

THE SCARLET LETTER: NORTH CAROLINA, *GIGLIO*, AND THE INJURY IN SEARCH OF A REMEDY

*Jeffrey Steven McConnell Warren, Esq.**

In North Carolina, a law enforcement officer's career can be over with the stroke of a prosecutor's pen. Cloaked in prosecutorial immunity, district attorneys enjoy a little-known power to decide that a law enforcement officer's character for truthfulness is materially impaired and that he or she will not be called as a witness in any future criminal proceeding in the state. While the decision of whether to call an officer as a witness during a particular criminal prosecution is subject to the discretion of the prosecuting attorney, district attorneys often publish their decisions concerning an officer's inability to testify at any future proceedings in a letter, known as a "Giglio letter," to an officer's employer. 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. Even if a prosecutor's determination is based on mistaken information or is the product of retaliation, there is no mechanism by which a law enforcement officer in North Carolina can present evidence in his or her defense, challenge a district attorney's decision, or appeal a Giglio determination.

On September 2, 2021, North Carolina enacted a law (the "Giglio Bill") that directs the North Carolina Criminal Justice Standards Division of the Department of Justice 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. Despite North Carolina's strong tradition of robustly protecting the rights of its citizens to earn a living in their chosen profession, the Giglio Bill does not create any safeguards to ensure that Giglio determinations are accurately made in good faith after a complete review of all available evidence and fails to create any avenue for officers to appeal adverse Giglio determinations. This Article explores the unique harm

* B.A., Rhodes College; J.D., University of North Carolina School of Law.

presented by a Giglio letter to law enforcement officers, the urgent need for due process, and ultimately argues that the Giglio Bill runs afoul of the North Carolina Constitution.

INTRODUCTION

In 1972, John Giglio appealed his conviction for forging money orders to the Supreme Court of the United States on the basis of newly discovered “evidence.”¹ His theory was novel: the government failed to disclose a promise made to its key witness that the witness would not be prosecuted if he testified for the government against Mr. Giglio.² In *Brady v. Maryland*,³ the Supreme Court had already determined that the state must disclose “exculpatory evidence” to criminal defendants. Although not “evidence” in the traditional sense, Mr. Giglio asserted that the undisclosed promise of immunity was of such importance to the key witness’s credibility, and therefore to Mr. Giglio’s defense, that the government’s failure to disclose it violated Mr. Giglio’s constitutional right to due process of law.⁴

The Supreme Court agreed.⁵ In *Giglio v. United States*,⁶ the Court held that prosecutors have a constitutional obligation to turn over evidence that can be used to impeach the credibility of a state’s witness “[w]hen the ‘reliability of [the] witness may well be determinative of guilt or innocence.’”⁷ The prosecution does not, however, have to disclose its “entire file” to defense counsel to meet these obligations.⁸ Rather, information is constitutionally discoverable only if it is (1) favorable to the defendant because it is either exculpatory or impeaching, (2) known to a member of the prosecution team, (3) not otherwise publicly available, and (4) the information is “material,” which in turn depends on whether there is a “reasonable probability” that disclosure to the defense would yield a different result in the proceeding (the “*Giglio* Doctrine”).⁹ Examples of such “material evidence” include evidence showing bias, interest, perjury, prior inconsistent statements, and other willful acts of dishonesty that are admissible to impeach testimony within the meaning of a state’s rules of evidence.¹⁰

1. *Giglio v. United States*, 405 U.S. 150, 150–51 (1972).

2. *Id.* at 151.

3. 373 U.S. 83 (1963).

4. *Giglio*, 405 U.S. at 151–53.

5. *Id.* at 154–55.

6. 405 U.S. 150 (1972).

7. *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

8. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

9. *Id.* at 682; see Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 748 (2015).

10. *Bagley*, 473 U.S. at 678–81.

In light of *Giglio*, many prosecutors understandably decline to call witnesses who have impeachable testimony.¹¹ A prosecutor's decision not to call an officer to testify at trial due to the requirement of disclosure regarding an officer's character is often referred to as the "*Giglio* impairment" of the officer.¹² But prosecutors have transformed the *Giglio* decision—intended to be a shield for criminal defendants—into a sword, making prosecutors the ultimate arbiters of who can, or cannot, serve as a law enforcement officer in a particular state.¹³

Over the last five decades, district attorneys across the country have read into the *Giglio* Doctrine a nonexistent obligation to publish sweepingly broad letters summarizing the reasoning behind *Giglio* impairment decisions, known as "*Giglio* letters," to officers' employers.¹⁴ Even though prosecutors only have a constitutional obligation to disclose impeachment material under *Giglio* when the reliability of a witness "may well be determinative of guilt or innocence,"¹⁵ *Giglio* letters are almost always preemptive in nature, meaning they are sent in the absence of a pending trial.¹⁶ These

11. See John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 495 (2001) (explaining the exculpatory nature of a witness's testimony that is both "inculpatory and critically important to the prosecution's case").

12. See *Krile v. Lawyer*, 2020 ND 176, ¶ 5, 947 N.W.2d 366, 371 (2020) (defining "*Giglio* impairment" and citing other cases referencing the phrase).

13. See *The Implications of Brady-Giglio for Law Enforcement*, NAT'L INST. FOR JAIL OPERATIONS, <https://jailtraining.org/the-implications-of-brady-giglio-for-law-enforcement/> (last visited Feb. 26, 2022); John V. Berry, *Giglio Issues for Law Enforcement Officers*, POLICE L. BLOG (Feb. 4, 2014), <https://policelawblog.com/blog/2014/02/giglio-issues-for-law-enforcement-officers.html>.

14. See Letter from Randy Hagler, President, N.C. State Lodge Fraternal Order of Police, to Reps. Kristen Baker, Howard Hunter, III, & John Szoka (Dec. 7, 2020) [hereinafter Letter from Randy Hagler], https://www.ncleg.gov/documentsites/committees/house2019-200/Final%20Report/Report%20Addendum/03_FOP%20Legger%20Regarding%20Draft%20Recommendations.pdf (addressing "[t]he issue of the increased issuance of *Giglio* letters by district attorneys nationwide"); see also *Krile*, 2020 ND at ¶¶ 6–7, 947 N.W.2d at 371 (discussing the "*Giglio* letter" at issue in the case).

15. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). *Giglio* only applies to "key" witnesses rather than "minor witnesses." See, e.g., *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1355–56 (11th Cir. 2011); *United States v. Buchanan*, 891 F.2d 1436, 1444 (10th Cir. 1989).

16. See, e.g., *Stockdale v. Helper*, 979 F.3d 498, 504 (6th Cir. 2020) *cert. denied*, 211 L.Ed. 2d 21 (2021), and *cert. denied*, *Helper v. Stockdale*, 142 S. Ct. 90 (2021); *Singer v. Steidley*, No. 13–CV–72–GKF–TLW, 2014 WL 580139, at *12–13 (N.D. Okla. Feb. 12, 2014); Complaint, *Aquino v. City of Charlotte*, No. 3:21-cv-00618 (W.D.N.C. Nov. 12, 2021); see also David Sinclair, *After Being Fired From Moore County Sheriff's Office, Ex-Deputy Wins 'Vindication'*, PILOT (Feb. 4,

preemptive *Giglio* letters inform an officer's employer of the state's refusal to call an officer as a witness at any future hypothetical trial, regardless of what the officer's role or testimony may be.¹⁷ These "preemptive" *Giglio* determinations frequently lack legal and factual justifications as it is impossible for a prosecutor to determine whether he or she will have disclosure obligations in reference to a particular officer without knowing the context of their future testimony.¹⁸

Although law enforcement agencies have an interest in knowing whether their employees can be called as witnesses, *Giglio* letters are colloquially referred to as "death letters" or "scarlet letters" by prosecutors and law enforcement officers because they are career killers.¹⁹ Being "Gigliod" is an official finding that an officer is too untrustworthy to testify.²⁰ When a district attorney decides not to utilize an officer as a witness for any future criminal trial, the officer is functionally unable to make arrests or be involved in handling evidence.²¹ Rendering them unable to perform basic duties, *Giglio* letters almost always result in the termination of officers or removal of their police powers.²² As such, even though they lack the authority

2020), https://www.thepilot.com/news/after-being-fired-from-moore-county-sheriff-s-office-ex-deputy-wins-vindication/article_801f60c6-47bf-11ea-966d-c77af0be4873.html; Jessi Stone, *Former Deputy Sues DA Over Giglio Order*, SMOKY MOUNTAIN NEWS (Dec. 1, 2021), <https://smokymountainnews.com/news/item/32638-former-deputy-sues-da-over-giglio-order>.

17. See Letter from Randy Hagler, *supra* note 14 (noting that after a *Giglio* violation is alleged and reported, "the only hearing is after the fact and on the issue of disqualifying the officer from serving" and requesting that "procedures be established by statute that will allow an officer an investigation into the factual basis of the alleged dishonesty and a hearing"); see also NC Watchdog Reporting Network, *DAs Warn Police About Untrustworthy Officers but Won't Share with Public*, CAROLINA PUB. PRESS (June 3, 2021), <https://carolinapublicpress.org/46100/das-warn-police-about-untrustworthy-officers-but-wont-share-with-public/> (describing the secret nature of *Giglio* letters).

18. See *United States v. Lujan*, 530 F. Supp. 2d 1224, 1255 (D.N.M. 2008) ("The precise time at which *Brady* or *Giglio* evidence must be disclosed will thus depend on the specific nature of the evidence at issue.").

19. Shea Denning, *Sheriffs' Association Releases Report Recommending Giglio-Related Reforms, Among Others*, UNIV. N.C. SCH. GOV'T: N.C. CRIM. L. (Nov. 18, 2020, 6:15 AM), <https://nccriminallaw.sog.unc.edu/sheriffs-association-releases-report-recommending-giglio-related-reforms-among-others/>; Alan J. Keays, *Tarnished Badge: Dishonesty and Ethical Issues Dog Dozens of Vermont Police Officers*, VTDIGGER (Dec. 16, 2020), <https://vtdigger.org/2020/12/16/brady-giglio-letters-vermont-police/>.

20. Keays, *supra* note 19.

21. See Denning, *supra* note 19; Keays, *supra* note 19; see also Letter from Randy Hagler, *supra* note 14 ("For working officers, [a *Giglio* letter] is a career ender.").

22. See, e.g., Tracee Wilkins, *Prince George's State's Attorney Keeps List of Officers Not Credible to Testify for the State*, NBC WASH. (Apr. 14, 2021),

to directly control the hiring and firing of law enforcement officers, prosecutors have utilized the *Giglio* Doctrine to become *de facto* personnel managers for law enforcement agencies across the country.

Prosecutors have been known to maintain lists of officers they deem to be subject to *Giglio* impairment.²³ In light of the repeated killing of unarmed Black men and women across the United States by law enforcement officers,²⁴ the public has developed a keen interest in these so-called “*Giglio*” or “*Brady*”²⁵ lists.²⁶ Prosecutors generally keep these lists secret, but they often face withering criticism for doing so.²⁷ In response to public outcry, some prosecutors are publishing the identities of officers who they have deemed to be too untrustworthy to testify.²⁸ The public release of this information only raises the stakes for law enforcement officers, whose reputations can be permanently damaged by public accusations of dishonesty.²⁹

In the last decade, pages of ink have been spilled explaining the failure of law enforcement officials, including prosecutors, to discover, report, and disclose “*Giglio* material” to criminal defendants, as well as the pitfalls and shortcomings of the *Giglio* Doctrine itself.³⁰ Almost

<https://www.nbcwashington.com/news/local/prince-georges-county/prince-georges-states-attorney-keeps-list-of-officers-not-credible-to-testify-for-the-state/2640833/>.

23. *Id.*

24. Khaleda Rahman, *Full List of Black People Killed by Police in 2021*, NEWSWEEK (Dec. 28, 2021, 7:00 AM), <https://www.newsweek.com/black-people-killed-police-2021-1661633>.

25. *Brady v. Maryland* was the initial Supreme Court decision holding that a state must produce exculpatory evidence to criminal defendants. 373 U.S. 83, 87 (1963). This holding was expanded by *Giglio* to include evidence that could be used to impeach a witness’ character for truthfulness. *Giglio v. United States*, 405 U.S. 150, 153–55 (1972).

26. See, e.g., *Brady List*, BRADY LIST, <https://giglio-bradylist.com/>; Denning, *supra* note 19; NC Watchdog Reporting Network, *supra* note 17.

27. Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison.*, USA TODAY (Oct. 14, 2019, 8:20 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/>; Wilkins, *supra* note 22.

28. See, e.g., Helen Greenia, *Baltimore Publishes Police ‘Do Not Call List’ – Officers Not to Be Called to Testify Because of Misdeeds*, DAVIS VANGUARD (Nov. 1, 2021), <https://www.davisvanguard.org/2021/11/baltimore-publishes-police-do-not-call-list-officers-not-to-be-called-to-testify-because-of-misdeeds/>.

29. *The Implications of Brady-Giglio for Law Enforcement*, *supra* note 13.

30. See Riley E. Clifton, Comment, *A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307, 309–11, 332 (2020); Jerry P. Coleman & Jordan Lockey, *Brady “Epidemic” Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 224 (2016); David Crump, *Brady v. Maryland, Attorney Discipline, and Materiality: Failed Investigations, Long-Chain Evidence, and Beyond*, 45 HOFSTRA L. REV. 515, 527 (2016); David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why*

nothing has been written, however, about the application of the *Giglio* Doctrine to law enforcement officers and the problems presented when officers are not afforded an opportunity to be heard. To that end, the purpose of this Article is to explain the grave problems presented by *Giglio* to law enforcement personnel, the roadblocks faced by officers in holding prosecutors accountable for abuse of *Giglio*, and the amplified harm presented to law enforcement officers by North Carolina's *Giglio* Bill.

I. A PERPETRATOR CLAIMING IMMUNITY

Considering the career-ending harm presented by *Giglio* letters, one might expect strong substantive and procedural safeguards to protect against “mistakenly or unfairly” subjecting an officer to an adverse *Giglio* determination.³¹ But this is not the case. There is no process in North Carolina, or most other states, through which officers can present evidence in their defense, explain their actions, cross examine their accusers, or otherwise contest or appeal a *Giglio* impairment.³² There is no requirement that officers even be provided notice before a *Giglio* determination is made.³³ Occasionally, officers are completely blindsided when, without warning, they receive a *Giglio* letter indicating they will never be called again to testify on behalf of the state.³⁴ If a *Giglio* letter is false, unfair, made in bad faith, based on incorrect or mistaken information, or simply the product of a grudge, there is nothing an officer can do.³⁵ Once officers are subject to a *Giglio* impairment, they are permanently unable to testify in criminal cases, and are frequently either terminated or relegated to restrictive duty status.³⁶

Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, 121 YALE L.J. ONLINE 203, 209 (2011); Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. REV. 345, 345–46 (2018); Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 43–45 (2017); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 539–40 (2011); Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 920 (2020).

31. Abel, *supra* note 9, at 781.

32. *Id.*

33. *See id.*

34. *See, e.g.*, Jessi Stone, *Macon Sheriff Candidate Gets Giglio Order*, SMOKY MOUNTAIN NEWS (Sept. 19, 2018), <https://smokymountainnews.com/archives/item/25548-macon-sheriff-candidate-gets-giglio-order> (describing an officer in Cherokee County who was “caught off-guard” after receiving a *Giglio* letter).

35. *See* Abel, *supra* note 9, at 781.

36. *See, e.g.*, Complaint, Aquino v. City of Charlotte, No. 3:21-cv-00618 (W.D.N.C. Nov. 12, 2021) (discussing case of an officer unable to testify after receiving a *Giglio* letter).

Because officers have no recourse, prosecutors and other officials have often abused the *Giglio* Doctrine as a pretext for retaliation.³⁷ For instance, in the District of Columbia, the police department asked the prosecutor's office to make *Giglio* determinations to facilitate the firing of officers who were otherwise protected from termination by the statute of limitations on their misconduct.³⁸ In Washington state, an officer claimed that he was improperly subject to a *Giglio* determination when the department wanted to punish him without navigating the obstacles of the formal disciplinary process.³⁹ In Texas, "police officers accused the Ellis County district attorney of labeling one of their colleagues a [*Giglio*] cop in order to help the police chief fire the officer."⁴⁰ In Arizona, a district attorney was accused of using a *Giglio* letter to retaliate against two Phoenix officers to cover up the questionable actions of an investigator.⁴¹ In Oregon, a deputy was placed on a *Giglio* list despite being cleared of any wrongdoing after allegedly butting heads with prosecutors.⁴² In Tennessee, a district attorney issued a *Giglio* letter after two law enforcement officers blew the whistle on police department corruption.⁴³ In Macon County, North Carolina, after purportedly making misstatements about his law enforcement experience during a campaign rally, a candidate for sheriff received a *Giglio* letter from his local district attorney, who happened to be a financial supporter of his opponent.⁴⁴ With no avenue to challenge a prosecutor's

37. See Abel, *supra* note 9, at 781; Singer v. Steidley, No. 13–CV–72–GKF–TLW, 2014 WL 580139, at *13 (N.D. Okla. Feb. 12, 2014).

38. Abel, *supra* note 9, at 782; CONVICTION INTEGRITY PROJECT, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES 26 n.16 (2012).

39. Abel, *supra* note 9, at 782 (citing Wender v. Snohomish County, No. C07-197Z, 2007 WL 3165481 (W.D. Wash. Oct. 24, 2007)). Officer Wender's federal civil rights suit resulted in reinstatement and a \$812,500 settlement. *Id.*

40. *Id.* (citing Telephone Interview with Patrick M. Wilson, Cnty. & Dist. Att'y, in Ellis Cnty., Tex. (Apr. 8, 2014)).

41. Patti Epler, *Cop Chop*, PHOENIX NEW TIMES (Oct. 9, 2003, 4:00 AM), <https://www.phoenixnewtimes.com/news/cop-chop-6407071>.

42. Whitney Woodworth, *Marion County Prosecutor's List Questions Honesty, Reliability of More than 40 Officers*, STATESMAN J. (Apr. 17, 2019, 4:00 PM), <https://www.statesmanjournal.com/story/news/crime/2019/04/17/oregon-marion-county-prosecutor-question-law-enforcement-honesty-reliability/3019431002/>.

43. *Stockdale v. Helper*, 979 F.3d 498, 501–02 (6th Cir. 2020) *cert. denied*, 211 L.Ed. 2d 21 (2021), *and cert. denied*, *Helper v. Stockdale*, 142 S. Ct. 90 (2021).

44. Stone, *supra* note 34. In August 2018, Eric Giles, a sheriff's deputy running to be sheriff of Macon County, was issued a *Giglio* letter by District Attorney Ashley Welch, who happened to be a financial supporter of his opponent. *Id.* According to the Smoky Mountain News, Mr. Giles made misstatements about his prior law enforcement experience during his campaign for sheriff. *Id.* District Attorney Welch's *Giglio* letter made vague references to internal "procedures" which governed her decision, but Mr. Giles was not given an opportunity to be heard prior to District Attorney Welch's decision. *Id.* According to District Attorney Welch, her office's *Giglio* "procedures" were voluntarily put

decision, and unable to afford an attorney, many officers are forced to leave law enforcement and find new careers.⁴⁵

Law enforcement officers in other states have also sued district attorneys for sending false or inaccurate *Giglio* letters, but with mixed success.⁴⁶ Prosecutors have “quasi-judicial” immunity, which bars claims arising from activities “intimately associated with the judicial phase of the criminal process.”⁴⁷ This immunity applies even where a prosecutor acts maliciously or with an unlawful purpose.⁴⁸ In defense of writing *Giglio* letters, district attorneys have leaned heavily on this immunity to defend against the publication of *Giglio* letters that would expose ordinary citizens to civil liability for defamation or tortious interference.⁴⁹

In *Savage v. Maryland*,⁵⁰ an officer alleged that a district attorney sent a *Giglio* letter to his employer in retaliation for the officer raising concerns about the district attorney’s use of racial epithets.⁵¹ The *Giglio* letter allegedly resulted in the officer’s termination.⁵² Purporting to adhere to the Supreme Court’s decision in *Imbler v. Pachtman*,⁵³ the U.S. Court of Appeals for the Fourth Circuit in *Savage* determined that the district attorney’s conduct was entitled to absolute immunity because, in the court’s view, “[d]ecisions regarding witness testimony—which witnesses to call, whether potential witnesses are credible, and how to proceed in the face of credibility questions—are a core prosecutorial function, directly tied to the conduct of a criminal trial.”⁵⁴

Similarly, in *Roe v. City & County of San Francisco*,⁵⁵ a police officer alleged that after he circulated a legal memorandum criticizing prosecutorial conduct, the prosecutor stopped calling him as a

in place by her in 2015 after she attended a training conference for district attorneys in Raleigh. *Id.* Mr. Giles has now filed a lawsuit against Ashley Welch in Clay County Superior Court, and District Attorney Welch removed to the Western District of North Carolina. Stone, *supra* note 16; see Notice of Removal, Giles v. Hindsman, No. 1:21-cv-00256 (W.D.N.C. Sept. 27, 2021).

45. Abel, *supra* note 9, at 780–81.

46. See, e.g., Beck v. Phillips, 685 N.W.2d 637 (Iowa 2004) (dismissing claims arising from the decision not to prosecute cases involving a former officer but allowing tort claims arising from the content of a *Giglio* letter); Singer v. Steidley, No. 13-CV-72-GKF-TLW, 2014 WL 580139, at *54 (N.D. Okla. Feb. 12, 2014) (dismissing defamation claims but allowing First Amendment retaliation claim).

47. *Imbler v. Pachtman*, 424 U.S. 409, 420, 430 (1976).

48. *Id.* at 427.

49. See, e.g., Stockdale v. Helper, 979 F.3d 498 (6th Cir. 2020) *cert. denied*, 211 L.Ed. 2d 21 (2021), and *cert. denied*, Helper v. Stockdale, 142 S. Ct. 90 (2021) (holding that prosecutor was protected by qualified immunity).

50. 896 F.3d 260 (4th Cir. 2018).

51. *Id.* at 266.

52. *Id.*

53. 424 U.S. 409 (1976).

54. *Savage*, 896 F.3d at 270 (citing *Imbler*, 424 U.S. at 426).

55. 109 F.3d 578 (9th Cir. 1997).

witness, determined that there would be no prosecutions of the officer's cases without corroborating evidence, and communicated that decision to the officer's state employer—all of which led to the officer being reassigned because he no longer could “complete [his] duties.”⁵⁶ The officer sued, alleging retaliation for speaking out in violation of the First Amendment.⁵⁷ But that claim, the U.S. Court of Appeals for the Ninth Circuit concluded, was barred by absolute prosecutorial immunity.⁵⁸ The prosecutor's failure to prosecute the officer's cases, the court reasoned, was fully protected: “[t]here can be no question that the nature of the decision not to prosecute is ‘intimately associated with the judicial phase of the criminal process.’”⁵⁹ The prosecutor's assessment of the officer's credibility would be similarly protected, whether “accurate or not.”⁶⁰

Because *Giglio* letters essentially end an officer's career, extending absolute immunity to the publication of *Giglio* letters weaponizes *Giglio* and transforms prosecutors into the ultimate arbiters of who can, or cannot, be law enforcement officers in a particular jurisdiction. What the courts in *Roe* and *Savage* failed to acknowledge is the important difference between a prosecutor deciding who to call as a witness in a *pending* or *identifiable* prosecution and communicating with an officer's supervisor before a criminal proceeding even exists. The key difference is whether the prosecutor's actions concern case-related advocacy. While the former is a necessary task directly tied to a judicial proceeding, the latter is inherently administrative and advisory in nature and is, by definition, not intimately associated with the “judicial phase” of a criminal process before a “judicial phase” exists in the first instance.⁶¹

56. *Id.* at 580–82.

57. *Id.*

58. *Id.* at 583.

59. *Id.* (citations omitted).

60. *Id.* at 584.

61. *Stockdale v. Helper*, 979 F.3d 498, 502–03 (6th Cir. 2020) *cert. denied*, 211 L.Ed. 2d 21 (2021), *and cert. denied*, *Helper v. Stockdale*, 142 S. Ct. 90 (2021). Furthermore, in *Kalina v. Fletcher*, the Supreme Court emphasized the importance of limiting prosecutorial immunity only to those actions undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his or her role as advocate for the state. *See* 522 U.S. 118, 127 (1997). The Court has held that, when determining whether an action is entitled to prosecutorial immunity, a court must examine the “nature of the function performed, not the identity of the actor who performed it.” *Forrester v. White*, 484 U.S. 219, 229 (1988). To that end, in *Kalina*, the Court evaluated each act in filing criminal charging documents separately, explaining how a prosecutor could be immune for filing the “information and the motion for an arrest warrant” but not for “personally attesting to the truth of the averments in the certification.” *Kalina*, 522 U.S. at 129. This principle is perhaps best illustrated by the determination that the senior law enforcement official in the nation—the Attorney General of the United States—is protected only by qualified, rather than absolute, immunity when engaged in the performance of

In recent years, courts have correctly identified this distinction and accordingly declined to extend absolute immunity to the publication of *Giglio* letters.⁶²

In *Beck v. Phillips*,⁶³ a former police officer sued the county district attorney for defamation.⁶⁴ The district attorney issued a *Giglio* letter claiming that the officer had lied about the circumstances surrounding the officer's wife's death.⁶⁵ The Iowa Supreme Court concluded that while the prosecutor's decision not to prosecute cases involving the officer was entitled to absolute immunity, sending a *Giglio* letter to the officer's employer was not.⁶⁶ The court characterized the latter as an "administrative function" of "merely advising local law enforcement authorities on how future criminal prosecutions should be conducted and how his office would deal with those cases."⁶⁷ Because *Giglio* letters are "advis[ory]" in nature, the court determined that the publication of *Giglio* letters is "not a function to which absolute immunity attaches."⁶⁸

The Supreme Court of North Dakota reached a similar conclusion in *Krile v. Lawyer*.⁶⁹ In that case, the district attorney sent a *Giglio* letter to the chief of police after finding two letters of reprimand and several poor performance evaluations in the officer's personnel file.⁷⁰ The *Giglio* letter indicated that the officer would not be called in any future prosecutions.⁷¹ The police department immediately terminated the officer.⁷² The officer sued the district attorney for defamation, but his complaint was dismissed.⁷³ On appeal, the North Dakota Supreme Court determined that while a district attorney has immunity in deciding who to call as a witness, publishing *Giglio* letters to an officer's employer does not fall "within the proper discharge of [a district attorney's] duties as a [state attorney]."⁷⁴ The court reasoned that "not every activity of a prosecutor is within a prosecutor's official duties simply because it is performed by a prosecutor."⁷⁵ The court held that the district attorney's *Giglio* letter amounted to an advisory letter on how she might act in future

national defense functions rather than prosecutorial functions. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985).

62. *Stockdale*, 979 F.3d at 502–03.

63. 685 N.W.2d 637 (Iowa 2004).

64. *Id.* at 641.

65. *Id.*

66. *Id.* at 645.

67. *Id.*

68. *Id.* (citations omitted).

69. 947 N.W.2d 366 (N.D. 2020).

70. *Id.* at 370.

71. *Id.* at 371.

72. *Id.*

73. *Id.* at 374.

74. *Id.* at 379.

75. *Id.*

hypothetical prosecutions, and therefore, the court declined to extend absolute immunity to this “administrative” action.⁷⁶

One of the latest federal appellate decisions concerning prosecutorial immunity for civil damages in the context of a *Giglio* letter is *Stockdale v. Helper*.⁷⁷ There, two police officers sued a district attorney who emailed a *Giglio* letter to the city manager.⁷⁸ The U.S. Court of Appeals for the Sixth Circuit described the letter as the result of an “old grudge” against two officers who blew the whistle on department corruption.⁷⁹ The officers were immediately terminated.⁸⁰ Once again, because “[n]o identifiable trial loomed” when the prosecutor sent the email, the court found that the district attorney was not entitled to immunity.⁸¹ Both sides appealed the Sixth Circuit’s decision on competing grounds, but the Supreme Court denied each party’s certiorari petitions.⁸²

Unlike the *Beck* and *Krile* courts, the *Stockdale* court went one step further by attacking the substance of the *Giglio* letter itself.⁸³ In *Stockdale*, the district attorney based her *Giglio* determination on an allegation that one of the officers used a credit card to enter a home and assault someone—events that purportedly occurred ten years before the operative *Giglio* determination.⁸⁴ Despite extensive briefing, the district attorney failed to justify “how these musty accusations—upon which she did not act in bringing a prosecution—would amount to [*Giglio*] material in *all* future cases.”⁸⁵ The *Stockdale* court explained that a district attorney’s obligations under *Giglio* do not apply to “generic evidence about prior bad acts with only a ‘tenuous connection’ to a pending case.”⁸⁶ No less importantly, the court stated, the accusations against the officers were already public, and prosecutors are under no constitutional obligation to disclose information that is “readily available to the defense from another source.”⁸⁷ Protecting such communications, the court reasoned, risks stretching prosecutorial immunity “beyond reasonable bounds.”⁸⁸

No North Carolina state court—or statute—has addressed what liability can attach from the publication of a preemptive *Giglio* letter.

76. *Id.*

77. 979 F.3d 498 (6th Cir. 2020) *cert. denied*, 211 L.Ed. 2d 21 (2021), and *cert. denied*, *Helper v. Stockdale*, 142 S. Ct. 90 (2021).

78. *Id.* at 501–02.

79. *Id.* at 500.

80. *Id.* at 501–02.

81. *Id.* at 503.

82. *Stockdale v. Helper*, 979 F.3d 498, 504 (6th Cir. 2020), *cert. denied*, 211 L. Ed. 2d 21 (2021), and *cert. denied*, *Helper v. Stockdale*, 142 S. Ct. 90 (2021) (quoting *Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996)).

83. *Id.* at 502–05.

84. *Id.* at 504.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

But the North Carolina Court of Appeals has tacitly acknowledged that preemptive *Giglio* letters may not be subject to prosecutorial immunity. The recent *In re Washington County Sheriff's Office*⁸⁹ decision is instructive. In that case, a trial court judge issued an order *sua sponte* directing the State to disclose investigative materials concerning a particular officer in “any criminal matter” in which the State intended to call the officer as a witness.⁹⁰ On appeal, the Court of Appeals vacated the trial court’s ruling, concluding that it was an improper advisory opinion made in anticipation of future “theoretical” criminal prosecutions involving the officer.⁹¹ While the decision in *In re Washington County* was limited to a *Giglio* determination made by a trial court (as opposed to a prosecutor), the decision stands for the proposition that preemptive *Giglio* letters are advisory in nature and are therefore not sufficiently associated with the “judicial phase of the criminal process” to give rise to prosecutorial immunity.⁹²

II. NORTH CAROLINA’S *GIGLIO* BILL

In the aftermath of the brutal murder of George Floyd,⁹³ North Carolina signed Senate Bill 300 into law on September 2, 2021.⁹⁴ The *Giglio* Bill’s overriding objective is to combat police violence and hold officers accountable for unreasonable uses of force.⁹⁵ To that end, the *Giglio* Bill places an affirmative obligation on law enforcement officers to intervene when unreasonable force is utilized by another officer,⁹⁶ encourages alternative methods of conflict resolution,⁹⁷ and

89. 843 S.E.2d 720 (N.C. Ct. App. 2020).

90. *Id.* at 721.

91. *Id.* at 723.

92. *Stockdale*, 979 F.3d at 502–03.

93. Travis Fain, *NC Legislature Approves Raft of Criminal Justice Reforms*, WRAL.COM, <https://www.wral.com/nc-legislature-approves-raft-of-criminal-justice-reforms/19841111/> (Aug. 25, 2021, 11:52 AM).

94. Act of Sept. 2, 2021, 2021 N.C. Adv. Legis. Serv. 138 (codified in sections of N.C. GEN. STAT. chs. 14, 15A, 17A, 17C, 17E, 122C, 132, 143B, 150B, 153A, 160A). The rest of this Article will cite to the relevant sections of the North Carolina General Statute accordingly.

95. Danielle Battaglia, *Cooper Signs 3 Laws Focused on Police Accountability but Says North Carolina Needs to Go Further*, TIMES NEWS (Sept. 3, 2021, 12:46 PM), <https://www.thetimesnews.com/story/news/2021/09/03/cooper-signs-3-laws-focused-police-accountability-but-says-north-carolina-needs-go-further/5714870001/>.

96. N.C. GEN. STAT. § 15A-401(d1).

97. See generally N.C. GEN. STAT. § 17C-6(a) (effective Oct. 1, 2021) (requiring officer training on specific issues such as community policing and minority sensitivity); N.C. GEN. STAT. § 17E-4(a) (effective Oct. 1, 2021) (same); see also N.C. GEN. STAT. § 14-4(c) (effective Oct. 1, 2021) (providing for alternatives to punishment for violations of certain local ordinances when a person charged produces proof of a good-faith effort to seek assistance to address

places mental health and the use of force at the forefront of officer training.⁹⁸ Its comprehensive reforms allowed the *Giglio* Bill to garner support from across the political spectrum, including the North Carolina Conference of District Attorneys.⁹⁹ These reforms are well taken and represent a step in the direction towards meaningful reform of policing in North Carolina.

Among other provisions, the *Giglio* Bill directs the North Carolina Criminal Justice Standards Division of the Department of Justice (the “Division”) and the North Carolina Criminal Justice and Training Standards Commission (the “Commission”) to collect and maintain information about officer conduct, including, for example, uses of force (the “Critical Incident List”).¹⁰⁰ The *Giglio* Bill also directs the Division to collect reports identifying any officer subject to a *Giglio* impairment (the “*Giglio* Database”).¹⁰¹

In a section entitled “Requirement to Report Material Relevant to Testimony,”¹⁰² any officer who has been informed that he or she “may not be called to testify at trial based on bias, interest, or lack of credibility” must notify the Division within thirty days.¹⁰³ The official making the *Giglio* determination must also notify and provide a copy of the *Giglio* letter to the Division within thirty days.¹⁰⁴ Once notified, the Division is directed to provide written notice of an officer’s *Giglio* status to the head of any future law enforcement agency to which an officer’s certification is transferred, as well as the district attorney in that agency’s prosecutorial district.¹⁰⁵ If an officer subject to a *Giglio* impairment has his or her certification transferred to a state agency, the Division is directed to notify every elected district attorney in every prosecutorial district in North Carolina of the officer’s *Giglio*

underlying factors related to mental health, homelessness, unemployment, or substance abuse).

98. See generally N.C. GEN. STAT. § 17C-6(a) (effective Oct. 1, 2021) (requiring officer educating and training to develop knowledge and increase awareness of mental health and wellness strategies); N.C. GEN. STAT. § 17E-4(a) (effective Oct. 1, 2021) (same).

99. See Emily Schmidt, *Gov. Cooper Signs Bipartisan Police Reform Bill, but Some Say More Needs To Be Done*, DAILY TAR HEEL (Sept. 7, 2021, 5:21 PM), <https://www.dailytarheel.com/article/2021/09/city-sb300-police-reform-bill-update>; Battaglia, *supra* note 95.

100. See N.C. GEN. STAT. § 17C-15 (effective Oct. 1, 2021).

101. *Id.* § 17C-16(a), (f). While the *Giglio* Bill does not explicitly create a “database” for officers subject to *Giglio* impairments, the Division will have to create some system for logging and recording the names of all officers who are *Giglio* impaired in order to carry out its statutory directive.

102. N.C. GEN. STAT. § 17C-16(a) (effective Oct. 1, 2021).

103. *Id.*

104. *Id.* § 17C-16(b)–(c).

105. *Id.* § 17C-16(d).

impairment.¹⁰⁶ These notification obligations extend until the *Giglio* impairment is withdrawn,¹⁰⁷ which almost never occurs.¹⁰⁸

The *Giglio* Bill does not create any standardized procedures for deciding when to issue a *Giglio* determination, what factors or evidence to consider, or whether to allow an officer to present evidence in his or her defense. There is no requirement that officers be provided notice before a *Giglio* determination is made, thereby eliminating any opportunity to contest accusations of *Giglio* impairment. Even if an officer is afforded a meeting, the *Giglio* Bill does not require that an officer be informed of the evidence being considered by an official in anticipation of a *Giglio* determination. There is also no requirement that the Division be informed of the reasoning behind a *Giglio* impairment. Instead, the *Giglio* Bill permits officials to make *Giglio* determinations in complete secrecy without notifying officers that *Giglio* impairments are being considered.

Rather than create a uniform set of *Giglio* guidelines or define “*Giglio* material,” each district attorney’s office, sheriff’s office, and police department must develop its own policies and procedures relating to *Giglio* determinations.¹⁰⁹ These policies and procedures are generally not made available either to the public (absent a public records request) or to the officers involved in a *Giglio* investigation.¹¹⁰ Without a transparent set of uniform procedures governing the *Giglio* process or an overriding definition of “*Giglio* material,” *Giglio* determinations are left to the “eye of the beholder,” creating situations where some officers may be subject to *Giglio*

106. *Id.*

107. *Id.* § 17C-16(e).

108. *See* Abel, *supra* note 9, at 788 (noting that any concessions prosecutors give officers regarding being on the *Brady* list, including reversing the decision altogether, are entirely voluntary).

109. *See* N.C. GEN. STAT. § 17C-16 (effective Oct. 1, 2021) (providing no guidelines, procedures, or definitions relating to *Giglio* guidelines or material).

110. Some larger prosecutorial districts have released their *Giglio* policies and procedures. *See Disclosure of Exculpatory Evidence in Charlotte NC*, CAROLINA ATT’YS: CAROLINA L. BLOG (Jan. 12, 2019), <https://www.carolinaattorneys.com/blog/disclosure-of-exculpatory-evidence-in-charlotte-nc/>. For instance, the Mecklenburg County District Attorney’s Office has established a *Giglio* committee to make decisions concerning whether a particular officer is *Giglio* impaired. *Id.* But their policy does not contain any provisions allowing an officer to challenge or appeal a *Giglio* determination. *See id.* North Carolina is not alone in its lack of a statewide policies and procedures for making *Giglio* determinations. For instance, Oregon’s *Giglio* rules vary county to county, which results in prosecutors “continually adjusting what it takes to label an officer a ‘*Brady* [or *Giglio*] cop.’” Whitney Woodworth & Hannah Kanik, *‘Brady Lists’ of Untruthful Oregon Police Officers Inconsistent County to County*, STATESMAN J. (July 13, 2020, 6:59 AM), <https://www.statesmanjournal.com/story/news/2020/07/13/brady-list-oregon-police-misconduct-cases-prosecutors-disclosure-exculpatory-evidence/5011457002/> (emphasis on “*Brady*” added).

determinations, while others may not—even if they engage in the same or similar conduct.¹¹¹ Furthermore, the lack of clear *Giglio* procedures leaves officers without any means to ensure that *Giglio* determinations are made in good faith after impartial consideration of the relevant evidence.¹¹²

The *Giglio* Bill also expands the number of individuals permitted to make *Giglio* determinations. Pursuant to N.C. Gen. Stat. § 17C-16 and § 17E-16, “agency heads”—meaning police chiefs and sheriffs, in addition to district attorneys and judges—are permitted to make *Giglio* determinations about their officers and report those officers to the Division without ever notifying their subordinates that *Giglio* determinations were ever being considered.¹¹³ On one hand, police chiefs and sheriffs need to report untruthful conduct on behalf of their officers to the appropriate authorities in order to hold those officers accountable and to ensure that district attorneys are able to fulfill their constitutional obligations under *Giglio*. Being untruthful is not the same as being *Giglio* impaired, however, and most police chiefs and sheriffs are not lawyers and do not have formal legal education concerning the North Carolina Rules of Evidence, the Federal Rules of Evidence, or the *Giglio* decision and its progeny.¹¹⁴ Without that educational foundation, the *Giglio* Bill creates an environment ripe for erroneous *Giglio* decisions.

Compounding the harm presented by this complete lack of safeguards, the *Giglio* Bill creates no avenue through which an officer can challenge either a *Giglio* impairment decision or the Division’s republication of a *Giglio* decision to future employers. In fact, the omission of any sort of due process from N.C. Gen. Stat. § 17C-16 and § 17E-16 appears to be intentional.¹¹⁵ Pursuant to the newly created

111. John V. Berry, *Due Process for Officers Placed on Giglio or Brady Lists*, POLICE L. BLOG (Jan. 29, 2018, 9:29 PM), <https://policelawblog.com/blog/2018/01/developments-regarding-giglio-lists.html>.

112. *Id.*

113. See N.C. GEN. STAT. § 17C-16(a)(1) (effective Oct. 1, 2021); N.C. GEN. STAT. § 17E-16(a)(1) (effective Oct. 1, 2021); see also ROY COOPER, N.C. DEP’T OF JUST. MUTUAL AID AGREEMENTS BETWEEN LAW ENFORCEMENT AGENCIES IN NORTH CAROLINA 3 (rev. ed. 2014) (explaining that the head of an agency could be “the chief or sheriff”).

114. CHRISTIE GARDINER, POLICING AROUND THE NATION: EDUCATION, PHILOSOPHY, AND PRACTICE 32 (2017), <https://www.policefoundation.org/publication/policing-around-the-nation-education-philosophy-and-practice/>. In 2017, “17.1% of CEOs (chiefs and sheriffs) ha[d] a high school diploma, 19.0% ha[d] a two-year degree, 28.7% ha[d] a four-year degree, 32.1% ha[d] a master’s degree, and 3.0% ha[d] a doctorate or other terminal degree (for example, J.D or Psy.D.)” *Id.* What’s more, the *Giglio* Bill does not require that police chiefs or sheriffs undergo any training concerning *Giglio* and its progeny.

115. Notably, the North Carolina Sheriff’s Association recommended that officers be afforded an administrative hearing to challenge a *Giglio* determination. See N.C. SHERIFFS’ ASS’N, REPORT ON LAW ENFORCEMENT

N.C. Gen. Stat. § 17E-15, law enforcement officers are able to challenge decisions placing them on the Critical Incident List, but officers are inexplicably unable to challenge a *Giglio* determination or contest the Division's future *Giglio* notifications.¹¹⁶ Instead, the Division is instructed to republish *Giglio* determinations—even if those determinations are defamatory, retaliatory, or otherwise erroneous—to an officer's future employers with no oversight or any way for the officer to appeal.¹¹⁷

North Carolina's failure to include any safeguards or judicial oversight to the *Giglio* determination process is incomprehensible because an explicit avenue for appeal was included for the Critical Incident List, and because, as proof it can be done, at least two other states have adopted laws or procedures that provide protection against the impact of a *Giglio* determination.¹¹⁸ For example, a California statute¹¹⁹ mandates that an adverse employment action “shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a *Brady* list, or [because] the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland*.”¹²⁰ Similarly, in New Jersey, the Attorney General's Office issued a law enforcement directive that discourages general-purpose *Giglio* determinations and allows police officers to seek review of a prosecutor's determination from the prosecutor or the Office of the Attorney General.¹²¹ Importantly, the New Jersey directive makes clear that such review

PROFESSIONALISM 9–10 (2020), <https://nccriminallaw.sog.unc.edu/wp-content/uploads/2020/11/NCSA-Report-on-Law-Enforcement-Professionalism-FINAL-10-21-20.pdf>.

116. N.C. GEN. STAT. § 17E-15(d) (effective Oct. 1, 2021). In *In re Washington County Sheriff's Office*, the North Carolina Court of Appeals had an opportunity to opine whether any due process is required before the issuance of a *Giglio* determination but declined to address the question as it was not necessary to the resolution of the case. *In re Washington Cnty. Sheriff's Off.*, 843 S.E.2d 720, 721 (N.C. Ct. App. 2020). On appeal, the officer asserted that his due process rights were violated because the trial court failed to conduct any hearing prior to unilaterally directing the state to turn over investigative materials about the officer in all future criminal trials where the officer is called as a witness. *Id.* at 721–22. Instead, the Court of Appeals vacated the trial court's order as an improper advisory opinion. *Id.* at 723.

117. N.C. GEN. STAT. § 17C-16(d) (effective Oct. 1, 2021).

118. See, e.g., CAL. GOV'T CODE § 3305.5(a) (2014) (mandating that officers cannot be fired solely for being on a *Brady* list); Attorney General Law Enforcement Directive Establishing County Policies to Comply with *Brady v. Maryland* and *Giglio v. United States* from Gurbir S. Grewal, N.J. Att'y Gen., to Cnty. Prosecutors 8–9 (Dec. 4, 2019) [hereinafter Directive Establishing County Policies], www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2019-6.pdf (directing New Jersey prosecutors to make a *Giglio* decision on a case-by-case basis and allowing officers to review the determination).

119. CAL. GOV'T CODE § 3305.5(a) (2014).

120. *Id.* (emphasis added).

121. Directive Establishing County Policies, *supra* note 118, at 8–9.

“shall not interrupt or interfere with the prosecutor’s obligation to disclose information in the ongoing case.”¹²²

Giglio letters do not appear to have any analogue in any other public employment setting in North Carolina. In fact, pursuant to N.C. Gen. Stat. § 150B-43, every licensed professional in North Carolina, from barbers to foresters, has a statutorily guaranteed mechanism by which to obtain judicial review of an occupational licensing board’s decision affecting their employment.¹²³ Now, even though *Giglio* letters almost always result in their termination, law enforcement officers may be the only exception to the rule guaranteeing judicial review of state-sanctioned decisions affecting a person’s employment.

III. THE *GIGLIO* BILL AND NORTH CAROLINA’S CONSTITUTION

Given the glaring absence of due process, transparency, or safeguards, the *Giglio* Bill is likely unconstitutional.

Article I of the North Carolina Constitution declares thirty-seven rights to its citizens, some of which have no analogue in the United States Constitution and predate those declared in the Bill of Rights.¹²⁴

Article I, Section 19 of the North Carolina Constitution provides:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.¹²⁵

North Carolina’s “law of the land” clause is synonymous with due process of law, both in terms of substance and procedure.¹²⁶ It is well established that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.”¹²⁷ This is especially true where a state attaches a “badge of infamy” to a citizen.¹²⁸

The creation of *Giglio* databases with no mechanism for appeal or removal has already been deemed constitutionally problematic by

122. *Id.* at 8.

123. See N.C. GEN. STAT. § 150B-43 (1973) (“Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article . . .”).

124. Grant E. Buckner, *North Carolina’s Declaration of Rights: Fertile Ground in A Federal Climate*, 36 N.C. CENT. L. REV. 145, 149–53 (2014).

125. N.C. CONST. art. I, § 19.

126. *Johnston v. State*, 735 S.E.2d 859, 870 (N.C. Ct. App. 2012) *aff’d*, 749 S.E.2d 278 (N.C. 2013).

127. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

128. *Id.* (quoting *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)).

courts in other jurisdictions. In 2017, the Philadelphia district attorney began compiling a “Do Not Call List” of officers who, in the district attorney’s view, were “tainted” and subject to *Giglio* impairments.¹²⁹ With no avenue to challenge the district attorney’s determination, the officers filed a lawsuit arguing that their placement on the “Do Not Call List” served as a stain on their professional reputations and violated their rights to due process.¹³⁰ Labeling the “Do Not Call List” a “blacklist of sorts,” the Commonwealth Court of Pennsylvania determined that the officers had a constitutionally protected interest in their professional reputation, which required notice and an opportunity to be heard prior to their placement on the “Do Not Call List.”¹³¹ The court explained that “*Giglio* [does not] eliminate the right of innocent officers to be afforded a meaningful opportunity to argue why they should not be placed on the List or why they should be removed.”¹³²

There is no greater “badge of infamy”¹³³ for law enforcement officers than a *Giglio* letter. Not only do N.C. Gen. Stat. § 17C-16 and § 17E-16 serve to perpetuate and memorialize “badges of infamy” on citizens in perpetuity without providing them any opportunity to be heard, but the *Giglio* Bill directs the state to take action and affirmatively republish *Giglio* determinations, even if those determinations are plainly erroneous, defamatory, or the product of mistaken information. With no avenue to present evidence in their defense or challenge a *Giglio* determination, law enforcement officers, unlike every other licensed professional in North Carolina, are not afforded any opportunity to defend their good name, reputation, honor, or integrity. This arbitrary and intentional omission of basic due process runs afoul of North Carolina’s strong traditions of robustly protecting the rights of its citizens to work, earn a living, and defend their reputations.

Unlike other states’ constitutions, the North Carolina Constitution also contains an—until very recently—often overlooked provision protecting the right of North Carolinians to enjoy the “fruits of their own labor.”¹³⁴ Article I, Section I of the North Carolina Constitution provides:

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.¹³⁵

129. Fraternal Ord. of Police Lodge No. 5 ex rel. McNesby v. City of Phila., No. 1295 C.D. 2019, 2021 WL 5182646, at *1, *4 (Pa. Commw. Ct. Nov. 9, 2021).

130. *See id.* at *6–7.

131. *Id.* at *33–37.

132. *Id.* at *27.

133. *Constantineau*, 400 U.S. at 437 (quoting *Wieman*, 344 U.S. at 191).

134. N.C. CONST. art. I, § 1.

135. *Id.*

The “fruits of labor” provision, as it is often called, was added to the North Carolina Constitution in 1868, shortly after the Civil War.¹³⁶ Passed the same year that North Carolina ratified the Fourteenth Amendment to the United States Constitution, the “fruits of labor” provision was likely intended to “strike an ideological blow at the slave labor system.”¹³⁷ North Carolina courts, however, largely ignored this provision until the mid-twentieth century, when it was applied to the State’s professional licensing powers.¹³⁸ The “fruits of labor” provision then lay dormant again until 2014, when the North Carolina Supreme Court applied it to a city ordinance capping towing fees.¹³⁹

In 2018, the North Carolina Supreme Court published a precedent-setting decision in *Tully v. City of Wilmington*,¹⁴⁰ expanding the “fruits of labor” provision into the public employment context.¹⁴¹ In that case, a Wilmington police officer was denied a promotion after he failed a mandatory examination that tested an officer’s knowledge of the law.¹⁴² His exam answers were correct based on the current state of the law, but he failed the exam because the answer key was outdated.¹⁴³ Written department policy laid out the promotion and examination procedures and provided that candidates could appeal any portion of the selection process, so the officer sought to appeal his test results.¹⁴⁴ The City of Wilmington refused to hear the officer’s appeal, determining the test results “were not a grievable item” and that nothing could be done.¹⁴⁵ The North Carolina Supreme Court determined that this decision violated the officer’s constitutional rights under Article I, Section 1, reasoning that the “fruits of labor” provision applies “when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place.”¹⁴⁶

136. *Mole’ v. City of Durham*, 866 S.E.2d 773, 777 (N.C. Ct. App. 2021) (citing JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION WITH HISTORY AND COMMENTARY* 38 (1993)).

137. ORTH, *supra* note 136, at 38.

138. *See Mole*, 866 S.E.2d at 777. These decisions recognized a person’s ability to earn a livelihood as a protected constitutional right and struck down licensing restrictions not rationally related to public health, safety, or welfare and not reasonably necessary to promote a public good or prevent a public harm. *See, e.g.*, *Roller v. Allen*, 96 S.E.2d 851, 854 (N.C. 1957); *State v. Ballance*, 51 S.E.2d 731, 735 (N.C. 1949).

139. *King v. Town of Chapel Hill*, 758 S.E.2d 364, 371 (N.C. 2014).

140. 810 S.E.2d 208 (N.C. 2018).

141. *Id.* at 213.

142. *Id.* at 211.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 215.

But *Tully* has far broader implications. The *Tully* court indicated that the “fruits of labor” clause protects a person’s “right ‘to engage in any of the common occupations of life,’ unfettered by unreasonable restrictions imposed by actions of the state or its agencies.”¹⁴⁷ In addition to failing to follow promotional policies, the North Carolina Supreme Court has stated that the “fruits of labor” clause is violated where the State “unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities.”¹⁴⁸ For these reasons, the North Carolina Court of Appeals suggested that the North Carolina Constitution is more protective of the rights of North Carolinians than the United States Constitution.¹⁴⁹

The mandated republication of an officer’s *Giglio* status directly to all future employers undoubtedly imposes “some stigma or disability” on an officer that will “foreclose the freedom to take advantage of employment opportunities.”¹⁵⁰ A *Giglio* determination is a scarlet letter for any law enforcement officer. The lack of procedural safeguards, due process, judicial review, or any requirement that notice be provided to an officer before a *Giglio* determination is made, creates an environment ripe for erroneous *Giglio* determinations, and renders the republication of *Giglio* decisions unfair to the officers involved. With no avenue to challenge the Division’s republication of a *Giglio* determination, even where a *Giglio* decision is premised on mistaken information, officers are unable to remove (or even contest) the stigma and disability placed upon them by the state and are deprived of their right to pursue their chosen profession free from unfair governmental interference.

CONCLUSION

The citizens of North Carolina have an undeniably compelling interest in identifying dishonest officers, holding them accountable, and prohibiting them from serving as agents of the state. There is no place in law enforcement for dishonest officers. In light of the ongoing epidemic of police violence in the United States, the *Giglio* Bill makes important reforms to policing in North Carolina. These measures are

147. *Id.* at 214 (quoting *Presnell v. Pell*, 260 S.E.2d 611, 617 (N.C. Ct. App. 1979)).

148. *Presnell*, 260 S.E.2d at 617 (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

149. *Mole’ v. City of Durham*, 866 S.E.2d 773, 777 (N.C. Ct. App. 2021) (“We must again consider whether the analogous clause in the North Carolina Constitution is more protective and extends the guarantee of equal protection in the public employment context. As with due process, the fact that the Fourteenth Amendment does not provide a cause of action for Sergeant Mole’ does not necessarily foreclose the possibility that our state Constitution could yield a remedy: the United States Constitution is the floor of constitutional protections in North Carolina, not the ceiling.”).

150. *Presnell*, 260 S.E.2d at 617.

well-taken and represent a step in the right direction, although there remains much work to be done to repair the relationship between law enforcement and communities across North Carolina and the United States.

A delicate balance exists between a prosecutor's constitutional obligation to produce exculpatory impeachment evidence to criminal defendants and an officer's constitutional rights to due process and to enjoy the fruits of his or her labor. The notion that this balance cannot be struck, or that a prosecutor's decision must always be afforded the greatest deference, is unsupported by current law and common sense.

Even though other states have created at least temporary solutions to the constitutional problems presented by *Giglio*, North Carolina failed to follow their example. The push for holding law enforcement accountable should not stop with the "blue line." District attorneys, all the way down to the newest beat cop, need to answer for their actions and omissions. Without providing an opportunity to be heard or rebut an adverse *Giglio* determination, even where that determination is based on mistaken information or is a transparent pretext for retaliation, the *Giglio* Bill deprives officers of a central tenet of North Carolina's organized system of justice: the right to be free from arbitrary and unfair government action. The provisions enacted by the *Giglio* Bill need meaningful reform to ensure that police officers receive the same constitutional protections as every other citizen in North Carolina.