



DOUGLAS COUNTY DISTRICT ATTORNEY’S OFFICE

SUZANNE VALDEZ

District Attorney

JOSHUA D. SEIDEN

Deputy District Attorney

“BRADY/GIGLIO POLICY” OF THE DISTRICT ATTORNEY

Consistent with the prevailing legal authority, the following policy addresses the obligation of this office to provide discovery in all criminal cases.

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*, 50 Kan.App.2d 405, 415, 327 P.3d 1042 (2014) (“[T]he extent of discovery to be allowed remains a policy judgement for rule-makers and legislators.”).

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, 505–06 (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*, 373 U.S. 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, 280–82 (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, 110 (1976); *State v. Nguyen*, 251 Kan. 69, 81 (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 United States 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, 71 (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 *Kyles* 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.” 514 U.S. at 438.

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.” *United States v. Blanco*, 392 F.3d 382, 394 (2d Cir. 2004).

Given the clear status of the law, the Douglas County District Attorney’s Office follows the directive of the United States Supreme Court in *Agurs*: “[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.” 427 U.S. at 108.

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.” *State v. Lackey*, 295 Kan. 816, 823–23 (2012) (discussing *Haddock v. State*, 295 Kan. 738, 759 (2012)).

Law enforcement agents are to provide discovery to the Douglas County District Attorney’s Office 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*, 527 U.S. at 280–82. Prosecutors and investigators have a duty under *Giglio v. United States*, 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.” *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); see also, *State v. Pister*, No. 113,752, 2016 WL 4736619, at *3–*4 (Kan.App.2016) (unpublished opinion), *rev denied* May 24, 2017.

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). “Prosecutors have a duty to disclose impeachment evidence to the defense under *Giglio v. United States*.” *Piatt v. State*, No. 116,342, 2017 WL 1535228, *1 (Kan.App.2017) (*unpublished opinion*).

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*, 373 U.S. at 87; *Strickler*, 527 U.S. at 281–82; and *Kyles*, 514 U.S. at 437–38.

In 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, for example, the Court noted the State's clear disclosure obligation under *Giglio*, 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. *Lumry v. State I*, 49 Kan.App.2d 276, 280 (2013), *aff'd in part, rev'd in part on other grounds*, 305 Kan. 545 (2016); *see also United States 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."

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, 320 (1974); *see State v. Deffenbaugh*, 217 Kan. 469, 473-74 (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, 628–30 (1994); *see also State v. Hills*, 264 Kan. 437, 450 (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 K.S.A. 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 K.S.A. 60-447. Kansas Statutes Annotated 60-447 governs character traits offered as evidence to prove conduct. Specifically, K.S.A. 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 K.S.A. 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 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, 94 (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.

Kansas Statutes Annotated 60-422 codifies this rule:

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 statement.

“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. Osbey*, 246 Kan. 621, 631 (1990); *see also United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008).

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 (2008). This includes any evidence that the witness is under investigation, charges, or subject to any other arrangement that might give the witness an incentive to testify for the State or against the accused. *See id.* at 55–60.

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. *Agurs*, 427 U.S. at 109, n. 16.

Under Kansas law, a witness’s prior convictions for “crime[s] not involving dishonesty” are inadmissible. K.S.A. 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 expungement. *Pope v. Ransdell*, 251 Kan. 112, 124–31 (1992); *see also* K.S.A. 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, 319–21 (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, 279–85 (2004).

The question remains whether evidence that would be inadmissible 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. *See United States v. Morales*, 746 F.3d 310, 314–15 (2014).

On one side, the First, Second, Third, Sixth, Ninth, and Eleventh Circuits have found 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—the state court focused on the discoverability” of the evidence and the specificity of the claim. This is not the inquiry called for by longstanding Supreme Court caselaw.”)

Conversely, dicta from the Seventh and Fourth circuits has questioned the materiality of inadmissible evidence. *See, e.g., United State v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995) (“[E]vidence that would not have been admissible at trial is immaterial because it could not have affected the trial court’s outcome.”); *Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996). But neither the Seventh nor the Fourth Circuit have explicitly adopted the position that only admissible evidence may qualify as *Brady* or *Giglio* material. *See United States v. King*, 910 F.3d 320, 327 n.3 (7th Cir. 2018) (“The government argues that the evidence must be admissible to be material under *Brady*. *See [Morales]* (noting a circuit split on this issue). . . . [W]e need not address this question.”); *Hoke*, 92 F.3d at 1356 (deciding the *Brady* claim on the assumption that the at-issue statements “would have been admissible”).

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.” 516 U.S. 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*, 746 F.3d at 315; *see also In re Miranda*, 43 Cal.4th 541, 576, 182 P.3d 513 (2008) (“*Wood* did not establish that inadmissible evidence can never be material for purpose of a *Brady* claim”); *Commonwealth v. Johnson*, 174 A.3d 1050, 1056 (Pa. 2017) (“Contrary to the Commonwealth's suggestion, *Wood* does not stand for the proposition that undisclosed impeachment evidence must be admissible (or lead to the discovery of admissible evidence) before it can be considered material. Rather, the *Wood* Court simply examined materiality by looking at the effect that the withheld evidence would have had on the outcome of the trial.”)

Given the current status of the law, while evidence of a diversion, expungement, 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 Douglas County District Attorney's Office retains the option to request an *in camera* inspection of the information to determine whether disclosure is required. *See State v. Riis*, 39 Kan.App.2d 273, 278 (2008).

D. IMPLEMENTATION OF THIS POLICY

Obligation of Law Enforcement Agency to Notify Prosecution.

Consistent with the prevailing legal authority, this office will continue to require law enforcement and government agencies to produce all discoverable material in each case charged. To ensure compliance, 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 are notified to produce all exculpatory, material evidence related to the case, as well as impeachment information or status relative to any witness.

Specifically, the Douglas County District Attorney's Office requests 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*, 427 U.S. at 109, n. 16.
- Evidence concerning impeachment information that is inadmissible under Kansas law—including diversions, expungements and pending investigations—will be assessed by the *Brady/Giglio* Committee of the Douglas County District Attorney's Office on a case by case basis to determine if the information may lead to the discovery of material evidence in the case. *See Wood*, 516 U.S. at 6–8.

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 therefore requires law enforcement and government agencies to promptly notify the District Attorney's *Brady/Giglio* law enforcement liaison—the Deputy District Attorney—of all potentially exculpatory or impeaching information related to any witness involved in the case, including impeachment status concerning a law enforcement or government agent.

E. RESPONSE OF THE OFFICE OF THE DISTRICT ATTORNEY

i. Brady/Giglio Committee

The Douglas County District Attorney's Office will maintain a *Brady/Giglio* Committee consisting of designated Assistant District Attorneys, supported in the fulfillment of their obligations by the Deputy District Attorney. This committee is tasked with disseminating impeachment status of any law enforcement or government agent to the 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 known to the assigned prosecutors in the office tasked with handling individual cases. A letter will be generated and provided as part of discovery to notify counsel for the defendant and, as necessary, will direct defense counsel to the agent's employer for additional details. The District Attorney's Office does not keep or otherwise maintain any law enforcement or government agent personnel records.

ii. Determination of impeachment status

The *Brady/Giglio* Committee is made aware of the impeachment status of law enforcement or government agents through review of the Law Enforcement Checklist (Appendix A). The District Attorney's Office provides the Law Enforcement Checklist to each of the respective law enforcement agencies operating within this jurisdiction. The Law Enforcement Checklist is to be completed for each officer at least once annually, or if ever any responses to the questions change. It is the responsibility of each law enforcement agency to retain the completed Law Enforcement Checklists. The District Attorney's Office does not keep or maintain any copies of the completed checklists. Representatives of the *Brady/Giglio* Committee of the District Attorney's Office will review the completed checklists and any supplemental materials on the premises of the respective law enforcement agency.

iii. Decision to commence or continue criminal prosecution

Pursuant to K.S.A. 22-2202(8): a complaint in a criminal case is “a written statement under oath of the essential facts constituting the crime.” Kansas Statutes Annotated 22-2302 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 affiant deliberately or recklessly misstated or omitted material information. *State v. Lockett*, 232 Kan. 317, 319 (1982); *see also State v. Francis*, 282 Kan. 120 (2006). Evidence relevant to the credibility of an essential witness 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 Douglas County District Attorney’s Office 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.

iv. Disclosure

As set forth above, if the decision is made to proceed with the prosecution of a case, the existence of exculpatory information regarding the witness will be made known to the assigned prosecutors in the office tasked with handling individual cases. A letter will also be generated and

provided as part of discovery notifying counsel for the defendant and, as necessary, may direct defense counsel to the agent's employer for additional details. If the occasion requires expedited disclosure, the disclosure may be made orally to counsel for the defense and then documented.

v. **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 also Berger v. United States*, 295 U.S. 78, 88 (1935) (explaining that prosecutors represent "a sovereignty 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, "[i]t 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." *State v. Hemminger*, 210 Kan. 587, 591 (1972) (*emphasis added*); *see also* K.S.A. 22-2202(h) & 22-2301(1); *State McCormick v. Board of Shawnee Cty. Comm'rs*, 272 Kan. 627, 650 (2001) (law enforcement officers and prosecutors alike "swearing out an affidavit for use at a probable cause hearing owe[] a duty of good faith to the judicial office"). Additionally, Rule 3.8(a) of the Kansas Rules of Professional Conduct states, a prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Pursuant to K.S.A. 22-2302(a), a warrant or summons will be issued "[i]f 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 Douglas County District Attorney's Office 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. *Cf. Franks*, 438 U.S. at 171–72.

The *Brady/Giglio* Committee will consider exceptions on request from the agency head (or designee) of the respective agent in situations involving pre-employment non-person misdemeanor crimes of dishonesty committed when the officer was a youthful offender or a juvenile. Specific weight will be given to orders of expungement of such crimes, pursuant to K.S.A. 21-6614.

F. EFFECT OF IMPEACHMENT INFORMATION

The Douglas County District Attorney's Office 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.

/s/ Suzanne Valdez
Suzanne Valdez
District Attorney
August 10, 2022

Appendix A



DOUGLAS COUNTY DISTRICT ATTORNEY

Seventh Judicial District
Judicial & Law Enforcement Center
111 E. 11th Street, Unit 100
Lawrence, KS 66044-2912
(785) 841-0211 Fax (785) 832-8202

<https://www.douglascountyks.org/depts/district-attorney>

Suzanne Valdez
District Attorney

Joshua D. Seiden
Deputy District Attorney

August 10, 2022

Memorandum on *Brady/Giglio* Law Enforcement Checklist

In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the U.S. Supreme Court held that prosecutors have an obligation to disclose to criminal defendants impeachment information regarding government witnesses. This is an especially sensitive obligation as it relates to law enforcement agents who will be called as witnesses or affiants.

We are requesting that you provide all possible impeachment information concerning agents and law enforcement officers of your respective agency. As a general proposition, impeachment information includes:

- (a) opinion or reputation evidence regarding one's character for untruthfulness;
- (b) specific instances of conduct which might be used to attack one's credibility and character for truthfulness (i.e. dishonest acts);
- (c) any prior felony convictions or misdemeanor convictions involving false statements or dishonesty;
- (d) any prior statements made by the individual that are inconsistent with the testimony to be provided in this case; and
- (e) any information which might tend to indicate that one is biased against a target, subject, defendant, or group of individuals.

Allegations made against this individual that have not been substantiated, are not credible, or have resulted in exoneration, are generally not considered to be potential impeachment information. However, the law in this area is constantly evolving, so any such allegations should still be provided in conjunction with the Law Enforcement Checklist.

If information exists that you believe might be considered potential impeachment information, you should err on the side of providing the information in question. Providing this information does not mean it will necessarily be submitted to the defense counsel or to the court. Prior to any such disclosure of the information, the individual and your agency will be notified; this notification will be sufficiently in advance of any disclosure to allow the individual and your agency to fully discuss the matter with our office. It is our goal to encourage open communication with the investigative agencies regarding potential impeachment information.

I have enclosed a Law Enforcement Checklist form with this letter. Please complete the Checklist for each agent/officer in your respective agency. The Checklist should be completed annually, or whenever any answer to any of the questions changes. If no potential impeachment information is discovered, please indicate that on the form by circling the appropriate responses to



DOUGLAS COUNTY DISTRICT ATTORNEY

Seventh Judicial District
Judicial & Law Enforcement Center
111 E. 11th Street, Unit 100
Lawrence, KS 66044-2912
(785) 841-0211 Fax (785) 832-8202

<https://www.douglascountyks.org/depts/district-attorney>

Suzanne Valdez
District Attorney

Joshua D. Seiden
Deputy District Attorney

the questions listed, sign the form at the bottom where indicated, and notify our office. If potential impeachment information is discovered, please make a copy of the form for each individual with potential impeachment information to report, fill in the agent's/officer's name where indicated, circle the appropriate responses to the questions listed, and notify our office. In either instance, please contact Deputy District Attorney Joshua D. Seiden at jseiden@douglascountyks.org upon completion of the Checklists.

Retain the completed Law Enforcement Checklists within your agency. Do not disseminate the originals or any copies to the District Attorney's Office; we will review the completed Checklists on your premises. Please also include any supporting documentation along with the completed Checklists.

OR

Please transmit the completed Law Enforcement Checklists to jseiden@douglascountyks.org. Please set aside any supporting documentation to be reviewed by the District Attorney on your premises. Do not transmit any supporting documentation to the District Attorney's Office.

I can assure you that each member of this office handling potential impeachment information will remember that one's personal and professional reputation is at stake. Accordingly, any information disclosed to our office will be treated with the utmost care and professionalism in accordance with this office's confidentiality policy. If you have any questions as to whether a matter would qualify as potential impeachment information, please feel free to discuss it with Mr. Seiden. Thank you for your cooperation.

Respectfully,

/s/ Suzanne Valdez

Suzanne Valdez

Douglas County District Attorney



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Seventh Judicial District
 Judicial & Law Enforcement Center
 111 E. 11th Street, Unit 100
 Lawrence, KS 66044-2912
 (785) 841-0211 Fax (785) 832-8202

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 Deputy District Attorney

<https://www.douglascountyks.org/depts/district-attorney>

LAW ENFORCEMENT CHECKLIST

Agent/Officer _____

Agency _____

1.	Does this officer have a juvenile adjudication on his/her record?	Yes	No
2.	Does this officer have an arrest or conviction on his/her record?	Yes	No
3.	Any agency/department finding of misconduct reflecting on truthfulness, credibility, or integrity?	Yes	No
4.	Any agency/department investigation of this officer for violation of departmental policy reflecting on truthfulness, credibility, or integrity?	Yes	No
5.	Any allegation or complaint of bias against a target, subject, defendant or group of individuals?	Yes	No
6.	Has this officer provided any prior inconsistent statements on material issues in a case?	Yes	No
7.	Are there any present allegations or complaints of violations of departmental policy against this officer?	Yes	No
8.	Are you aware of any allegations or complaints against this officer regarding specific instances of misconduct going to truthfulness, credibility, veracity, use of force, inaccurate reporting, mishandling of evidence, false documentation, and/or failure to follow procedure in handling of a confidential informant or source of information?	Yes	No
9.	To your knowledge, has anyone in your agency/department, or any other agency/office/department expressed an opinion/reputation about this officer concerning his/her lack of truthfulness, credibility or veracity?	Yes	No
10.	Are you aware of any instance in which this officer failed to report a use of force?	Yes	No
11.	Do you understand that you have a duty to update this checklist if new information arises in the future or if an answer to any previous question would change?	Yes	No

If you answered “yes” to any of the questions numbered 1 through 10, please set aside supporting documentation to be reviewed by the District Attorney on your premises.

Signature of Supervisory Official

Date

Name and Title of Supervisory Official



DOUGLAS COUNTY DISTRICT ATTORNEY

Seventh Judicial District
Judicial & Law Enforcement Center
111 E. 11th Street, Unit 100
Lawrence, KS 66044-2912
(785) 841-0211 Fax (785) 832-8202

<https://www.douglascountyks.org/depts/district-attorney>

Suzanne Valdez
District Attorney

Joshua D. Seiden
Deputy District Attorney

August 10, 2022

***Brady/Giglio* Policy Overview**

The United States Constitution assures every accused person a fair trial. To that end, “there are situations in which evidence is obviously of such substantial value to [an accused’s] defense that elementary fairness requires it to be disclosed.” *United States v. Agurs*, 427 U.S. 97, 110 (1976). In *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), the United States Supreme Court recognized two such types of evidence. *Brady* entitles an accused to all “favorable . . . evidence [that] is material either to guilt or to punishment.” 373 U.S. at 87. *Giglio* entitles an accused to all material “evidence affecting credibility” of any “witness [who] may well be determinative of [an accused’s] guilt or innocence.” 405 U.S. at 154. Withholding this information from an accused risks inviting sanctions, the suppression of evidence, the dismissal of charges, or a conviction’s reversal.

Consistent with these constitutional directives, the Douglas County District Attorney’s Office introduces the following *Brady/Giglio* Policy. This policy addresses only the gathering and disclosing of *Brady/Giglio* information—not the use or admissibility of any disclosed *Brady/Giglio* information at a defendant’s trial. Full cooperation under this policy’s terms is expected of both the District Attorney’s Office and law enforcement in the gathering and disclosing of *Brady/Giglio* information. Generally, the policy operates as follows:

- I. Gathering *Brady/Giglio* Information. Any investigating officer who possesses or knows of *Brady/Giglio* information must promptly provide that information to the District Attorney’s Office through the Law Enforcement Checklist furnished by this office.
 - A. Exculpatory *Brady* information includes any information that tends to show the accused’s innocence or mitigates the accused’s punishment. Examples include:
 - any information
 - linking another to the accused’s charged crime
 - supporting any legal defense available to the accused
 - showing a witness’ failure to positively identify the accused during any identification procedure
 - prior inconsistent or exculpatory statements made by a prosecution witness
 - B. Impeaching *Giglio* information includes any information that tends to discredit a prosecution witness or investigator.
 1. *Giglio* material generally includes any information that shows:
 - poor character or reputation for truthfulness
 - a conviction or juvenile adjudication for either (i) any felony or (ii) any misdemeanor involving dishonesty or false statement
 - specific instances of dishonesty (other than any conviction or juvenile adjudication)



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-
- a mental or physical defect that would have reduced the witness's or investigator's ability to perceive or remember events correctly
 - a poor opportunity to observe the events about which the witness's or investigator's testimony relates
 - drug or alcohol use at or near the time of the events about which the witness's or investigator's testimony relates
 - a prior statement that contradicts the witness's or investigator's expected testimony
 - any (i) bias for or against a group or individual; (ii) interest or financial stake in the outcome of the accused's prosecution—like actual or potential exposure to criminal penalties, leniency/plea agreement, payments, immigration benefits, etc.; or (iii) other motive to testify falsely
2. Additionally, as to an investigator specifically, *Giglio* material includes any:
- pending criminal charge or conviction
 - pending investigation concerning an allegation of misconduct bearing on an investigator's truthfulness, bias, or integrity
 - information that suggests the investigator is biased for or against the accused
 - any official agency or judicial finding made under a preponderance of the evidence standard that an investigator:
 - lacks his or her purported education or qualifications
 - has filed a false report or submitted a false certification in any professional or personal matter
 - was untruthful or demonstrated a lack of candor
 - intentionally mishandled or destroyed evidence
 - is biased against a particular class of people, for example, based on a person's gender, gender identity, race, or ethnic group
- II. Disclosing *Brady/Giglio* Information. The District Attorney's Office *Brady/Giglio* Committee will then review the provided information and, after notice to the producing agency, take any of the following actions:
- A. No Action. Information provided the District Attorney's Office under this policy may, upon review, prove to be too immaterial to qualify as *Brady/Giglio* material subject to mandatory disclosure. That determination will result in the information's return.
 - B. Decision to Prosecute and Disclosure to Defense. The determination that material *Brady/Giglio* information exists will, depending on the information and the stage of the proceedings, result in the District Attorney's Office either: (1) filing no charges; (2) dismissing filed charges; or, (3) proceeding with filed charges but only on the condition that the prosecution either (i) not use any *Giglio*-impaired investigator or witness and/or (ii) disclose the material *Brady/Giglio* information to defense. *Brady/Giglio* information is material when proceeding to trial without disclosing the information would undermine



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confidence in the trial's outcome. Appropriate redactions and protective orders will accompany any disclosure of *Brady/Giglio* information.

- C. Disclosure to Court. Where the materiality of the provided *Brady/Giglio* information is unclear, the District Attorney's Office may disclose the *Brady/Giglio* information to the trial court for inspection. The trial court's determination will then direct whether the District Attorney's Office takes no action, decides not to prosecute, or prosecutes only on conditions and/or after disclosure to defense, as outlined above.

Ultimately, this policy is comprehensive but not exhaustive. A case-by-case determination will need to occur in every situation involving potential *Brady/Giglio* information. And this policy should be understood to incorporate all subsequently published controlling legal authority. Any questions arising under this policy are therefore encouraged to be directed to Deputy District Attorney Joshua D. Seiden.

Respectfully,

/s/ Suzanne Valdez

Suzanne Valdez

Douglas County District Attorney