



Truth and Consequences:

The *Brady/Giglio* Rule for Police Officers and Law Enforcement Agencies

Richard Poulson
LRIS Executive Director
Willig, Williams & Davidson

December 11, 2024

Presented by
Labor Relations Information System
3142 NE Multnomah St. | Portland, OR 97232
503-282-5440
www.LRIS.com | email: info@LRIS.com

Truth and Consequences:
The *Brady/Giglio* Rule for Police Officers and Law Enforcement Agencies

December 11, 2024

10:00 AM PT / 1:00 PM ET

60 minutes

Attendees will gain a deep understanding of the legal duties imposed by *Brady/Giglio* and how to navigate them. Ensure you're informed and prepared to handle *Brady/Giglio*-related issues with confidence.

Understanding *Brady/Giglio* Obligations: Learn how the *Brady/Giglio* Rule affects police officers and the disclosure of evidence in criminal cases.

Protecting Integrity: Explore the implications of *Brady/Giglio* on officers' professional credibility and career.

Balancing Of Rights: Discuss the balancing of legal rights among different stakeholders – prosecutors, police agencies, criminal defendants, and individual police officers.

Case Studies In Action: Examine real-world examples where the *Brady/Giglio* Rule has impacted law enforcement personnel.

Presented By Richard Poulson

Mr. Poulson has been representing labor unions for his entire career, representing union clients in collective bargaining, interest and grievance arbitration and employment-related litigation. He is a partner with the Philadelphia, Pennsylvania firm of Willig, Williams & Davidson, where he focuses on advising and representing police, fire, paramedic and other uniformed employees regarding municipal affairs and public employment. He earned his B.A. from La Salle University (1992) and his J.D. from the Catholic University of America, Columbus School of Law (1997). Rick is the Executive Director of LRIS. Since its inception in 1981, LRIS has been a valuable resource for public safety labor relations. LRIS conducts labor seminars, publishes a monthly newsletter, and currently has five books in print.

[Richard G. Poulson | Willig, Williams & Davidson \(wwdlaw.com\)](http://www.wdlaw.com)

Truth And Consequences: The *Brady/Giglio* Rule For Police Officers And Law Enforcement Agencies

Richard G. Poulson
Willig Williams & Davidson
Philadelphia, PA



1

Upcoming LRIS Seminars

Public Safety Union Leadership Strategies, Tips & Insights

Feb. 5 – 7, 2025
Las Vegas, Nevada



www.LRIS.com/ULV25

Collective Bargaining For Public Safety Employees

March 26 – 28, 2025
Nashville, Tennessee



www.LRIS.com/CBTN25

The Rights Of Police Officers

June 18 – 20, 2025
Las Vegas, Nevada



www.LRIS.com/ROPLV25

2

The Brady Rule Today In The Press

NEWS **Law Mass: DAs Keep Police**

Lansing police chief questions list that names him and 14 local officers as untrustworthy

by Thomas Yawwinski | Monday, January 25th 2021

CRIME AND JUSTICE

Tarnished Badge: Dishonesty and ethical issues dog **of untruthful Oregon**

Uneven approach to Colorado police officers w
leaves public in the dark

The Denver Post identified more than 400 officers with histories that could da

'Brady' lists help pi
track police miscon

Some law enforcement concerned
hurt officers' careers

Problem officers in most
Minnesota agencies not required to
keep body cameras on

Several years ago, state officials suggested that some
should wear them when responding to all calls

3

AZ's 'Brady' officers - ABC15

List of Arizona law enforcement officials with credibility, honesty issues, compiled by ABC15.

Search in table

< Page 14 of 93 >

Full Name	Agency	Status	Date(s) Added	Other Info	County/Current as of:
	Phoenix PD	Active	10/18/2010	-	Maricopa , 11-Mar-19
	Phoenix PD	No longer employed	9/24/2018	-	Maricopa , 11-Mar-19
	Phoenix PD	No longer employed	12/20/2005	-	Maricopa , 11-Mar-19
	Wickenburg	Active	10/8/2018	-	Maricopa , 11-Mar-19
	Scottsdale PD	No longer employed	8/31/2015	-	Maricopa , 11-Mar-19
	MCSO	No longer employed	6/12/2017	-	Maricopa , 11-Mar-19
	Mesa PD	No longer employed	8/12/2014	-	Maricopa , 11-Mar-19
	Phoenix PD	No longer employed	3/1/2007 & 3/4/2011	-	Maricopa , 11-Mar-19
	Phoenix PD	Active	10/1/2012	-	Maricopa , 11-Mar-19

The Brady Rule Today
On Web Pages

Source: ABC15

4



LAW OFFICES OF
JERRY L. STEERING
WISDOM JUSTICE CONSTITUTION

Law Offices of Jerry L. Steering
4063 Birch Street, Suite 100
Newport Beach, CA 92660

Phone: (949) 474-1849
Available 24 Hour a Day

[FREE CASE EVALUATION](#)

[HOME](#)

[POLICE MISCONDUCT ARTICLES](#)

[CRIMINAL DEFENSE](#)

[CIVIL RIGHTS](#)

[YOUR CONSTITUTIONAL RIGHTS](#)

[OUR CASE RESULTS](#)



Member of the Bar of the
United States Supreme Court since 1987

Criminal Defense Bar Reactions To The *Brady* Rule

Some criminal defense lawyers realize there are advantages to their clients if more officers are on *Brady* lists and have web pages asking the public to send in the names of officers for forwarding to a prosecutor's office for placement on a *Brady* list.

5

Criminal Defense Bar Reactions To The *Brady* Rule

If you would like to add a "Bad Apple" cop to the Steeringlaw *Brady* List page, please email the information to The Law Offices of Jerry L. Steering. A "*Brady* List" is a list that is kept by District Attorney's Offices and police agencies, of police officers and deputy sheriff's, who had been found to have acted in a dishonest manner (i.e. provoking a response from you to justify punching your lights out, and then authoring a false police report and other documents, to present a false rendition of the material events to the DA's Office; to procure the bogus criminal prosecution of the unreasonable force civilian victim Or, maybe a cop who has framed others, by planting drugs on others and then procuring their bogus criminal prosecutions. This, by the way, is normal behavior, for far too many "peace officers.)"

6

The *Brady* Rule Today Stanford Law Review (2015)

An officer who cannot testify – a so-called “*Brady* cop” – may find herself out of work and unemployable, as such an officer cannot make arrests, investigate cases, or carry out any other duties that might put her on the witness stand. Moreover, officers fear that prosecutors and police supervisors will use access to the files to abuse the *Brady*-cop designation, by labeling officers as *Brady* cops in order to punish them outside of formal disciplinary channels and those channels’ attendant procedural protections.

7

The *Brady* Rule Today Stanford Law Review (2015)

Brady has become not only a matter of defendants’ due process trial rights, but also of police officers’ due process employment rights. And the officers and their unions have used litigation, legislation, and informal political pressure to push back on *Brady*’s application to their files.



STANFORD
LAW REVIEW

8

The *Brady* Rule Today Wake Forest Law Review (2022)

“In North Carolina, a law enforcement officer’s career can be over with the stroke of a prosecutor’s pen. Once a district attorney writes a *Giglio* letter about a particular officer, that officer is functionally unable to make arrests, handle evidence, or interview suspects. As a result, law enforcement officers who receive *Giglio* letters are almost always terminated and forced to find new careers.”

<https://www.wakeforestlawreview.com/2022/02/the-scarlet-letter-north-carolina-giglio-and-the-injury-in-search-of-a-remedy%E2%82%AC%81/>

9

DEVELOPMENT OF THE *BRADY*/*GIGLIO* RULE

10

The *Brady* Rule Evolution At The Supreme Court

In *Brady v. Maryland* (1963), the Supreme Court ruled that the prosecution must disclose evidence favorable to the defendant if it is material to guilt or punishment.

- The Court held that withholding such evidence violates the defendant's constitutional right to a fair trial under the 14th Amendment and thus can result in overturned convictions or retrials.

11

The *Brady* Rule Evolution At The Supreme Court

In *Giglio v. United States* (1972), the Court held that the prosecution must disclose evidence that could impeach the credibility of a government witness, including police officers.

- This includes prior misconduct, dishonesty, or other information that could call into question the witness' reliability.
- Officers with documented credibility issues may be deemed unreliable witnesses, potentially affecting their ability to testify in court.

12

The *Brady* Rule Evolution At The Supreme Court

In *United States v. Bagley* (1985), the Court ruled that the obligation to disclose *Brady* information existed even in the absence of a request from a defendant for the information.

- The Court also instructed that evidence is “material” for *Brady* purposes “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”

13

The *Brady* Rule Evolution At The Supreme Court

- In *Kyles v. Whitley* (1995), the Court extended the *Brady* obligation to the entire prosecution team.
- “The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”



Justice David Souter



14

The *Brady/Giglio* Rule – A Summary

- The prosecution must disclose any evidence that is favorable to the defense, including exculpatory evidence (which may prove innocence) and impeachment evidence (which could challenge the credibility of prosecution witnesses).
- Disclosure obligation is affirmative and applies whether or not requested by the defense.
- Disclosure obligation extends to evidence in the possession of all members of the prosecution team, including law enforcement agencies.

15

***Brady* and Prosecutions But What Is “Material” To A Prosecution?**

- *Brady* does not mandate the release of personnel and internal affairs records – even if otherwise *Brady* material – unless the officer’s testimony is “material” to the criminal case.
- Example: The testimony of an arresting officer who took no further action with respect to the suspect other than the arrest, might not be “material” to the criminal prosecution.

16

The *Brady* Rule

Examples Of Non-Materiality

Where defendants have sought the personnel files of officers who were not going to testify at trial.

An officer's expunged conviction for a felony drug offense ten years before, where the conviction could not be used for impeachment under the rules of evidence and did not involve dishonesty.

An officer's four-year-old conviction for shoplifting.

17

The *Brady* Rule

Examples Of Non-Materiality

Records relating to lawsuits previously filed against an officer.

A request to run a police officer's "rap sheet."

18

The *Brady* Rule Examples Of Non-Materiality

Evidence regarding an officer's involvement in an unrelated officer-involved shooting.

Where the basis for a defendant's request to look at personnel records was "gossip among criminal defense lawyers."

A request to cross-examine an officer through the use of non-sustained findings.

19

**BRADY/GIGLIO DISCLOSURES WITHIN THE
PROSECUTION TEAM**

20

A Balancing Act

- Balancing Transparency and Fairness: The *Brady/Giglio* rule requires prosecutors to balance transparency and fairness by disclosing relevant information while avoiding the creation of potentially misleading or incomplete lists.
- Emphasis on Individualized Assessment: The focus should be to provide a case-by-case evaluation of police witness credibility, taking into account the specific circumstances of each case.
- Disclosures within the Team: Prosecutors may err on the side of transparency when requesting information from law enforcement agencies.

21

What Is *Brady/Giglio* Information? The DOJ's "Giglio Policy"

Casting a very wide net, the DOJ requires all "cooperating criminal justice agencies" to disclose seven categories of information to the DOJ in federal prosecutions:

1. Any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;
2. Any past or pending criminal charge brought against the employee;

<https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

22

The DOJ's "Giglio Policy"

3. Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
4. Prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct.
5. Any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence — including witness testimony — that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.

23

The DOJ's "Giglio Policy"

6. Information that may be used to suggest that the agency employee is biased for or against a defendant.
7. Information that reflects that the agency employee's ability to perceive and recall truth is impaired.

24

The DOJ's "Giglio Policy" – Additional Guidance

"Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration. Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration."

"With regard to allegations disclosed to a prosecuting office under this paragraph, the *Giglio* Requesting Official shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraphs 7(b) and 12 below."

25

The DOJ's "Giglio Policy" – Additional Guidance

"7(b) Secure Records with Limited Access. *Giglio* Requesting Official(s) shall ensure that the information in their office's *Giglio* system of records is securely maintained and is accessible only upon a request to a *Giglio* Requesting Official or other senior management entrusted with this responsibility. The information shall only be disclosed to requesting prosecutors within that office on a case-related, need-to-know basis. It should be noted that much of the information in the *Giglio* system of records is sensitive information which if released or reviewed without a case-related need could negatively impact the privacy and reputation of the agency-employee to whom it relates and could violate the Privacy Act."

26

The DOJ's "*Giglio* Policy" – Additional Guidance

"12. Prosecuting Office Plans to Implement Policy. Each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: ... (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an ex parte, in camera review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; (e) allowing the relevant agencies the timely opportunity to fully express their views; and (f) information contained within the *Giglio* system of records may not be disclosed to persons outside of the Department of Justice except in a criminal case to which the United States is a party, and where otherwise authorized by law, regulation, or court order."

27

PROSECUTOR APPROACHES TO *BRADY*/*GIGLIO*

28

The *Brady* Rule

How Have Local Prosecutors Reacted?

The reaction by prosecutors to the DOJ's policies have varied tremendously from state to state, and even from jurisdiction to jurisdiction.

- Some prosecutor offices have simply ignored *Brady*, at least insofar as law enforcement personnel files are concerned.
- In other areas, law enforcement agencies conduct periodic review of their files and inform local DA offices when those files may contain *Brady* information.

29

Prosecutor Reaction To The *Brady* Rule

- Local DA offices began maintaining so-called *Brady* lists.
- In yet other areas, DA offices have both *Brady* lists and so-called "exclusion lists."

**22 more St. Louis police officers
added to list of cops on prosecutor's
'exclusion' list**

30

What Is A Brady List?

- A shortcut.
- Some prosecutors compile lists of officers with a history of misconduct to track potential credibility issues.
- Prosecutors use these lists to determine if an officer's past actions might make them an unreliable witness.
- The use and criteria for *Brady/Giglio* Lists vary significantly across the United States.
 - Ex: Massachusetts. No statewide standards or mandates.
 - Ex: New Hampshire: Statewide legislation governing process.

31

Why Maintain A Formal List?

- Efficiency: Enable prosecutor's office to quickly identify officers who may pose special challenges in a prosecution.
- Standardization and Consistency: Provide consistent standards across administrations and in different jurisdictions.
- Notice: Provide departments with guidance on deployment decisions in manner that will minimize *Brady* risks.
- Transparency: Provide consistent source for defense counsel to utilize.

32

Why Not Maintain A Formal List?

- Impracticality: The vast scope of disclosures includes many instances that don't constitute actual misconduct, making list maintenance impractical.
- Risk of Misinterpretation: Including minor inconsistencies or witness contradictions on a list could be misleading and misconstrued as misconduct.
 - Ex: Philadelphia's former "Police Misconduct Database."
- Due Process Concerns: Creating a list that could impact an officer's career requires due process considerations, including fair hearings and clear standards.

33

AGENCY APPROACHES TO *BRADY/GIGLIO*

34

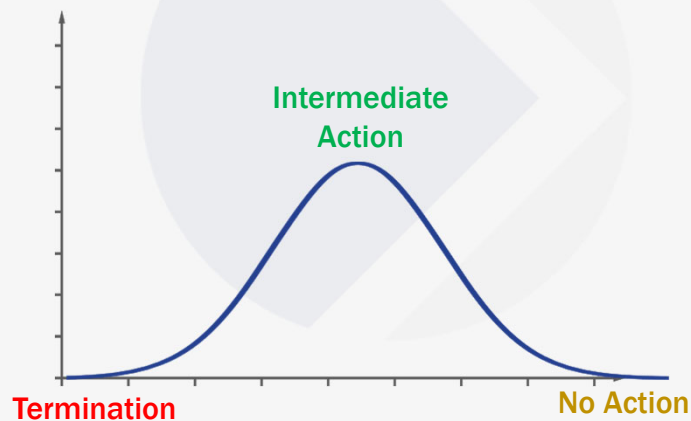
Agency Reactions To The *Brady* Rule

- The reaction by law enforcement agencies to an employee being a “*Brady* officer” has varied tremendously.
- In some places, employers take the position that officers unable to testify cannot do the essential functions of the job of a law enforcement officer and should be discharged.
- In other places, employers fundamentally ignore *Brady* list issues.

35

Agency Reactions To The *Brady* Rule

The vast majority of jurisdictions fall somewhere on the *Brady* continuum.



36

Agency Reactions – The “Double Dip”

Brown v. Nero, (Tex. App. 2015) (PSLN Dec 2015)

- Police officer terminated based on allegations of dishonesty and improper drug use.
- Officer appealed to Civil Service Commission and won. Discipline reduced to 15-day suspension.
- DA then issues letter refusing to accept cases in which the officer had a role.
- Police Department terminates officer a 2nd time because the officer could no longer fulfill an essential job function – **testifying in court.**

37

Agency Reactions – The “Double Dip”

Brown v. Nero, (Tex. App. 2015) (PSLN Dec 2015)

- Officer appealed to Civil Service Commission and won ... **again.**
- “Brown was not fired because she failed to maintain a license, pass an exam, or perform satisfactorily in the field. Rather, the evidence showed that the prosecutors’ decision not to accept Brown’s cases was based on Chief Nero’s accusations of untruthfulness, which the hearing examiner found to be groundless. And instead of abiding by the hearing examiner’s award, which was final and binding on all parties, Chief Nero allowed the unilateral decision of elected officials to circumvent the protections of the Civil Service Act.”

38

Agency Reactions – The Lazy Way

Hubacz v. Village of Waterbury (Vt. 2018) (PSLN May 2018)

- Village terminates officer based on DA's election not to prosecute any cases involving the officer for *Brady/Giglio* reasons.
- Vermont Supreme Court overturns the discipline:
- “An officer may be terminated for cause when the State's Attorney unilaterally decides not to prosecute the officer's cases if, as a result of that non-prosecution decision, the officer is unable to perform the duties of his employment.”

BUT ...

39

Agency Reactions – The Lazy Way

Hubacz v. Village of Waterbury (Vt. 2018) (PSLN May 2018)

BUT ... the Court held that a Brady restriction may only warrant termination where the department **cannot reasonably accommodate** the effect of the limitation by assigning the officer to alternate duties, ensuring that the officer's arrests are witnessed, or by some other means.

“Prosecutorial discretion does not give a prosecutor free rein over the employment or termination of law enforcement agency personnel. In general, a prosecutor's unilateral decision not to prosecute a particular officer's cases should not in all cases mandate termination of the officer's employment.”

40

Is Testifying An Essential Function?

§ 261.2. Definitions.

Essential job functions of a police officer—The job functions and tasks essential to performing the full duties of a municipal police officer, including, but not limited to, the ability to effectuate arrests, proficiently handle firearms, operate a police vehicle and perform a variety of physical tasks, the ability to communicate effectively, both verbally and in writing, the ability to comprehend documents and apply rules, procedures, and precedent, and other mental tasks, as well as perform rescue functions and other miscellaneous duties.

37 PA. CODE CH. 261

41

Agency Reactions – The Accommodation

Will County, Ill., (Greco 2018)(PSLN May 2018)

- Two deputy sheriffs sign “last chance” agreements in order to avoid termination. Both disciplinary actions involved false statements made by the officers during IA investigations.
- Deputies were not permitted to bid into patrol positions on their return and were instead relegated to court security based on DA’s Brady designation
 - Imposed 10-year blackout period on bid rights.
- Deputies grieved, and lost:

42

Agency Reactions – The Accommodation

Will County, Ill., (Greco 2018)(PSLN May 2018)

- Arbitrator concluded that the limitations were not disciplinary in nature.
- Arbitrator concluded that the employer had “no choice” but to reassign.
- Employer acted based on its legitimate concern that the grievants’ false statements might affect their credibility and thereby hinder the prosecution’s case.

43

OFFICER/UNION APPROACHES TO *BRADY/GIGLIO*

44

Officer Reactions To The *Brady* Rule

- In any number of cases, officers have sued DAs for wrongfully placing them on *Brady* lists.
- Typically, the lawsuits seek damages.
- Most such lawsuits for damages are unsuccessful due to the common law doctrine of “prosecutorial immunity.”

45

How Far Does Prosecutorial Immunity Extend?

Prosecutorial immunity has barred the following claims:

- Where a prosecutor has placed an officer on his *Brady* list even though the officer’s termination was reversed by an arbitrator.
- Where prosecutors were alleged to have intentionally submitted false evidence to a grand jury.

46

How Far Does Prosecutorial Immunity Extend?

- Where a prosecutor falsely accused a police officer of dishonesty and announced he would refuse to use the officer as a witness, all in retaliation for the officer complaining to the EEOC and the state bar association about the prosecutor's repeated use of racial terms.
(*Savage v. State of Maryland*)
- Where a prosecutor refused to prosecute an officer's cases allegedly as an act of pure political retaliation.
(*Bennett v. Marquis*)

47

How Far Does Prosecutorial Immunity Extend?

Where a prosecutor placed officers on a *Brady* list because they supported a competing candidate for office and made public statements criticizing the prosecutor.

"The relevant inquiry is not whether the prosecutor's complained of conduct amounted to misconduct, but whether it was a function of their duties as an officer of the court. If so, prosecutors have immunity regardless of whether the actions were appropriate."

Adamson v. Pierce County, (W.D. Wash. 2022)(PSLN Aug 2022)

48

Prosecutorial Absolute Immunity

Harris v. Krasner, (3d. Cir. 2024)(PSLN Oct 2024)

- Complaint against officer filed by her domestic partner in response to officer acting on sexual assault against her child.
- IA investigates – complaint dismissed as unfounded and expunged.
- 4 years later. Officer learns of placement in the DA's Police Misconduct Database based on *unfounded* complaint.
- Third Circuit noted that prosecutors should err on the side of disclosure when unsure about whether information is disclosable under *Brady*. DA immune from suit.

49

Prosecutorial Immunity – Extreme Cases

▪ ***Pownall v. Krasner, (3d Cir. 2024)(PSLN Nov 2024)***

“Pownall exited his police car and approached Jones, whose bike had stalled. A struggle ensued. Pownall grabbed Jones and felt the outline of a gun tucked into Jones’ s waistband. Jones broke free from Pownall, who then drew his firearm and ordered Jones to stop resisting. Jones refused to comply.”

“Pownall attempted to fire his gun at Jones, but the weapon misfired. Pownall moved to clear the misfired round and momentarily lost sight of Jones and Jones’ s gun. Jones dropped or threw away the gun, and started to flee; Pownall, not realizing that Jones no longer had a gun, shot Jones. ... Jones was taken to the hospital, where he was pronounced dead. The police recovered a stolen firearm and multiple live rounds from the ground near the site of the altercation.”

50

Prosecutorial Immunity – Extreme Cases

- DA investigates OIS and retains an expert to prepare a report on whether the use of force was justified.
- Expert concludes the use of force was **justified** - Pownall shot Jones because he temporarily lost visual contact while clearing the misfired round, and that Jones' own actions caused the shooting.
- DA nonetheless presents case to a grand jury and **withheld the expert report**, until later ordered to produce it by a judge.
- The criminal charges (first degree murder) would later be dismissed, and Pownall reinstated with back pay by an arbitrator.

51

Prosecutorial Immunity – Extreme Cases

- Pownall sued DA and **lost**.
- Court noted expansive protections of absolute immunity for prosecutors acting in their advocacy role, including misconduct coinciding with grand jury proceedings.
 - For example, immunity was appropriate in another case where prosecutors were accused of intentionally failing to call witnesses with knowledge of the events that the prosecutors believed would exculpate a defendant.
- The only way Pownall could prevail was if DA acted not in his advocacy role, but in his investigatory role.

52

Prosecutorial Immunity - Limits

Bevill v. Wheeler, 2024 WL 2762493 (5th Cir. 2024).

- Former city police captain sued city, mayor, district attorney and judge for improper retaliation for exercising his First Amendment rights by participating in criminal defense of his friend.
- In response to allegations in affidavit submitted by Captain alleging local corruption, DA informs City that he will no longer prosecute cases from the Department.
- DA not afforded absolute immunity.

53

Prosecutorial Immunity - Limits

Bevill v. Wheeler, 2024 WL 2762493 (5th Cir. 2024).

“Immunity cases involve a prosecutor’s actual decision to not prosecute actual cases brought by certain officers or call those officers as witnesses. Such decisions are based on “delicate issues of witness credibility, that “fall entirely within a prosecutor’s judicial function regardless of whether one case or a line of cases is at issue,”

“It is difficult to see how threatening to categorically not prosecute a particular city’s cases implicates the issues of witness credibility that were present in the immunity cases.”

54

Prosecutorial Immunity - Limits

Bevill v. Wheeler, 2024 WL 2762493 (5th Cir. 2024)

“While DA may assert prosecutorial immunity in his decisions to prosecute or forgo prosecution generally, this immunity does not cover his alleged act of wielding his prosecutorial authority as a threat to influence a public employment decision over which he had no lawful authority.”

“Such a threat cannot reasonably be considered intimately associated with the judicial phase of the criminal process. DA Wheeler is not shielded by absolute prosecutorial immunity.”

55

Prosecutorial Immunity - Limits

Krile v. Lawyer, (N.D. 2020) (PSLN Sept 2020)

- DA reviews personnel records of entire police dept in response to anonymous complaint about bad cop.
- DA finds *Giglio* material in **one** officer's file, sends letter to Police Chief that she will not prosecute cases involving that officer.
- Officer terminated and sues DA.
- DA raises absolute immunity defense and **loses**.

56

Prosecutorial Immunity - Limits

Krile v. Lawyer, (N.D. 2020) (PSLN Sept 2020)

- Court finds:
- DA's decision to *Giglio* impair officer and no longer use officer as witness in criminal proceedings was an activity intimately associated with the judicial phase of the criminal process entitled to absolute privilege or immunity.
- **BUT ...** DA's publication of *Giglio* letter to Police Chief Donlin was not made within the proper discharge of DA's judicial duties.

57

Prosecutorial Immunity - Limits

Krile v. Lawyer, (N.D. 2020) (PSLN Sept 2020)

“We recognize prosecutors are required to disclose certain information to the defense in a criminal proceeding under *Brady* and *Giglio*, and that the diminished credibility of a police officer hindered by *Brady* and *Giglio* may raise challenges for the prosecution. However, in this instance, the DA was acting in an administrative capacity by informing the Chief of her opinion that the officer was *Giglio* impaired and of how her office would proceed with cases in which the officer was involved. The DA's publication of the *Giglio* letter to the Chief was not an absolutely privileged communication.”

58

Recent Due Process Gains? Part 1

Duchesne v. Hillsborough County Attorney (N.H. 2015)

- Three Manchester police officers suspended for excessive use of force. County DA places on *Brady* list.
- Suspensions grieved and overturned in arbitration. Officers request removal from *Brady* list and DA refuses.
- Officers sued, argued that the refusal violated their constitutional rights to due process of law.
- New Hampshire Supreme Court ruled in favor of the officers and ordered that their names be removed from the *Brady* list.

(PSLN Sept 2015)

59

Recent Due Process Gains? Part 1

Duchesne v. Hillsborough County Attorney (N.H. 2015) **(PSLN Sept 2015)**

“Given that the original allegation of excessive force has been determined to be unfounded, there is no sustained basis for the officers’ placement on the ‘*Laurie* List.’ It makes no sense that the threshold determination – that something was thought to be potentially exculpatory and worthy of an *in camera* review by the Court but has now been shown not to be of that character – should follow the officers every time they appear as witnesses.”

60

Recent Due Process Gains? Part 2

Fraternal Order of Police Lodge No. 5 v. City of Philadelphia (Pa. Cmwlth. 2021) (PSLN Jan 2022)

- Philadelphia police officers sue Police Department and District Attorney alleging wide-scale violations of due process and privacy rights related to placement of *Brady* restrictions on hundreds of city police officers.
- District Attorney is former criminal defense and civil rights attorney – sued Police Department 80 times.
- Supporters chanted “F**k the FOP” at DA’s 2017 victory party.

61

Recent Due Process Gains? Part 2

Fraternal Order of Police Lodge No. 5 v. City of Philadelphia (Pa. Cmwlth. 2021) (PSLN Jan 2022)

- FOP brought constitutional procedural due process claim on behalf of officers (many exonerated) who either did not believe they should be on the list in the first place or thought they should be removed.
- PA Commonwealth Court agreed. Held that the Philly DA’s *Brady* procedures deprived officers of due process:

62

Recent Due Process Gains? Part 2

“The procedure offered by the District Attorney’s Office, which restricts any challenge to the ‘correctness’ of the information contained in the letters, does not serve as meaningful opportunity to be heard on the issue. Moreover, **adequate due process requires an impartial tribunal...** The process offered places sole discretion with the DA regarding whether officers should be placed on or remain on the Do Not Call List even though they were acquitted. ... **It is not an adequate remedy to leave the decision to the very person whom the appellant police officers contend mistakenly and unfairly placed them on the list in the first place.**”

63

BARGAINING APPROACHES TO *BRADY/GIGLIO*

64

Brady And Bargaining

Concerns about improper placement on *Brady* lists – or disciplinary ramifications of such placement – can be addressed at the local level in collective bargaining:

- CBA provision prohibiting double-jeopardy discipline for subsequent placement on *Brady* list.
- CBA provision requiring notice and pre-deprivation hearing before personnel records turned over to DA office.
- CBA language setting forth distribution limitations and privacy protections for affected officers.

New Castle County, DE (2018)(Brady list procedures subject to mandatory bargaining obligation).

65

Brady And Bargaining

- *Brady* abuses can also be addressed via traditional just cause disciplinary protections in police CBAs.
- Arbitrators tend to be hostile to agency disciplinary actions based *solely* on an officer's *Brady/Giglio* status.
- As opposed to instances in which agencies may raise *Brady* restrictions as a possible bar to reinstatement as part of discipline for the underlying conduct.

66

Brady/Giglio In Arbitration

The general trend among arbitrators is that placement on a *Brady* list, absent clear proof of an officer's underlying dishonesty, is an insufficient basis to terminate an officer.

- *City of Marco Island*, FMCS Case No. 190601-08006 (Fowler 2020)
- *Borough of Gettysburg v. Teamsters Local 776*, 2020 WL 3022985 (Pa. Cmwlth. 2020)
- *City of Hutchinson* (2015)
- *City of Elma, Washington* (2013)
- *Wyandotte County/Kansas City, Kansas* (2013)
- *Franklin County Sheriff's Office* (2010)
- *County of Stanislaus* (2010)

67

Brady/Giglio In Arbitration

From Arbitrator Joe Daly, 2019:

"There is overwhelming arbitral precedent that an officer's *Brady* status is not a substitute for just cause and is not in and of itself grounds for termination. In recent years, law enforcement agencies have increasingly sought to 'weaponize' *Brady* by asserting, as the City does in the present case, that a *Brady*-impaired officer is effectively disqualified from employment because he or she will be unable to testify in future criminal cases."

"But . . . arbitrators have repeatedly rejected this argument, holding that a *Brady* designation cannot be construed as a "silver bullet" for employers."

68

LEGISLATIVE APPROACHES TO *BRADY/GIGLIO*

69

***Brady* And Bargaining**

While the federal approach to *Brady/Giglio* disclosures is generally consistent, approaches at the state level vary.

- Some states have enacted legislation to standardize some aspects of the *Brady* disclosure process as it relates to police officers.
 - These approaches will supplement rules contained in statewide rule of criminal procedure.
- For example, California, Maryland, and Washington provide disciplinary protections against “double jeopardy” *Brady* discipline.

70

***Brady* In State Legislatures: Arizona**

Arizona passed broader *Brady* standardization legislation in 2021.

Section 38-1119 of the Arizona Statutes (2021) requires:

- Notice before placement on a *Brady* list.
- Officer opportunity to provide “input” and request reconsideration.
- Departments must provide disciplinary protections similar to California, Maryland, and Washington.
- Prosecutors must adopt policies describing placement criteria and procedures.

71

***Brady* In State Legislatures: North Carolina**

North Carolina SB 300 of 2021 “*Giglio* Bill”. Establishes a *Giglio* “red flag” database for police officers.

Requires NC Criminal Justice Standards Division to obtain the identity of every officer in the state subject to a “*Giglio* impairment” and republish his or her *Giglio* status to any law enforcement agency who hires them.

72

***Brady* In State Legislatures: Florida**

Florida's HB 95 became effective in July 2023:

- Prohibits the discharge of a law enforcement officer solely for placement on a *Brady* list,
- Explicitly does not mandate *Brady* lists.
- Requires notice when IA materials are sent to prosecutor.
- Creates a modest right to appeal a *Brady* determination made by a prosecutor.

73

***Brady* In State Legislatures: Iowa**

Iowa's House File 2496 in 2023:

“An officer shall not be discharged, disciplined, or threatened with discharge or discipline by a state, county, or municipal law enforcement agency solely due to a prosecuting agency making a determination or disclosure that exculpatory evidence exists concerning the officer.”

But there's more.

74

Brady In State Legislatures: Iowa

a. A prosecuting agency that maintains a *Brady-Giglio* list shall adopt a policy that, at a minimum, includes all of the following:

(1) The criteria used by the prosecuting agency to place an officer's name on a *Brady-Giglio* list.

(2) The officer's right to receive written notice before the prosecuting agency places the officer's name on a *Brady-Giglio* list, and the officer's right to provide input to the prosecuting agency before the prosecuting agency makes a determination of whether the officer's name should be placed on a *Brady-Giglio* list." . . .

75

Brady In State Legislatures: Iowa

(3) The duty of the prosecuting agency to provide notice of the prosecuting agency's decision regarding placement of the officer's name on a *Brady-Giglio* list.

(4) The officer's right to make a request for reconsideration of the prosecuting agency's determination to include the officer's name on a *Brady-Giglio* list and to submit supporting and corroborating documents and evidence in support of the officer's request for reconsideration.

76

Brady In State Legislatures: Iowa

- (5) The applicable time frame and procedures for notifying the officer of the prosecuting agency's final decision on an officer's request for reconsideration.

77

Brady In State Legislatures: Iowa

- (e) An officer whose name was placed on a *Brady-Giglio* list prior to the effective date of this Act shall have the right to request reconsideration as follows:
- (f) A prosecuting agency shall notify the officer, within ninety days of the effective date of this Act and provide the officer with the information required under paragraph “c”.
- (h) This subsection does not create a private cause of action against a prosecuting agency or an employee of a prosecuting agency.”

78

THE COMPREHENSIVE APPROACH TO *BRADY*

79

The Comprehensive Approach

To protect the rights of officers as well as criminal defendants, police unions and agencies can pursue the following approaches:

- Pursue state legislation to codify and standardize best practices.
- Develop mutually acceptable disclosure policies with local prosecutors, including due process procedures for affected officers.
- Bargain standards governing disclosure triggers, notice and opportunity for officers to challenge disclosures, and standard accommodations for limited officers.
- Ensure ample disciplinary protections for officers negatively impacted by a prosecutor *Brady* decisions.

80

Upcoming LRIS Seminars

**Public Safety Union Leadership
Strategies, Tips & Insights**
Feb. 5 – 7, 2025
Las Vegas, Nevada



www.LRIS.com/ULV25

**Collective Bargaining For Public
Safety Employees**
March 26 – 28, 2025
Nashville, Tennessee



www.LRIS.com/CBTN25

The Rights Of Police Officers
June 18 – 20, 2025
Las Vegas, Nevada



www.LRIS.com/ROPLV25