



MINUTES

Brady-Giglio List Study Committee

Monday, December 6, 2021

MEMBERS PRESENT

Senator Dan Dawson, Co-chairperson
Senator Julian B. Garrett
Senator Kevin Kinney
Senator Todd E. Taylor

Representative Jarad J. Klein, Co-chairperson
Representative Eddie Andrews
Representative Eric Gjerde
Representative Steven Holt
Representative Mary Lynn Wolfe

Ex Officio members:
Senior Judge Arthur Gamble
Ms. Shannon Archer
Mr. Stephan Bayens
Ms. Susanna Cave
Ms. Oleta Davis
Mr. Ben Johnston
Mr. Mark Miller
Mr. Mike McKelvey
Mr. Shawn Morgan
Ms. Sarah Orwig
Mr. Greg Stallman

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Brady-Giglio List Study Committee

I. Procedural Business

Call to Order and Adjournment. The Brady-Giglio List Study Committee was called to order by temporary Co-chairperson Klein at 10:00 a.m. on Monday, December 6, 2021, in Room 103 of the State Capitol, Des Moines. The meeting was adjourned at 3:16 p.m.

Election of Permanent Co-chairpersons. Voting members of the committee elected temporary Co-chairpersons Senator Dawson and Representative Klein as permanent co-chairpersons without committee discussion.

Adoption of Rules. Members of the committee adopted the proposed rules without committee discussion.

Opening Remarks. Co-chairperson Klein welcomed members of the committee, especially public members, as well as persons in attendance. He made brief opening comments, noting that an important function of the committee was to learn more about the issues being presented and creating a record for the General Assembly, without necessarily coming to conclusions.

Presentations

Mr. Kevin Cmelik, Director, Criminal Appeals Division, Office of the Attorney General, Department of Justice.

First Panel: Ms. Shannon Archer, Assistant County Attorney, Polk County Attorney's Office and Mr. Clint Spurrier, Ringgold County Attorney.

Second Panel: Ms. Martha Lucey, Appellate Defender, Office of the State Public Defender, and Mr. Bobby Rehkemper, an attorney with the Gourley, Rehkemper & Lindhold, PLC.

Third Panel: Mr. Stephan Bayens, Commissioner of the Department of Public Safety, and Mr. Greg Stallman, Police Chief, City of Altoona.

II. Charge

The committee is required to study the disclosure of information in officer personnel files as it relates to a Brady-Giglio list and the efficiency of implementing a statewide system for a Brady-Giglio list. The Committee shall submit a report to the Governor and General Assembly by December 16, 2021.

III. Overview

Mr. Cmelik was invited to present an overview of issues involved in requiring the disclosure of certain information regarding a law enforcement officer to a defendant (defense attorney) which could impact the defense, including information contained in a law enforcement officer personnel file. He discussed two United States Supreme Court decisions, *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). In *Brady*, the Court held that withholding exculpatory evidence from a defendant violates due process protections of the fifth amendment to the United States Constitution. In *Giglio*, the Court held that a prosecuting attorney has a duty to disclose to a defendant evidence relating to the credibility of testimony offered by a prosecuting attorney in order to allow the defendant to impeach that witness. He also briefly discussed *State v. Garrison*, 711 N.W.2d 732 (Iowa Ct. App. 2006) an Iowa case in which the Court found a law enforcement officer's suspension was not relevant to the credibility of his testimony. He noted that a prosecuting attorney might err on the side of disclosure because the lack of such disclosure could result in an overturned conviction.



Mr. Cmelik and committee members discussed the process of disclosure by prosecuting attorneys, the criteria used when making such a disclosure, and the use of a list of names of law enforcement officers prepared by a prosecuting attorney's office, when deciding when disclosure is required, including criteria to be placed on and removed from such a list, and the use of *in camera* review of disclosed information by a judge. Mr. Cmelik noted the United States Department of Justice guidelines for prosecuting attorneys may be a good starting point for further discussions. Such guidelines include a questionnaire to be completed by a law enforcement officer prior to being called to offer testimony,

IV. Perspectives by Prosecuting Attorneys

The first panel was invited to present information regarding the perspectives of prosecuting attorneys practicing in large and small counties. Ms. Archer discussed the doctrine of exculpatory evidence which tends to show that a defendant is not guilty or deserves a less severe sentence and the use of impeachment evidence which tends to show a witness's testimony should not be relied upon. Ms. Archer noted that a prosecuting attorney is responsible for disclosing such evidence regardless of whether that information was known (e.g., received from a law enforcement agency) citing *Kyles v. Whitley*, 514 U.S. 419 (1995). In addition, the proper scope of a prosecuting attorney's duty of disclosure is not always clear, and the disclosure may involve information contained in a police officer's personnel file which would otherwise be considered confidential and may have future employment implications for that officer. Those concerns are weighed against a defendant's right to a fair trial. She also discussed how that information is requested from prosecuting attorneys in other jurisdictions. In the Polk County Attorney's Office, the decision to disclose information regarding a law enforcement officer's alleged conduct includes an analysis of whether alleged conduct rises to the level of disclosure and whether such conduct by the officer occurred. If warranted, a disclosure statement is filed with the district court hearing the case stating that the office has become aware of information regarding a named law enforcement officer which involves the officer's truthfulness or credibility. Ms. Archer also noted that judges rather than prosecuting attorneys decide questions of admissibility and that this involves using an after-the-fact standard that applies retroactively to a pretrial disclosure question. Ms. Archer described a starting point for future discussion which could include the establishment of an independent statewide panel to determine the scope of inquiry and decision-making by prosecuting attorneys, establishing a confidential database that compiles relevant officer conduct, and providing a law enforcement officer with a right to appeal placement on a list.

Mr. Spurrier explained that he is the county attorney for Taylor and Ringgold counties, and that his office does not keep a list of officers subject to disclosure to a court. He discussed the issue of tracking past conduct by a law enforcement officer moving to another county, and the difficulty that smaller communities have when trying to attract quality officers. He also discussed the use of confidential information contained in personnel files, including medical history, that is unrelated to a law enforcement officer's relevant conduct. He expressed a concern that a case not shift from the defendant's alleged culpability to a law enforcement officer's personnel record. He also discussed issues involving a county's civil liability arising from an incident and the tendency of insurance companies to settle claims without an investigation, which may result in causing an unfair injury to the officer's reputation. He noted that a law enforcement officer who is placed on a list has no meaningful right of appeal of that decision. He recommended that any list be prepared according to reasonable criteria and that some form of qualified immunity be provided when a county attorney furnishes information for disclosure.

Members of the committee and the presenters discussed the value of a list, that no list can be comprehensive, and whether a name included on a list could be removed after a certain period of time. Members also discussed how a state panel would function including its voting process. Members



and Mr. Spurrier discussed circumstances in which he would not disclose information to a prosecuting attorney in another jurisdiction. Members discussed what standard of conduct would apply in deciding whether a law enforcement officer's name should be included on a list, and what appeal process could be afforded to an officer whose name was included on that list. It was noted that a judge and not a panel is charged to make the final decision regarding the relevance of a law enforcement officer's conduct in a criminal proceeding.

V. Perspectives by Defense Attorneys

The second panel was invited to present information regarding the perspectives of defense attorneys. Ms. Lucey noted that underlying the issue of disclosure is the principle that all persons facing a criminal charge deserve a fair trial. She discussed an Arizona law (Ariz. R. Crim. P. 15.1) which establishes a database used by participants in that state's criminal justice system. A prosecuting attorney is required to notify a law enforcement officer that the officer's name has been placed in the database. She discussed guidelines followed by the United States Attorney as a good model. She also noted that the Office of the Attorney General in Iowa does not have the same ties with law enforcement officers as do prosecuting attorneys in local communities. Ms. Lucey stressed that when balancing the interests of a law enforcement officer being included on a list against the due process rights of a defendant, the greater weight should be afforded to disclosure. She also noted that a judge decides whether information disclosed about a law enforcement officer should be admitted.

Mr. Rehkemper emphasized that the purpose of the disclosure doctrine is to provide that a criminal defendant receives a fair trial. He discussed creating avenues for persons to file complaints regarding misconduct by law enforcement officers. He also discussed the fundamental role of judges to act as gatekeepers in allowing or excluding relevant evidence. Mr. Rehkemper expressed reservation regarding the use of a state panel to determine by vote the relevance of evidence to be admitted into a criminal trial.

Members and the presenters discussed the duty of a prosecuting attorney to disclose information to a prosecuting attorney in another jurisdiction. It was noted that a county attorney brings a criminal action on behalf of the state and not the county where they serve. Ms. Lucey suggested the use of a questionnaire to be completed by a law enforcement officer to determine whether disclosure was necessary. It was noted that under United States Supreme Court rulings, the discretion to disclose information regarding a law enforcement officer cannot be delegated to a panel. Representative Klein stated that the idea of a panel was only one idea and that the committee was established to consider any number of possible ideas. Mr. Rehkemper suggested that the state establish a database of complaints against law enforcement officers.

VI. Perspectives by Law Enforcement Personnel

The third panel was invited to present information regarding the perspectives of law enforcement personnel. Mr. Bayens has served as Assistant Polk County Attorney and Assistant United States Attorney, and currently serves as Commissioner of the Department of Public Safety. He emphasized the need for law enforcement officers to be vigilant when performing duties involving the public safety, and that obstacles should not be placed in the way of an officer's conscientious performance of that duty. He noted a case in which a police officer testified to an event and later voluntarily acknowledged that he was mistaken concerning the facts which led to reversing the defendant's conviction. He suggested that a prosecuting attorney could file a motion with a court to rule that the officer's original testimony should not be subject to disclosure, and the court's ruling could be used to prevent disclosure in future criminal proceedings. Mr. Bayens supported the ideal of developing a questionnaire for a



prosecuting attorney to use when having a conversation with a law enforcement officer as a normal part of trial preparation. He expressed concern regarding the establishment of a state body such as a panel which would add another layer of administration to the process and vest a state body with the responsibility of looking over the shoulders of a local prosecuting attorney and law enforcement agency.

Mr. Stallman presented recommendations by the Iowa Police Chiefs Association that includes requiring that each county maintain a list of police officers subject to disclosure, that the list be maintained in a repository agency which could be either centralized or local, that standards of conduct used to place information regarding a law enforcement officer on the list be established pursuant to administrative rule, that a procedure be established providing the officer with a right to contest that decision, and that some limit on liability be afforded to persons making a decision to share information. Mr. Stallman discussed the history of a law enforcement officer who as a student was convicted for the theft of firewood committed as part of a fraternity prank. The officer was not aware that his name had been placed on a list until later when he participated in a special federal law enforcement group.

Members and the presenters discussed a number of issues, including the use of a questionnaire to be completed by a law enforcement officer in lieu of using a list prepared by a prosecuting attorney, the conflict arising between a law enforcement officer's reputation and the tendency of insurance companies to settle claims, the difference between practices by large versus small counties, the need to include law enforcement officers in the process, the need to make decisions regarding disclosure according to uniform standards, whether an event should be excluded from consideration based on when the event occurred, the process of notifying an officer that their past conduct will be reported to a court, the best practice to disclose information contained in personnel records, and the concern that officers will become tentative when enforcing the law.

VII. Committee Discussion

Members discussed options for continuing the discussion regarding issues raised during the committee meeting. A number of members expressed a desire to be involved in the process as discussions continue during the upcoming legislative session.

VIII. Materials Filed with the Legislative Services Agency

Materials were distributed at or in connection with the meeting and are filed with the Legislative Services Agency. The materials may be accessed from the "Committee Documents" link on the committee's Internet site accessible at the following address: www.legis.iowa.gov/committees/meetings/documents?committee=36640&ga=ALL

1. Brady-Giglio Supplemental and Background Information
2. Senate File 342 (2021 Iowa Acts chapter 183)
3. Rules adopted by the committee
4. PowerPoint: Brady & Giglio Material (Ms. Shannon Archer)
5. Giglio-Brady Recommendations (Iowa Police Chiefs Association)