J.S.A. 40A:14-181 and carries the force of law for State and local law enforcement. *See* In re Att'y Gen. Directive, 246 N.J. 462, 487-88 (2021).

including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential." Id. *See Also*, Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 142-43, 270 A.3d 362 (2022) (recognizing the New Jersey Attorney General's authority to adopt rules and regulations that guarantee the confidentiality of internal affairs investigations and all supporting materials).

New Jersey law allows for these confidential records to be shared under limited circumstances, including if there are related administrative charges or a lawsuit, or pursuant to a court order or a request of a prosecutor. IAPP, Sect. 8.6.1.

As such, it was not the trial prosecutor who viewed the records as "sensitive or confidential". Rather, it was the New Jersey AG, Legislature and Supreme Court.

The ACLU also errs in applying the law. The ACLU contends that, pursuant to federal constitutional law, the State is required to automatically disclose records related to pending, unproven internal affairs complaints. Amicus br., p. 4. It further contends that "(t)here is no case that holds" that criminal defendants are required "to meet additional standards" before this disclosure occurs. Id.

Contrary to the ACLU's contentions, the United States Supreme Court has determined that a criminal defendant has no right to statutorily confidential files unless he or she makes a showing to the trial court that they contain material, exculpatory evidence. *See* Pa v. Ritchie, 480 U.S. 39, 58 (1987).

In Pa v. Ritchie, the accused sought records from Child and Youth Services (CYS) that were confidential under Pennsylvania state law. Id. at 57. The State argued that the documents were confidential and could not be disclosed or produced for an in-camera review. Id. at 57. Relying on a statutory provision that permitted disclosure of CYS records when directed to do so by court order, the U.S. Supreme Court determined that the statute did not prevent disclosure in all circumstances. Id. at 58-59. However, the Court also recognized that the public interest in protecting statutorily confidential information is strong. *See* Id. at 58.

The Pennsylvania Supreme Court had ordered that the records be produced to the accused. Id. at 46. The U.S. Supreme Court overturned that decision and made clear that statutorily confidential information should not be produced automatically without first being reviewed in-camera by the trial court. Id. at 58. The Court wrote:

> "The (Pennsylvania Supreme) Court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. We cannot agree." Id. at 58.

The dispute in Ritchie mirrors the dispute in this case. Both the CYS records in Ritchie and the pending internal affairs records in this case have been made confidential by state law, and both are thus subject to disclosure in limited circumstances. *See* Id. at 58-59 and IAPP, Sect. 8.6.1. The U.S. Supreme Court in

Ritchie held that a criminal defendant should not be given "full access" to the CYS files prior to an in-camera review. Id. at 58. Likewise, Defendants in this case should not be given "full access" to records related to pending internal affairs investigations without first requesting an in-camera review. Thus, the ACLU's contention that "(t)here is no case" that supports the State's position is without merit. *See* Amicus br., p. 4. In fact, there is controlling case law from the U.S. Supreme Court. [The U.S. Supreme Court is the final arbiter of all questions of federal constitutional law. M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148, n. 8 (2022), *quoting* State v. Coleman, 46 N.J. 16, 34 (1965).]

The ACLU contends this appeal should be decided based on federal law, and that federal law requires the State to disclose the statutorily confidential files at issue to Defendants automatically without an in-camera review. However, as recognized in Ritchie, the U.S. Supreme Court, "has never held that a defendant alone may make the determination as to … materiality," but rather that a defendant's "interest in ensuring a fair trial can be protected fully be requiring (statutorily confidential) files be submitted only to the trial court for in-camera review." Id. at 58-60.

The State has a duty to turn over all material exculpatory evidence and impeachment evidence in its possession. *See* Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). "Typically, the prosecution itself makes the initial determination as to what evidence must be disclosed to the defense.

United States v. Leung, 40 F.3d 577, 582 (2d Cir. 1995). "To the extent that there is a question as to the relevance or materiality of a given group of documents, the documents are normally submitted to the court for in camera review.' United States v. Wolfson, 55 F.3d 58, 60 (2d Cir. 1995). As such, federal courts agree that disputes over the disclosure of confidential documents should be resolved through in-camera review; not by compelling automatic disclosure to the defense.

The ACLU's position is also not supported by state law. The New Jersey Supreme Court has also found that disagreements about whether material is Brady / Giglio should be resolved by an in-camera review. Higgs, 253 N.J. at 358.

In Higgs, the New Jersey Supreme Court granted certification to consider multiple issues including whether it would, "require the disclosure of police internal affairs records to a criminal defendant in pretrial discovery." Id. at 355. The N.J. Supreme Court determined that a defendant who seeks discovery from an internal affairs file must first file a motion with the trial court requesting an in-camera review. Id. at 358. That motion must identify the specific category of information the defendant seeks, and the relevance of that information to the defendant's case. Id.

The ACLU's contention that the Higgs decision "restrict(s) rights provided by the federal Constitution" is without merit. Amicus br. p. 4. The Higgs decision merely adopts the approach taken by federal courts and the U.S. Supreme Court.

Further, the Higgs court specified that it was not imposing an excessive burden on defendants, stating, "(W)e anticipate that many defendants will be in a position to meet the relevancy standard and decline to adopt the more stringent 'peculiar evidence' standard." Id. at 358.

The ACLU interprets Brady and Giglio to mean that all evidence that is material to either guilt or punishment, or that can be used to impeach a state's witnesses, must be disclosed automatically to criminal defendants without an in-camera review and regardless of its confidentiality. Amicus br. p. 3. Thus, the ACLU's interpretation of Brady / Giglio material is so broad as to encompass any discoverable items. The ACLU then contends that the Higgs framework was meant to apply only to, "IA materials that do not otherwise fall within Brady or Giglio." Amicus br. p. 5. The ACLU thus takes the impossible position that all evidence should be disclosed automatically pursuant to Brady / Giglio, but that the Higgs framework applies to some other type of unspecified evidence. The ACLU, like Defendants, fails to identify what that other type of evidence could be.

The ACLU's contention is also contradicted by the plain language of Higgs. The ACLU contends the Higgs framework applies only to internal affairs records "that do not otherwise fall within Brady or Giglio." Amicus br. p. 5. In Higgs, the New Jersey Supreme Court did not say that its decision applied only to records "that do not otherwise fall within Brady or Giglio." Rather, it stated that it would consider

whether to "require the disclosure of police internal affairs records to a criminal defendant in pretrial discovery." State v. Higgs, 253 N.J. 333, 355 (2023). If the Court meant for its decision to address only records 'that do not otherwise fall within Brady or Giglio", it would have stated that in its comprehensive opinion.

On top of that, the Higgs Court specified that it's holding applied to evidence subject to Brady / Giglio.. Id. at 358. It found that "defendants must be allowed, under certain circumstances, to access documents in law enforcement's internal affairs files." Id. It found this to be "consistent with the State's obligation to produce exculpatory and impeachment evidence (i.e. Brady / Giglio evidence)." Id. It then mirrored the language in Ritchie by clarifying: "(T)hat does not, however, mean that defendants should have unbridled access to internal affairs records." Id. After that, it put forth the procedure that defendants must follow to obtain an in-camera review of the records and held that this procedure was necessary to, "appropriately balance the important needs involved." Id. Thus, the ACLU's argument that the Higgs decision did not address evidence subject to Brady / Giglio is without merit.

The ACLU cites numerous cases that address only the disclosure or evidence that is not statutorily protected. *See* Kyles v. Whitley, 514 U.S. 419, 441-451 (1995) (prosecution's failure to disclose eyewitness statements made to the police by an informant, and a computer print-out of license plate numbers of cars parked at the scene that did not list the number of the accused's car); United States v. Five Persons,

472 F. Supp. 64, 68 (D.N.J. 1979) (a district court pre-trial order pre-dating Ritchie and directing disclosure of unspecified evidence following a challenge to the time of its disclosure); and United States v. Bethea, 787 F. Supp. 75, 77 (D.N.J. 1992) (finding that early disclosure of a prosecution witness's criminal history was not warranted). The State does not dispute its duty to disclose this type of information.

Equally unsupported is the ACLU's broad contention that the State's refusal to automatically turn over statutorily confidential records without an in-camera review is "unworkable and unjust". Amicus br. p. 7. The ACLU fails to cite a single case where statutorily confidential information was disclosed under these circumstances. It is unable to do so because no such case exists. Rather, it is the practice of trial courts to compel disclosure of confidential records only after an in-camera review. Given that this practice has persisted for decades and has never been successfully challenged, the ACLU cannot credibly contend that it is "unworkable".

Likewise, the ACLU is unable to show that this practice is "unjust". The State concedes that it will disclose internal affairs records if the investigation is sustained, or under many other circumstances. AG Directive 2019-6, subsections (II)(A)(2)(b)(i), (ii), (iv), (viii), and (ix); *See Also* Pa0114-0115[3]. The State merely contends that pending, unproven allegations should not be disclosed unless they are

[3] Pa0111 – 01118 is the Passaic County Prosecutor's Office's Brady / Giglo Policy.

substantiated. "Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee … generally are not considered to be potential impeachment information." Attorney General Directive No. 2019-6 (I)(E). *See Also* United States v. Novaton, 271 F.3d 968, 1005 (11th Cir, 2001).

New Jersey Courts have held that a trial court must "balance the public interest in protecting the flow of information against the individuals' right to prepare his defense and contest the State's charges"; and that, "(T)rial courts must consider "possible disclosure … on a case-by-case basis." *See* State v. Williams, 356 N.J. Super. 599, 604 (App. Div. 2003) and State v. Garcia, 11 N.J. 67, 80 (1993). Here, disclosure of these documents would compromise the integrity of pending internal affairs investigations and unjustly impugn the reputations of law enforcement officers who have not been found to have committed any type of misconduct. Balancing the State's interests against the defendant's interests, the Higgs Court established a procedure whereby records of pending internal affairs investigations may be disclosed after an in-camera review. After the investigation has been completed and a sustained finding has been entered, there is no longer a need to protect the integrity of the investigation or the confidentiality of the officer. As such, once the investigation is complete, the results of the weighing process change. It is then – after the IA investigation is completed and has resulted in a sustained finding – that defendants may obtain IA records without an in-camera review.

The ACLU presents a hypothetical situation in which details of a pending internal affairs investigation are protected, and that investigation is then sustained after conviction. Amicus br. p. 7. The ACLU overlooks the fact that, under those circumstances, the State will have already disclosed the existence of the investigation, which would allow the defendant to make a knowing and informed decision to either delay the trial until the IA investigation is complete, or file a motion seeking an in-camera review of the files pursuant to Higgs.

If the defendant chose the first option, the records of any substantiated investigation would be disclosed to him before trial. If the defendant chose the second option, the trial court would determine – in advance of a conclusion to the internal affairs investigation – whether the investigative materials should be disclosed. Any adverse decision could be challenged on appeal, if the trial eventually resulted in a guilty verdict. In this way, the defendant in the hypothetical scenario envisioned by the ACLU would have the opportunity to access any discoverable records prior to trial, and the State would still be able to protect the integrity of the internal affairs investigation and the privacy of innocent officers.

The ACLU also contends Defendants should have the right to "probe the allegations made in the complaint through an independent investigation and / or cross-examination." Amicus br., p. 8. However, New Jersey law requires internal affairs complaints to be investigated by an objective internal affairs investigator –

not by a criminal defendant with an interest in the outcome. *See* IAPP Sect. 1.0.9; *See also* Aristizibal v. City of Atlantic City, 380 N.J. Super. 405, 426 (2005). Furthermore, by following the process laid out in Higgs, or by simply waiting for the IA investigation to conclude, Defendants will have the information before trial.

The ACLU contends the State could purposely "slow-walk" an internal affairs investigation until after a verdict in order to avoid disclosing investigative materials. Amicus br., n. 3. However, for an internal affairs department to engage in this type of "gamesmanship" would be contrary to both law and reason. The ACLU seems to believe that internal affairs investigations are conducted in support of pending criminal investigations or prosecutions. That is not the case. Rather, internal affairs investigations are conducted to determine whether an officer violated any law; regulation; directive, guideline, policy, or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure; rule; or training. States Newsroom Inc. v. City of Jersey City, 261 N.J. 392, 410 (2025). The goals of the policy are to enhance the integrity of the law enforcement agencies, improve the delivery of police services, and assure people that complaints of police misconduct are properly addressed. IAPP, Sect. 1.0.1. Those goals and that purpose would not be served by "slow-walking" an investigation.

New Jersey law also requires individuals assigned to conduct internal affairs investigations to, "be of unquestioned integrity and hold sufficient rank to achieve

the objectives of the inspection function." IAPP, Sect. 3.5.2. Delaying an internal affairs investigation to assist in a criminal prosecution, as the ACLU suggests the State might, would not support the goals of internal affairs. Internal affairs investigators "of unquestioned integrity" would not engage in such conduct, and the ACLU has failed to point to a single instance where they allege this has taken place.

In addition, it would be contrary to the State's interests to obtain a conviction that was based on incomplete evidence. "Slow-walking" an internal affairs investigation would increase the likelihood that a conviction would be reversed.

In fact, criminal defendants, who are subject to fewer ethical requirements than internal affairs investigators, are more likely to abuse the law if the ACLU's position were to be adopted by this Court. The ACLU contends that the mere existence of an internal affairs complaint is impeachment evidence and that, upon the filing of an internal affairs complaint, that complaint and all future investigative materials become subject to automatic discovery without any review by the trial court. Were that position to be adopted by this Court, an unscrupulous defendant could submit an internal affairs complaint solely for the purpose of creating impeachment evidence against an honest officer, and thus increasing his chances at acquittal[4]. Trial courts could prevent this type of misconduct by performing in-

[4] Internal affairs investigators are not permitted to reject complaints under any circumstances. Rather, the IAPP requires, "that any complaint from a member of the public is readily accepted and fully and promptly investigated." IAPP, Sect. 5.02.

camera review of confidential information pursuant to Higgs, and denying disclosure related to frivolous or bad-faith complaints.

POINT II: THE LETTERS SENT BY THE STATE ARE NOT SUBSTANTIVE DISCLOSURES

The State provided Defendants with a letter notifying them that there was a pending internal affairs investigation against an officer who was likely to testify against him or her at trial. Pa0015, 0029; 0034; 0045; 0065-0066; 0080; 0091

The ACLU contends this type of letter is insufficient to constitute a Giglio disclosure. However, those letters are not intended to be a substitute for a Giglio disclosure. Rather, they are meant to advise defendants of the existence of a pending investigation that, if substantiated, will result in the disclosure of impeachment evidence. A defendant could then make the choice to either delay the criminal case until the conclusion of the IA investigation, continue with the criminal case with the knowledge that the investigation is pending, or file a Higgs motion seeking immediate disclosure of the internal affairs records. This notification is a courtesy meant to comply with notion of fair-play – not a constitutionally required disclosure.

POINT III: THE PROTECTIVE ORDERS ARE NECESSARY AND PROPER

Four (4) different Superior Court judges reviewed applications for protective orders in the Defendants' cases. Recognizing that the protective orders were

necessary to protect the integrity of the internal affairs investigation and the identity of innocent officers, each of those judges approved and issued those orders.

Those orders limits disclosure of the existence of the contents of the State's letters. Pa0015, 0029; 0034; 0045; 0065-0066; 0080; 0091.

The ACLU contends that those letters do "not apprise defense counsel of the nature of the allegation" and do "not allow for proper investigation and cross examination." Amicus br. p. 9. The ACLU then contends that the protective orders preventing disclosure of the content of those letters "limit OPD (Office of the Public Defenders) lawyers from discussing case specifics or facts with one another or from sharing evidence." Amicus br., p. 11.

If the ACLU's contention is that the letters fail to disclose any pertinent case specifics or facts, then it is unclear why the ACLU believes the OPD attorneys need to discuss case specifics or facts relayed in those letters with one another. If it were somehow deemed necessary for OPD attorneys to strategically discuss the existence of an incomplete IA investigation, the ACLU offers no explanation as to why they cannot have that conversation in the abstract without naming specific officers.

In addition, the protective orders are necessary to protect the identity of officers who have not been found to have committed any misconduct. The orders restrict only the disclosure of the identity of police officers who have not been found

to have committed any misconduct. They do not restrict the disclosure of the identity of officers who have committed misconduct. Rather, if an IA investigation is substantiated, the records will be disclosed and the officer will be named.

The orders are also necessary to allow IA investigations to proceed without tampering or interruption. "Persons charged with the responsibility of conducting the affairs of the police department must be able to rely on confidential information prepared for internal use. The integrity of this information would be eroded if public exposure was threatened." State v. Kaszubinski, 177 N.J. Super. 136, 138-39 (Law.Div.1980). Thus, the protective orders do not harm the rights of Defendants, and are necessary to protect the important interests of internal affairs investigations.

CONCLUSION

For the reasons listed above, and the reasons outlined in the State's initial briefs, the State respectfully requests that this Court (1) vacate the trial court's order holding that confidential records of pending internal affairs investigations are subject to automatic disclosure to the defense, and (2) reinstate the protective orders.

Respectfully submitted,
CAMELIA M. VALDES
PASSAIC COUNTY PROSECUTOR

By: /s/ Timothy Kerrigan
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Attorney I.D. 002462012
Dated: February 27 2026 TKerrigan@Passaiccountynj.org

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February 27, 2026

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Of Counsel and
On the Letter-Brief

REPLY LETTER BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0275-19

: CRIMINAL ACTION

: On Appeal from an Interlocutory Order of the Superior Court of
: New Jersey, Law Division,
Passaic County.

STATE OF NEW JERSEY, :

Plaintiff-Appellant, :

v. : Indictment No. 25-02-0111-I

DEXTER HUBBARD, :

Defendant-Respondent. :

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	Indictment No. 24-12-0898-I
GUSTAVO ARENAS,	:	
Defendant-Respondent.	:	
	:	
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	Indictment No. 24-02-0071-I
KYANAZIA DOBSON,	:	
Defendant-Respondent.	:	
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	Indictment No. 23-04-0311-I
KAHDAR HOLMES,	:	
Defendant-Respondent.	:	

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	Indictment No. 25-01-0065-I
MARCUS MORALES,	:	
Defendant-Respondent.		
	:	
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	Indictment No. 24-12-0864-I
JAMARSCU RUSSELL,	:	
Defendant-Respondent.		
	:	
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	
v.	:	Indictment No. 24-09-0678-I
JOSEPH PEREZ,	:	
Defendant-Respondent.		

Sat Below:

Hon: Sohail Mohammed, P.J.Cr.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2

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CITATION KEY

Pa - Petitioner's appendix

Srb - State's reply brief

Ab - Attorney General's Brief

LEGAL ARGUMENT

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER COMPELLING DISCLOSURE.

It would be unconstitutional to allow the State to withhold impeachment evidence to which a criminal defendant is constitutionally entitled unless a defendant makes a special showing. This Court should affirm the trial court's order.

A. The Prosecution Found the IA Complaints Were Impeachment Evidence Subject to Disclosure. Thus, Disclosure of Their Substance Was Required.

The State's and Attorney General's main complaint on appeal is that the trial court and the defense are demanding the automatic production of the substance and underlying records related to every pending internal affairs investigation bearing on an officer's truthfulness, bias or integrity, without any case-by-case determination that the complaint contains relevant or material information. This Court's holding need not be so broad. In each of the cases before this Court, the State prosecutors identified the complaints as ones that bear on an officer's truthfulness, bias or integrity, and the officers involved as necessary or important witnesses. (1T 88-5 to 15) Based on those findings, the prosecutors below determined that they were constitutionally required to disclose the existence of the complaint "pursuant to Giglio v. United States, 405 U.S. 150 (1972) and Attorney General Directive No. 2019-6." (Pa 15, 29, 34, 45, 66, 80, 89). Thus, although it is the defense's position that the State is obliged to disclose all impeachment evidence, without respect to

materiality, see Section C, this Court need not decide in this case whether the State would need to turn over pending IA information related to immaterial witnesses or frivolous complaints. Instead, this Court should hold that in the cases at hand, where the State has already identified the officers as necessary or important, the prosecution is required to disclose the entirety of the impeachment evidence, including that which is contained in a confidential, pending IA complaint.

The State contends in its reply brief that it never conceded that the existence of the IA complaint was subject to disclosure under Giglio. (Srb 3-4) To the contrary, the State's position below was that the existence of the IA complaints, but not the substance or underlying records, was subject to disclosure under Giglio. (Pa 95) In each of the cases consolidated in this appeal, the prosecutors made a case-by-case determination to disclose the existence of the pending IA complaints bearing on truthfulness bias or integrity "pursuant to Giglio v. United States, 405 U.S. 150 (1972) and Attorney General Directive No. 2019-6," after doing Giglio checks on important or necessary officers and identifying IA complaints that bear on the truthfulness, bias and integrity of those officers.[1] (Pa 15, 29, 34, 45, 66, 80, 89; 1T

[1] The State noted that the prosecutor's office used to construe "necessary witnesses" to only include witnesses that the State could not avoid calling as a witness and that the office policy was to avoid calling officers with known Giglio problems in order to avoid disclosure. (1T 87-6 to 23) According to the prosecutor below, the office's understanding of their Brady/Giglio obligations is now "more expansive," such that "any officer with the prospect or reasonable likelihood of being called at trial is going to be subject to [] Giglio vetting and disclosures." (1T 88-5 to 8) This

46-23 to 25, 87-1 to 88-15, 99-2 to 7) During the prosecutor's argument before the trial court, the prosecutor stated his position clearly: "[T]he existence of the investigation is Giglio material." (1T 40-9) He repeatedly reiterated: "[The State] must disclose the existence of that investigation when that law-enforcement officer is a necessary witness in the prosecution." (1T 38-17 to 22; see also 39-17 to 18 ("[S]o the State must disclose the existence of the investigation.")) The parties' disagreement was about whether or not the defense was also entitled to the substance of the IA complaint or any underlying records. (1T 40-9 to 41-11; see, e.g., 1T 41-9 to 11 ("The individual steps taken in the investigation are not Giglio material. The investigation is, the steps are not.") Because the State identified the officers as necessary witnesses and made a case-by-case determination that disclosure of the existence of the complaint was required by Giglio, the State was equally required to turn over the substance of that complaint.

B. It Would Be Unconstitutional to Allow the State to Withold Impeachment Evidence Unless the Defendant Can Make a Showing that His Interests in Disclosure Outweigh the State's Interests in Confidentiality.

The prosecution and Attorney General erroneously contend that disclosure of the IA complaints and their substance is not warranted unless and until the defense

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determination is made on a "case-by-case basis" and turns on "what the officer's role was in the investigation that led to the arrest and the prosecution of the defendant that is [] charged." (1T 88-12 to 15) The prosecutor ultimately "may not call that officer at trial" and will "litigate the use or admissibility of that Giglio material, but [the prosecutor will be] making those disclosures." (1T 88-9 to 11)

seeks in-camera review and makes some special showing that disclosure is warranted based on some balancing of the interests. (Ab 29 ("[T]he defendant must, at a minimum, identify the information sought, explain its relevance to the defense, demonstrate why that relevance overcomes the State's confidentiality interests in thus-far-unsubstantiated IA records, and show why disclosure cannot await the investigation's conclusion.")) Specifically, the Attorney General contends that only after demonstrating the need for immediate disclosure, that the substance of the complaint would be material, and that the defense's interest in disclosure outweighs the State's confidentiality interests, should the court conduct in-camera review "to determine whether the substance of the allegations is in fact material to the criminal case and if disclosure to the defense is mandated by the constitutional protections embodied in the Brady/Giglio line of cases." (Ab 28-34) In fact, the only question relevant to disclosure is one prosecutors are constitutionally obliged to consider: whether disclosure of the allegations is compelled by Brady/Giglio and the discovery rules. If it is, then it would be unconstitutional for the State to withhold that evidence without a special showing by defense counsel.

The law is clear that the onus is on the prosecutor to gather and disclose all exculpatory and impeachment evidence, including that which is confidential. See Connick v. Thompson, 563 U.S. 51, 66 (2011) ("Prosecutors are not only equipped but are also ethically bound to know what Brady entails and to perform

legal research when they are uncertain."); Fields v. Wharrie, 672 F.3d 505, 513–14 (7th Cir. 2012) (explaining that "Brady and Giglio duties are functionally prosecutorial" because the prosecutor's purpose is to secure criminal convictions and ensure that criminal trials are fair (citations omitted)); see also State v. Mauro, 476 N.J. Super. 134, 148 (App. Div. 2023) (explaining that prosecutors' "heightened responsibilities" include "faithful adherence" the defendant's right to discovery); R.P.C. 3.8 (setting forth a prosecutor's "special responsibilities"). Likewise, the Internal Affairs Policy and Procedures Act expressly recognizes that it is ultimately for prosecutors to "conduct an independent review of the [confidential IA] information provided to determine whether it needs to be disclosed." IAPP. § 9.10.4.

The State has acknowledged its obligation. In its brief, it states: "It is the State's responsibility to identify and disclose Giglio information." (Srb 15) In each case, the prosecution is required to make decisions about what evidence must be disclosed pursuant to Brady/Giglio – there is no reason that prosecutors should not have to make this determination when the evidence is a pending IA complaint, as opposed to another type of evidence.

In making this determination, the prosecution might consider the relevance of the witness, or whether the IA complaint is entirely frivolous or false such that it contains no impeachment evidence. If the witness is irrelevant, or the allegation is false or frivolous, the prosecutor may decide that disclosure is inappropriate. In such

a case, the prosecutor could let the defense and court know and the parties could litigate whether disclosure is required under Brady, Giglio and the discovery rules.

Case law provides guidance as to how this might work in an unusual case where the State believes a pending IA complaint is false or frivolous. For instance, in United States v. Bulger, 816 F.3d 137, 155 (1st Cir. 2016), the Court conducted in-camera review of an IA investigation and determined that disclosure was not required because the IA unit and the court had deemed the allegations not only "dubious," "unsupported," but "false." Id. The Court warned, "[T]o be clear, our conclusion today by no means suggests that the government can sidestep its Brady obligations simply by conducting its own investigation and determining that potentially discoverable allegations [of misconduct by an officer] are unsubstantiated. Our holding is limited to the facts of this case." Id. Another federal court recently applied Bulger to conclude that in-camera review of an internal affairs investigation was appropriate "to ascertain whether it contains Brady material" even though the investigation found "no wrongdoing." United States v. Stottlar, 596 F. Supp. 3d 294, 296 (D.N.H. 2022) (emphasis added). The court distinguished Bulger, where the trial court had found the allegations false, rather than not sustained, after conducting in-camera review.

In the cases at hand, of course, unlike in Bulger and Stottlar, the complaints have not been deemed unfounded or not sustained. It is the defense's primary

position that pending complaints should always be disclosed. But it is possible that in-camera review would be appropriate in a future case where the State believes that a certain complaint is entirely unsupported or false, such that there is no impeachment evidence in the IA file. In such a case, the trial court could review the prosecutor's decision and determine whether the allegations are false and whether there is any impeachment evidence in the IA file.

At bottom, the prosecution is constitutionally obliged to automatically disclose all impeachment evidence, even if the evidence is contained in a confidential IA file. It would be contrary to well-established law to require the defense to make some special showing in order to be entitled to that evidence. The cases the State and Attorney General cite to not suggest otherwise.

In Pennsylvania v. Ritchie, the Supreme Court of the United States agreed that criminal defendants are entitled to Brady/Giglio evidence, regardless of confidentiality or any balancing of interests. Pennsylvania v. Ritchie, 480 U.S. 39, 58-61 (1987). In that case, the defendant sought disclosure of all the Children Youth and Services ("CYS") records related to his daughter, which were confidential by statute. Id. at 43. The court noted that it "was impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file." Id. at 57

(emphasis added). The Court found that a defendant does not have a "constitutional right to conduct his own search of the State's files to argue relevance" but that in-camera review was appropriate to locate any exculpatory or impeachment evidence subject to disclosure. Id. at 59.

In Ritchie, the Court did not say it would be permissible for the prosecution to withhold exculpatory or impeachment evidence without a showing or request by the defendant, or that it would be appropriate to require a defendant to make a special showing to obtain disclosure. Instead, the Court was clear that "the [prosecutor's] obligation to disclose exculpatory material does not depend on the presence of a specific request."[2] Id. at 58, n. 15; see also id. at 59 ("[I]t is the State that decides

[2] The State also relies on Commonwealth v. Wanis, 690 N.E.2d 407 (Ma. 1998). The court held that IA files need only be produced with a defense motion and showing that the defendant had a "good faith basis" to believe that the materials were exculpatory. The court said that in-camera review could be appropriate if the trial court deemed such review necessary to determining whether evidence was subject to disclosure. The Massachusetts Supreme Court recently explained the basis for its decision. It said Wanis placed a limitation on the prosecution's duty to obtain IA records held the police department and not possessed by the prosecution. Graham v. Dist. Att'y for Hampden Dist., 225 N.E.3d 245, 270 (2024); see also Wanis, 690 N.E.2d at 411("There has been no showing that the prosecutor had access to these materials, or that the police department was obliged to provide its investigative files to the prosecution."). The Court was clear: "This limitation does 'nothing to relieve the Commonwealth of its ongoing duty to disclose exculpatory information — including any material, exculpatory information related to past discipline or internal investigation of the officer in question — to the extent such information is in the possession, custody, or control of the prosecution team.'" Id. There has been no dispute that in New Jersey the prosecution have a duty to review IA records, or that the knowledge of the officers is imputed to the defense.

which information must be disclosed."). "If defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention," then a defendant can move for disclosure. Id. at 59 n. 16. Where a defendant wants to initiate a search for potentially discoverable evidence in confidential records, the defendant can request that court conduct in-camera review of the records to look for evidence of that kind. See id. at 58. In contrast, "[i]f a defendant is aware of specific information contained in the file . . . , he is free to request it directly from the court" and argue disclosure is required. Id. at 60. No special showing or balancing of the interests is appropriate before a defendant is entitled to Brady/Giglio evidence.

State v. Williams, 197 N.J. 538, 538-542 (2009) is also illustrative of the same principles. There, our Supreme Court considered pending allegations against an officer, specifically allegations that a superior, non-testifying officer used a racial epithet to describe the defendant. The Court ordered immediate disclosure of "the date, time, location and identity of all individuals present at the 'meeting within the office' at which the 'superior officer' used 'a racial epithet to describe' defendant." Id. In addition, the Court ordered for in-camera review the officer's "investigatory or disciplinary file" and "complete personnel file." Id. The in-camera review was appropriate so that unrelated charges or evidence could be redacted, before "[a]ny and all documents relating to the racial epithet" were disclosed to the defense. Id. Thus, like Ritchie, Williams helps demonstrate when and for what purposes in-

camera review might be appropriate. For instance, where review of the entirety of an officer's disciplinary or personnel file is requested or warranted, in-camera review allows the court to help identify which the portions of those voluminous confidential records are discoverable.

Unlike the defendants in Ritchie and Williams, the defendants in this case are not seeking review of the entirety of the officer's internal affairs or complete personnel file to look for relevant information; they are seeking disclosure of the substance of a known, pending IA complaint bearing on truthfulness of an important witness and any evidence supporting that complaint contained in the specific IA file. See Ritchie, 480 U.S. ("If a defendant is aware of specific information contained in the file . . . , he is free to request it directly from the court" and argue disclosure is required"). If this Court believes that in-camera review is appropriate to help the prosecution ascertain what redactions are necessary and appropriate, the defense has no objection to the trial court conducting that review prior to disclosure.

Even cases holding that a defendant needs to make some plausible or good faith showing that the records will contain discoverable information in order to obtain in-camera review or to subpoena confidential records, do not support the State's position that a defendant must first demonstrate that disclosure is warranted based on a balancing of the interests. C.f. State v. Higgs, 233 N.J. 333 (2023); Riley v. Taylor, 277 F.3d 261, 301 (3d Cir 2001); United States v. Dent, 149 F.3d 180, 191

(3d Cir. 1998). If a defendant seeks disclosure of a pending IA complaint that bears on the truthfulness, bias and integrity of a witness, the defendant necessarily has made a plausible or good faith showing that specified records contain impeachment evidence. Nothing more is ever required. See Dent, 149 F.3d at 191 (where a defendant subpoenas an officer's personnel file to look for exculpatory evidence, the custodian of the records may submit the records to the trial court to review to determine if they "contain[] . . . impeachment or exculpatory material.").

This Court should decline the Attorney General's invitation to promulgate a new multi-step, multi-prong framework to govern the disclosure of pending IA complaints that bear on truthfulness, bias or integrity of officers. This Court should instead remind prosecutors that they have a continuing ethical and constitutional obligation to disclose all exculpatory or impeachment evidence, including that contained in confidential IA files.

C. The State Should Be Required to Disclose All Impeachment Evidence, Irrespective of Materiality.

For the reasons set forth above, this Court need not decide whether prosecutors are required to disclose all impeachment evidence, irrespective of materiality. See Section A. Nevertheless, because the Attorney General and State contend that only material exculpatory and impeachment evidence should be disclosed, the defense addresses the question below.

The materiality of the withheld evidence plays no part in assessing whether it must be disclosed pretrial. When it is discovered, post-conviction, that the State has failed to turn over exculpatory or impeachment evidence, a defendant's conviction will only be reversed if: (1) the evidence was "favorable to the accused, either as exculpatory or impeachment evidence"; (2) the State "suppressed the evidence, either purposely or inadvertently"; and (3) the evidence was "material" such that "there is a reasonable probability that timely production of the withheld evidence would have led to a different result." State v. Brown, 236 N.J. 497, 518-20 (2019).

In contrast, before the trial has taken place, "an accused has a right to broad discovery." State v. Hernandez, 225 N.J. 451, 461 (2016). The plain language of the discovery rules requires that all exculpatory and impeachment evidence be disclosed, without regard to materiality, upon unsealing of the indictment. R. 3:13-3(b)(1)(A)-(K) (requiring disclosure of all "relevant evidence," including exculpatory and impeachment evidence); see also State v. Hyppolite, 236 N.J. 154, 166 (2018) ("Disclosure of all exculpatory evidence [occurs] after indictment and well in advance of trial.") (emphasis added). In other words, while a defendant's conviction will only be reversed if the withheld exculpatory or impeachment evidence was material, before trial, a defendant is entitled to any and all "exculpatory

information or material" well before trial.[3] R. 3:13-3(b)(1). If the State were only required to turn over material exculpatory or impeachment information in discovery, the discovery rule would have said so. Since Rule 3:13-3(b)(1) is not limited in such a way, it plainly mandates the automatic disclosure of all exculpatory or impeachment evidence, whether material or not.

It does not make sense to analyze the materiality of evidence in the discovery context because materiality is about the outcome of a trial – something that has not yet happened in this case. The materiality standard asks "whether in the absence of the undisclosed evidence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence." State v. Nelson, 155 N.J. 487, 500 (1998). Where the defendant has not yet had any trial at all, materiality is irrelevant. Materiality is plainly a post-trial analysis, not a pretrial one. It has no applicability to the motion to compel at issue here.

This Court said as much in Williams. In Williams, the dissenting judge concluded that discovery of evidence related to the use of a racial epithet by a superior officer was unwarranted because the evidence would not have changed the

[3] This is why the cases cited by the Attorney General, where the courts determined that a new trial was not warranted because the impeachment evidence was not material, are inapposite. See e.g., United States v. Souffront, 338 F.3d 809, 820 (7th Cit. 2003); State v. Locascio, 6 F.3d 924, 949 (2d Cir. 1993); United States v. Diaz, 922 F.2d 998, 1006 (2d Cir. 1990); United States v. Hill, 483 F. App'x 195, 196-97 (6th Cir. 2012); United States v. Trapp, 241 F. App'x 148, 152 (4th Cir. 2007).

outcome and therefore was not material under Brady/Giglio. 403 N.J. Super. 39, 50 (2008), aff'd as modified by Williams, 197 N.J. at 540-541. The majority disagreed and concluded that due process required that the court allow "discovery of relevant information to determine" whether the evidence could have changed the outcome at the initial trial or would be admissible in the retrial. Id. (explaining that discovery is appropriate to uncover all relevant evidence and that "under Giglio, the State [is] required to turn over any material that could impeach the credibility of any of the State's witnesses"). Although the evidence might not have changed the outcome at the first trial, or ultimately be admissible at the next trial, the defendant still had the right to disclosure of the relevant evidence. Because the allegation and underlying investigatory material may have been relevant to the credibility of witnesses, this Court and then the Supreme Court ordered disclosure of all evidence related to the use of the racial slur, irrespective of materiality. Williams, 197 N.J. at 540-41.

State v. Hyppolite, further helps illustrate that a materiality analysis is only relevant after-the-fact – not in the context of a motion to compel discovery. In Hyppolite, the Court reaffirmed that the court rules mandate the disclosure of "all exculpatory evidence" before a detention hearing. 236 N.J. at 166 (citing R. 3:4-2(c)(2)(E)). The question before the Court in Hyppolite was what happened when the State failed to meet this obligation. Id. at 164. The Court held that the "traditional materiality standard" did not apply in assessing whether the defendant was entitled

to a new detention hearing because of the State's failure to turn over exculpatory evidence. Id. at 167. "[T]he pure materiality standard in Brady provides a fair and workable approach for motions filed after trial" but "the test is not ideal for evidence withheld before a detention hearing." Id. Instead, given the "abbreviated" nature of detention hearings and the limited record, courts should apply a "modified" materiality standard: whether there is a "reasonable possibility" that the result of the hearing would have been different had the evidence been disclosed. Id. at 167, 169.

Hyppolite was still about the remedy for the State's failure to disclose exculpatory evidence after the relevant proceeding had taken place. While the traditional Brady materiality standard did not apply, a modified materiality standard was still appropriate to assess whether the defendant was entitled to a new detention hearing; the materiality standard was modified to account for the limited record of a detention hearing. However, where, as here, the question is what should happen before the relevant proceeding occurs, materiality plays no role. We should not speculate about the effect this exculpatory and impeachment evidence may have on a trial that has not yet occurred.

CONCLUSION

For these reasons, and those set forth in the defense's opening brief, this Court should affirm the trial court's decision.

Respectfully submitted,

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