OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT

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"BRADY/GIGLIO POLICY" OF THE DISTRICT ATTORNEY 18th Judicial District

Consistent with the long-standing practice of the Office of the District Attorney, 18th Judicial District, the following policy addresses the obligation of this office to provide discovery in all criminal cases.

LEGAL ANALYSIS

A. STATUTORY AND CASE LAW AUTHORITY

Kansas Statutes Annotated 22-3212 & 22-3213 set forth the statutory obligation of the State of Kansas to collect and provide complete discovery to the defense in all criminal matters. See State v. Lewis, ___ Kan. ___, 327 P.3d 1042 (2014).

Constitutionally, prosecutors have an unqualified obligation under Brady v. Maryland, 373 U.S. 83, 87 (1963), to turn over all evidence favorable to the accused when the evidence may be "*material either to guilt or punishment.*" See State v. Warrior, 294 Kan. 484, 505-506 (2012). The failure to disclose material evidence can, by itself, provide grounds for a new trial "*irrespective of the good or bad faith of the prosecution.*" Brady, at 87.

Evidence that is "favorable to the defense" has been specifically held to encompass "*impeachment evidence as well as exculpatory evidence.*" Strickler v.

Greene, 527 U.S. 263, 281-82 (1999); United States v. Bagley, 473 U.S. 667, 676 (1985); and State v. Kelly, 216 Kan. 31, 37 (1975).

The Kansas Supreme Court has included the responsibility in the Rules of Professional Conduct that govern the behavior of Kansas prosecutors. **Rule 3.8(d)** states that prosecutors are ethically required to "*make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.*" *See* In re Jordan, 278 Kan. 254, 261 (2004).

If any law enforcement officer is in possession of discoverable information, the prosecution has a positive obligation to provide the information even if the defense does not make such a request. United States v. Agurs, 427 U.S. 97, 108 (1976); State v. Nguyen, 251 Kan. 69, 82 (1992). Given this affirmative obligation, the continuing "open file" policy of this office, while helpful, does not absolve the State of its affirmative obligation to seek out and specifically provide exculpatory information. State v. Adam, 257 Kan. 693, 707 (1995).

The U.S. Supreme Court made clear in Kyles v. Whitley, 514 U.S. 419 (1995) that information in the possession of **any** state officers, not just prosecutors, is subject to the Brady disclosure obligation. In other words, it is no defense to the Brady responsibility that the prosecution did not know about the material information that was in the possession of a law enforcement agent. See State v. Francis, 282 Kan. 120 (2006).

As such, prosecutors have an affirmative duty to uniformly seek out exculpatory and impeachment evidence in the possession of law enforcement agents. As the Whitley court observed, there can be no question that "*procedures and regulations can be established to carry* [the prosecutor's] *burden and to insure communication of all relevant information on each case to every lawyer who deals with it.*"

Stated another way, the obligation to disclose exculpatory information is collectively held by law enforcement and the prosecution:

> *"There is no ambiguity in our law. The obligation under Brady and Giglio is the obligation of the government, not merely of the prosecutor [citation omitted]. 'Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where the investigating agency does.'"* U.S. v. Blanco, 392 F.2d 382, 394 (2004).

Given the clear status of the law, the Office of the District Attorney, 18th Judicial District, follows the directive of the United States Supreme Court in Agurs, 427 U.S. 97, 108 (1976): "[T]*he prudent prosecutor will resolve doubtful questions in favor of disclosure.*"

B. DISCLOSABLE BRADY EVIDENCE

i. Exculpatory Information

As set forth above, the State has an obligation to collect and provide exculpatory, material information to the defense. "*Evidence is exculpatory if it tends to disprove a fact in issue which is material to guilt or punishment.*" State v. Aikins, 261 Kan. 346, 382 (1997). Further, "*evidence may be exculpatory without being exonerating.*" Haddock v. State, 295 Kan. 738, 759 (2012).

Law enforcement agents are to provide discovery to the Office of the District Attorney in a timely manner as the information becomes available. ***Kansas Statutes Annotated*** 22-3212(h) contemplates full discovery being completed "*no later than 21 days after arraignment, or at such reasonable later time as the court may permit.*" However, when a request for discovery is made by the defense, this office endeavors to respond to the defense within days, not weeks.

ii. Impeachment Information

> *"One of the most important areas of the law of evidence relates to impeaching witnesses. 'To impeach a witness means to call into question*

the veracity of the witness by means of evidence offered for that purpose, or by showing that the witness is unworthy of belief.'" State v. Stinson, 43 Kan.App.2d 468, 479 (2010), *quoting* State v. Barnes, 164 Kan. 424, 426 (1948).

Impeachment evidence is exculpatory and therefore subject to Brady obligations. See Strickler v. Greene, supra. Prosecutors and investigators have a duty under *Giglio* v. U.S., 405 U.S. 150 (1972) "*to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility.*" U.S. v. Bernal-Obeso, 989 F.2d 331 (1993).

The following types of impeachment information relative to the credibility of **any** witness—including law enforcement officers and government agents—are subject to production and disclosure under Brady:

1. Opinion or Reputation evidence regarding witnesses' credibility and truthfulness

Kansas Statutes Annotated 60-446 & 60-447 allow the admission of evidence related to a character trait of a witness.

Impeachment of a witness with evidence regarding the witness's reputation for truthfulness has a long history in this state. See Stevens v. Blake, 5 Kan.App. 124, §3 (1897).

An example would include but not be limited to a situation in which a law enforcement agency sustains an allegation that an agent of that department lied during an internal investigation or sustains a finding that the officer provided false testimony or testimony that lacked credibility. Such a finding must be provided to the prosecution so that the information can then be disclosed to the defense, because that impeachment information is in the possession of the law enforcement or government agency. See Brady; Strickler; and Whitley.

In Lumry v. State, 49 Kan.App.P2d 276, 280 (2013) (petition for review granted

on other grounds, June 2014), an action brought by a former KBI agent who had been placed on administrative leave for falsifying a time sheet and then later claimed retaliatory discharge, the Court noted the State's clear disclosure obligation under Giglio v. U.S., 405 U.S. 150 (1972), in light of concerns of expressed by Lumry's former supervisor concerning Lumry's "*credibility as a government witness*":

> "*Prosecutors are required to disclose evidence about the credibility of government witnesses, including law enforcement officers, to defense counsel in criminal prosecutions, and such information may jeopardize those prosecutions.*"

See also U.S. v. Kiszewski, 877 F.2d, 210, 216 (2d Cir. 1989).

2. Any prior criminal convictions involving false statement or dishonesty.

Kansas Statutes Annotated 60-421 states, "[e]*vidence of the conviction of a witness for a crime* ***not*** *involving dishonesty or false statement shall be* ***inadmissible*** *for the purpose of impairing his or her credibility.* (emphasis added)"

Conversely, convictions for crimes of dishonesty are properly used to impeach a witness. "*The phrase 'dishonesty or false statement' means crimes such as perjury, criminal fraud, embezzlement, forgery, or any other offense involving some element of deceit, untruthfulness, or lack of integrity in principle.*" Bick v. Peat Marwick & Main, 14 Kan.App.2d 699, 711-12 (1990). See also, State v Thomas, 220 Kan. 104 (1976) (Burglary); Tucker v. Lower, 200 Kan. 1 (1969) (Theft and possession of stolen property); State v. Laughlin, 216 Kan. 54 (1975) (Robbery).

Juvenile adjudications (convictions) for crimes of falsehood or dishonesty are the proper subject of impeachment. Davis v. Alaska, 415 U.S. 308 (1974); see State v. Deffenbaugh, 217 K. 469 (1976).

3. Promises of benefit

A witness may be questioned concerning his or her "relationship with police."

State v. Humphrey, 252 Kan. 6, 17 (1992). This would include any communication between the law enforcement agent and the witness that promises or implies certain benefits or consequences to the witness's testimony. See Giglio. Benefits would include, but would not be limited to the following: dropped or reduced charges; immunity agreements; expectations for a downward departure or motions of reduced sentence; assistance in any criminal proceedings; consideration; monetary benefits; non-prosecution agreements; U-Visas; S-Visas.

Similarly, a defendant is allowed to question a witness concerning his or her probation status in order to explore the witness's motive—if any—to appease the State due to his or her status as a probationer. State v. Bowen, 254 Kan. 618 (1994); see also, State v. Hills, 264 Kan. 437 (1998).

4. Specific instances of conduct which might be used to attack one's credibility and character for truthfulness.

The admissibility of evidence concerning a witness's character trait for truthfulness is governed by ***Kansas Statutes Annotated*** 60-446 and 60-447. ***Kansas Statutes Annotated*** 60-446 provides that when a person's character is in issue, such character can be proved by opinion or reputation evidence, or by specific instances of conduct, subject to the limits of ***Kansas Statutes Annotated 60-447***. ***Kansas Statutes Annotated*** 60-447 governs character traits offered as evidence to prove conduct. Specifically, ***Kansas Statutes Annotated*** 60-447 states that "when a trait of a person's character is relevant as tending to prove conduct on a specified occasion," that trait may be proved as provided by ***Kansas Statutes Annotated*** 60-446, except that "evidence of specific instances of conduct" are inadmissible other than certain prior convictions. As such, where a party seeks to admit evidence of a person's

character to prove the charged conduct charged, it may only be admitted in the form of reputation or opinion evidence, not specific instances of conduct. See State v. Price, 275 Kan. 78 (2003).

In the situation when a government agent has been found by his or her supervisor to have lied during an internal investigation, or been sustained for untruthfulness or dishonesty, the specific facts that lead to the conclusion that the witness lied would likely be inadmissible, however, the opinion of the supervisor that the agent is a liar or has such a reputation could be admissible.

5. Statements of any witness that are inconsistent with the testimony of the witness.

Prior inconsistent statements of any witness are admissible to cross examine the witness. See ***Kansas Statutes Annotated*** 60-422:

> *"As affecting the credibility of a witness ... (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him or her an opportunity to identify, explain or deny the statements."*

"When a witness's testimony contradicts his prior testimony, extrinsic evidence of that prior testimony may be admitted. In addition, the extent of cross-examination for purposes of impeachment lies within the sound discretion of the trial court and, absent proof of clear abuse, the exercise of that discretion will not constitute prejudicial error." State v. Brown, 235 Kan. 688, 689 (1984); See also U.S. v. Triumph capital Group, 544 F.3d 149 (2nd Cir. 2008); State v. Osbey 246 Kan. 621, 631 (1990).

To ensure compliance with Brady, any memorialization—written or recorded—of any statements made by the witness inconsistent with his or her testimony must be provided in discovery.

6. Any information which may indicate a witness is biased against a group or individual.

Kansas Statutes Annotated 60-420 states that a party may attack the credibility of a witness and may "*examine the witness and introduce extrinsic evidence concerning any conduct by him or her and any other matter relevant* [to] *the issues of credibility.*"

A witness with an "*interest in the outcome, or [who] is prejudiced, hostile, or sympathetic . . . may be impeached by having these matters exposed to the jury.*" State v. Scott, 39 Kan.App.2d 49, 58-59 (2008).

When a law enforcement or government agency is in possession of any information material to the bias of any witness, this information must be provided to the prosecution for subsequent disclosure.

- Hereinafter, "impeachment information" refers to the above categories of impeachment.

C. **REQUIRED DISCLOSURE VS. ADMISSIBILITY**

The prosecution has no obligation to communicate preliminary, challenged, or speculative information. United States v. Agurs, at 109 & fn 16.

Under Kansas law, a witness's prior convictions for crimes not related to crimes of dishonesty are not admissible. ***Kansas Statutes Annotated*** 60-421.

Certain other specific issues have been addressed by the appellate courts of this state and held not to be the proper subject of cross-examination.

i. Expunged convictions – a witness may not be impeached in a civil case with his or her prior expungment. Pope v. Ransdell, 251 Kan. 112, 124 (1992). See ***Kansas Statutes Annotated*** 21-6614 (formerly 21-4619). To date, the issue has not

specifically been raised in a criminal case in Kansas.

ii. Diversion – a witness may not be impeached with his or her prior diversion. State v. Sanders, 263 Kan. 317 (1997);

iii. Pending Investigation - evidence of a pending investigation of any crime, that has not yet resulted in a conviction. State v. Martis, 277 Kan. 267, 279-289 (2004).

The question remains whether evidence that would **not** be admissible under Kansas law remains subject to discovery and disclosure under Brady? The Supreme Court's holding in Brady itself does not answer this specific question. Kansas case law is silent on the issue and there has been a split of opinion in the federal circuits. U.S. v. Morales, 746 F.3d 310 (2014).

On one side, the First, Second, Third, Sixth, Ninth and Eleventh Circuits have held that "*inadmissible evidence may be material if it could have led to the discovery of admissible evidence.*" Johnson v. Folino, 705 3d 117, 130 (3d Cir. 2013); Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); United States v. Gil, 297 F.3d 93, 04 (2d Cir. 2002); Bradley v. Nagle, 212 F.3d 559, 567 (11th Cir. 2000); United State v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991). See also Milke v. Ryan, 711 F.3d 998, 1006 (9th Cir. 2013) ("*Instead of examining this claim in light of Giglio—asking whether the evidence was favorable, whether it should have been disclosed and whether the defendant suffered prejudice, see* Strickler [citation omitted]*—the state court focused on the discoverability of the evidence and the specificity of the claim. This is not the inquiry called for by long-standing Supreme Court caselaw.*")

Conversely, other circuits have held "*evidence that would not have been admissible at trial is immaterial because it could not have affected the trial court's*

outcome." United State v. Silva, 71 F.3d 667, 670 (7th Cir. 1995); Jardine v. Dittmann, 658 F.3d 772, 777 (7th Cir. 2011); and Hoke v. Netherland, 92 F.3d 1350, 1356 (4th Cir. 1996).

In Wood v. Bartholomew, 516 U.S. 1 (1995), the Supreme Court held that evidence of a polygraph examination—which was inadmissible under state law, even for impeachment purposes—"*is not 'evidence' at all.*" Wood, at 6. While that would seem to have been dispositive, the Wood court then "*proceeded to analyze whether the withheld information 'might have led* [defendant's] *counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized.*'" Morales, at 315.

Given the current status of the law, while evidence of a diversion, expungment, or pending investigation, for instance, would not be admissible under Kansas law, evidence related to these issues in any witness's background must be assessed to determine if the issue could have led to the discovery of admissible impeachment evidence in a given case. The Office of the District Attorney retains the option to request an *in camera* inspection of the information to determine whether disclosure is required.

D. **IMPLEMENTATION OF THIS POLICY**

Obligation of Law Enforcement Agency to Notify Prosecution.

Consistent with the long-standing policy of the Office of the District Attorney, this office will continue to require law enforcement and government agencies to produce all discoverable material in each case charged. To ensure compliance, a written request will be sent annually to law enforcement and government agencies bringing cases to this office for review and prosecution or whose agents may be called as witnesses in the same. This

request will require the production of all exculpatory, material evidence related to the case, as well as impeachment information or status relative to **any** witness.

Specifically, the Office of the District Attorney will request each law enforcement agency conducting business and regularly participating as witnesses in cases filed in this jurisdiction provide impeachment status relative to its respective agents, **as that information becomes known to said agency.**

- Allegations that cannot be substantiated, are not credible, have been unfounded or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. See Agurs.
- Evidence concerning impeachment information that is inadmissible under Kansas law—including diversions, expungments and pending investigations—will be assessed by the Brady/Gilgio Committee of the Office of the District Attorney on a case by case basis to determine if the information may lead to the discovery of material evidence in the case. See Wood.

The obligation to evaluate and when appropriate, disclose potential Brady/Giglio material, extends to information held by the prosecution team, even if the individual prosecutor or the District Attorney's Office did not know of the material. These legal principles require the District Attorney to insist upon the cooperation of law enforcement and government agencies in providing this office with said information. Failure to disclose such material has the potential to result in sanctions, suppression of evidence, dismissal or the reversal of a conviction.

The District Attorney requires law enforcement and government agencies to promptly notify the District Attorney's Brady/Giglio law enforcement liaison (Chief of Investigations, Office of the District Attorney) of

impeachment status concerning a law enforcement or government agent, involved in a criminal prosecution.

E. **RESPONSE OF THE OFFICE OF THE DISTRICT ATTORNEY**

i. Brady/ Giglio Committee

The Office of the District Attorney will maintain a Brady/Giglio committee consisting of the administrative legal staff, supported in the fulfillment of their obligations by the Chief of Investigations of the Office of the District Attorney. This committee is tasked with disseminating impeachment status of any law enforcement or government agent to the supervising attorneys of this office.

When impeachment status concerning a law enforcement or government agent is made known to the Brady/Giglio committee, the agent's status will be made available to the supervising attorneys of the Office of the District Attorney. The individual prosecutors in the office tasked with handling individual cases are directed to check with their respective supervisor to determine whether any witness they intend to call has been identified as having impeachment status. If the witness is a law enforcement or government agent, counsel for the defense will be notified of the impeachment status and, as necessary, directed to agent's respective employer for additional details.

ii. Decision to commence criminal prosecution

Pursuant to ***Kansas Statues Annotated*** 22-2202(8): a complaint in a criminal case is "*a written statement under oath of the essential facts constituting the crime . . .*" ***Kansas Statues Annotated*** 22-2203 provides that a warrant or summons shall issue in reliance upon the affidavit filed in support of the complaint information.

Under Franks v. Delaware, 438 U.S. 154, 171-72 (1978), an affidavit filed in support of a warrant is presumed to be reliable unless the defendant exposes that the material

statements set forth in the affidavit "*deliberately omitted material facts.*" See State v. Lockett, 232 Kan. 317, 319 (1982); and State v. Francis, 282 Kan. 120 (2006). Evidence relevant to the credibility of a witness—impeachment evidence—is material and may be exculpatory. The failure to disclose evidence relevant to the credibility of the affiant, would therefore, violate Brady.

When a law enforcement or government agent has been determined to have impeachment information in his or her past, the Office of the District Attorney will examine that agent's role in a case presented for charging, on a case by case basis to determine which of the following options are available:

a. whether a case should be filed;

b. whether a case already filed should be dismissed;

c. whether to proceed with the prosecution without using the officer as a witness;

d. whether to proceed with the case with the officer as a potential witness, after disclosing to the defense the impeachment status.

iii. Disclosure

If the decision is made to proceed with the prosecution of a case, any exculpatory information is to be provided to defense counsel in a timely manner through the normal discovery process, consistent with long-standing policy of this office.

If the Brady/Giglio committee determines a law enforcement or government agent has impeachment information in his or her past that requires specific disclosure, the prosecuting attorney assigned to the case or his or her supervisor shall notify counsel for the defendant. When practicable, the disclosure should be made in writing and said form will notify defense counsel the means by which additional information can be obtained from

the agent's employer. If the occasion requires expedited disclosure, the disclosure may be made orally to counsel for the defense and then documented.

iv. Interaction with the Brady/Giglio Officer

A prosecutor "*occupies a quasi-judicial position whose sanctions and traditions he or she should preserve.*" State v. Lockhart, 24 Kan.App.2d 488, 493, *rev. denied* 263 Kan. 889 (1997). See Berger v. United States, 295 U.S. 78, 88 (1935) ("*the prosecutor represents 'a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not a that it shall win a case, but that justice shall be done.*) Further, "*it is important to the public, as well as to individuals suspected or accused of crimes, that* [the] *discretionary functions of the prosecutor be exercised with the highest degree of integrity and impartiality and with the appearance of the same.*" State v. Cope, 30 kan.App.2d 893, 895 (2002).

In Kansas, a criminal prosecution "*is commenced by the filing of a* ***verified*** *complaint and the issuance of a warrant in* ***good faith*** *(emphasis added).* State v. Hemminger, 210 Kan. 587, 591 (1972); see ***Kansas Statutes Annotated*** 19-702 & 22-2202(17); State McCormick v. Board of Shawnee County Comm'rs, 272 Kan. 627, 634 (2001) (the filing of a criminal complaint or information with the district court is the most basic duty and responsibility of the public prosecutor). Additionally, **Rule 3.8(a)** states, a "*prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.*" Pursuant to ***Kansas Statutes Annotated*** 22-2302, a warrant or summons will be issued "*if the magistrate finds from the complaint, or from an affidavit or affidavits filed with the complaint or from other evidence, that there is probable cause to believe both that a crime has been committed and that the defendant has committed it . . .*"

Given the standards to which prosecutors are held, and the place affidavits hold in the commencement of criminal prosecutions in this state, the general policy and practice of the Office of the District Attorney is that an affidavit presented by an officer/agent with identified impeachment history subject to disclosure will not be relied upon in support of the commencement of any prosecution or the issuance of any warrant or summons. See also, Franks v. Delaware. The Brady/Giglio committee will consider exceptions only on request from the agency head (or designee) of the respective agent.

F. **EFFECT OF IMPEACHMENT INFORMATION**

The Office of the District Attorney takes no position on the job assignment or discipline of any law enforcement or government personnel by virtue of that employee having impeachment information in his or her past subject to disclosure. That is a matter for decision by the law enforcement or government agency alone.

G. **EFFECT OF SUBSEQUENT CHANGES**

The publication of controlling case law that modifies any aspect of the Brady discovery obligation subsequent to the dissemination of this policy will be incorporated into the above and foregoing policy from the date of said publication.

Marc Bennett
District Attorney
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