IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
SEVENTH JUDICIAL DISTRICT

STATE OF KANSAS,
Plaintiff,

Case No. 2022-CR-000107
Division 2

vs.

STEVEN C. DRAKE, JR.,
Defendant.

DOUGLAS COUNTY DISTRICT ATTORNEY'S MEMORANDUM ON *BRADY/GIGLIO* OBLIGATIONS

I. Formulation of the District Attorney's *Brady/Giglio* Policy

Prior to District Attorney Suzanne Valdez taking office, the Douglas County District Attorney's Office never had any sort of written or formal *Brady/Giglio* policy. As soon as she was elected in 2020, District Attorney Valdez began gathering and reviewing policies from other jurisdictions. Appreciating the importance of buy-in from local law enforcement partners, District Attorney Valdez convened a *Brady/Giglio* working group in December 2020. Among the agencies who participated in the working group are the Baldwin City Police Department, Douglas County Sheriff's Office, Eudora Police Department, Kansas Highway Patrol, KU Public Safety Office, and the Lawrence Police Department. With the exception of the Douglas County Sheriff's Office and the Eudora Police Department, each of those agencies had their counsel present during at least one of the working group meetings. Representatives and counsel for Lawrence Police Officers' Association were present as well. The working group meetings occurred on January 7, 2021, November 22, 2021, and January 4, 2022. In addition to the working group meetings, the District Attorney's Office discussed formulation of the *Brady/Giglio* Policy during weekly meetings with local law enforcement leadership. Development of the *Brady/Giglio* Policy was an open, collaborative process.

On January 4, 2022, the District Attorney's final *Brady/Giglio* Policy (Attachment A – *Brady/Giglio* Policy of the District Attorney, *revised August 10, 2022*) was disseminated to local law enforcement leadership. On January 10, 2022, the District Attorney's Office published the *Brady/Giglio* Policy and also sent the policy to each member of the Douglas County District Court Bench (including this Court). The policy requires a Law Enforcement Checklist provided by the District Attorney be completed for each sworn peace officer who may provide testimony in any matter prosecuted by the District Attorney's Office. The checklist is derived from a checklist utilized by the United States Department of Justice. The checklists are to be completed by a supervisory official of each respective law enforcement agency. The checklists are intended to streamline the process of ferreting out potential impeachment material while respecting personal privacy interests of the law enforcement officers. The District Attorney's review of law enforcement personnel files would only be triggered by a "yes" answer to one of 10 questions on the checklist. Even then, the District Attorney's review would be confined to the specific personnel materials that resulted in a "yes" answer. Thus, the District Attorney is not demanding unfettered access to personnel materials. Even when the District Attorney reviews personnel materials for potential impeachment value, that review occurs on the premises of the respective law enforcement agency. Unless otherwise ordered by the Court, the District Attorney does not remove or otherwise retain copies of any law enforcement personnel materials.

II. Facts specific to the Douglas County Sheriff's Office

During formulation of the District Attorney's *Brady/Giglio* Policy, Sheriff Jay Armbrister occasionally participated in working group meetings as well as weekly meetings with the members of the District Attorney's Office and other local law enforcement leaders. Up to the point at which the policy was implemented, Sheriff Armbrister was not critical of the policy or

checklist. Rather, he spoke favorably of the checklist and encouraged full participation from his peers:

> We're a department of 186 people, of which only about 50 are sworn. Our jailers are subject to be called (to testify) at all times. I would rather know it now than when they get called and subpoenaed and the defense asks for this stuff and we have to find out that they have something. I'd rather know than on the day of trial and affect some charge getting dismissed because we've harbored a shit employee for X number of years without realizing that they have *Giglio* issues that we should have known about.

(Sheriff Armbrister, speaking at 23:00 during the November 22, 2021 *Brady/Giglio* Working Group meeting).

Sheriff Armbrister emphasized the importance of completing the checklists within his own agency. On February 25, 2022, Sheriff Armbrister notified his Command Staff via email that the checklists needed to be completed for "all officers and deputies as well as any civilian staff that may testify." Sheriff Armbrister further stated, "This is a big undertaking since we have so many folks, but we need to get moving on it." (Attachment B – February 25, 2022 email from Sheriff Armbrister to Command Staff).

Given his unfortunate experience and subsequent discipline associated with mishandling of evidence in Douglas County District Court Case No. 2018-CR-001122, *State of Kansas v. Matthew Hart*, Sheriff Armbrister is intimately aware with the concept of impeachment material as well as the State's duty of disclosure. (Attachment C – *Douglas County sheriff's personnel file was not reviewed, cleared by judge as he stated*, The Lawrence Times, May 6, 2022). On April 1, 2022, Max Kautsch, a local media law attorney, informed the District Attorney's Office that in response to a Kansas Open Records Act ("KORA") request, Lieutenant Rich Qualls of the Douglas County Sheriff's Office stated, "[T]he *Brady/Giglio* policy published by the Douglas County District Attorney's Office is not binding on the DGSO; it has not been adopted by the

DGSO so it is not part of DGSO policy." The correspondence from Mr. Kautsch marked the first time the District Attorney's Office was made aware that the Sheriff's Office did not intend to comply with the District Attorney's *Brady/Giglio* Policy. The District Attorney contacted Sheriff Armbrister regarding Lieutenant Qualls' statement. Sheriff Armbrister said he had not authorized Lieutenant Qualls to make that statement to Mr. Kautsch. The District Attorney and Sheriff Armbrister agreed to meet on April 4, 2022 to further discuss the matter.

During the April 4, 2022 meeting, the District Attorney and Sheriff Armbrister could not find common ground on the checklists. Though Sheriff Armbrister previously championed the checklists and directed his Command Staff to complete them, he had completely reversed course. His only apparent reasoning for his about-face was that he had "people to protect." Sheriff Armbrister's solution was that he would "vouch" for his staff. The District Attorney informed Sheriff Armbrister that "vouching" was no substitute for completion of the checklists. The District Attorney further informed Sheriff Armbrister that under the policy, he was *Giglio*-impaired. Sheriff Armbrister agreed that under the policy, he would be *Giglio*-impaired. Because Sheriff Armbrister refused to complete the checklists, the District Attorney explored other legal mechanisms to obtain discovery of potential *Giglio* material. Specifically, the District Attorney exercised her subpoena power to compel Sheriff Armbrister and Undersheriff Simmons to bring personnel files of testifying officers to scheduled court hearings to address the issue of potential impeachment material.

III. The District Attorney's Law Enforcement Checklist

What should and should not be disclosed as potential impeachment material is a subject of debate throughout the criminal justice system nationally. There is abundant case law, but a general lack of direction as to how issues of disclosure should be handled from a practical

standpoint, especially when personnel materials are implicated. The difficulty in making these determinations is amplified by the fact that prior to January 2022, the Douglas County District Attorney's Office had no *Brady/Giglio* policy – written or otherwise. Working off of a document utilized by the Department of Justice, the District Attorney formulated her Law Enforcement Checklist. The checklist calls for law enforcement personnel to answer a total of eleven 'yes or no' questions. The intention of this checklist is to uphold the District Attorney's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). *Brady* and its progeny place a positive duty on prosecutors to disclose any exculpatory or impeachment evidence to criminal defendants.

The questions contained in the checklist touch on all aspects of required *Brady* disclosures, specifically those relating to impeachment evidence. Examples include questions concerning previous criminal convictions of law enforcement officers, agency investigations into officers, allegations of bias or untruthfulness against officers, and failure to report specific conduct. These questions are in accordance with Supreme Court, federal court, and Kansas court decisions interpreting *Brady* disclosures.

The landmark decision in *Brady v. Maryland* provided that prosecutors have a duty to disclose any material exculpatory evidence to the defense. Suppression of that evidence, "irrespective of good faith or bad faith of the prosecution" is a violation of due process. 373 U.S. at 87. The Supreme Court then expanded its holding in *Giglio v. United States*. The *Giglio* decision sought to determine whether the prosecution's failure to disclose its promise of leniency to a state witness violated due process. 405 U.S. at 150. The Court held that when any evidence that shows a witness' credibility is withheld, a defendant's due process rights are violated. *Id*. at

154. Under *Brady*'s materiality requirement, evidence is material if it could "affect the judgement of the jury." *Id*. (citing *Napue v. Illinois*, 360 U.S. 264 (1959)).

The Supreme Court has since denied that there is any difference between exculpatory and impeachment evidence under a *Brady* analysis. *United States v. Bagley*, 473 U.S. 667 (1985). The weight of that evidence is immaterial to the analysis; the materiality described in *Brady* need not show that the defendant would be found not guilty, it need only have some effect on the judgement of the jury. *Id*. at 682. If withheld, impeachment evidence carries the same weight as exculpatory evidence under *Brady*, resulting in a violation of the defendant's due process rights. *See id*.

The prevailing case law places a significant and substantial obligation on prosecutors, holding that "the individual prosecutor has a duty to learn of *any* favorable evidence." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added). This includes evidence known to any government actors, "including the police." *Id*. In *Kyles*, the State argued that because evidence was known to law enforcement, but never disclosed to the prosecution, the prosecutor could not be held liable. *Id.* at 438. The Court disagreed, stating this would lead to a "serious change of course from the *Brady* line of cases. *Id*.; *See also Id*. at 1560 ("the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention."). Rather, prosecutors should establish procedures to ensure communication between themselves and law enforcement. *Id*. (citing *Giglio*, 405 U.S. at 154). A prosecutor cannot escape accountability of due process violations even when they do not know such impeachment evidence exists. *Id*. Prosecutors should disclose *any* material evidence; the Court sums up by stating "This is as it should be… The prudence of the careful prosecutor should not therefore be discouraged." *Id*. at 439-40.

The Supreme Court has also held that a prosecutor may have an obligation to examine state agency files under *Brady*. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987). After a subpoena was served on a Pennsylvania state investigative agency, that agency denied disclosure arguing that the records were privileged and confidential. *Id*. at 43. The prosecutor in *Ritchie* had never seen the agency's files. *Id*. at 57. The State argued it had a compelling interest of confidentiality in the file and disclosure on mere speculation that the file might contain material evidence would violate that interest. *Id*. The Court found that the Defendant had a right to examine the agency file. *Id*. at 58. This decision shows that the prosecution should have access to all state agency files in a case. *See id*. at 59 ("it is the State that decides which information must be disclosed…the prosecutor's decision on disclosure is final."); *see also* Robert Hochman, *Brady v. Maryland, and the Search for Truth in Criminal Trials*, 63 U. Chi. L. Rev. 1673, 1678 (1996).

Hochman first considers the difference between "classic" and "search" obligations under *Brady*. The classic *Brady* claim arises when a defendant discovers that a prosecutor failed to disclose evidence that is favorable to the defense. *Id*. at 1676-77. "Search" *Brady* claims arise when the prosecutor "fails to gather, or to receive from others, evidence that might be favorable to the defense." *Id*. at 1677.

Considering the burdens placed on the prosecution, Hochman states that "an examination of a testifying officer's personnel file may be necessary in order to ensure that it does not contain any impeachment evidence." *Id*. at 1688 (citing *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (requiring federal prosecutors to examine the personnel file of a testifying Drug Enforcement Agency agent) and *United States v. Dominguez-Villa*, 954 F.2d 562 (9th Cir. 1992) (holding that defendants do not need to show materiality to compel examination of any state or

federal law enforcement agent file, despite the Government's argument that the burden of searching files outweighed the prospect of impeachment evidence being found)).

This position comes from the idea of "constructive possession" within the "prosecution team." *See generally* Hochman, 1681-83. This constructive possession arises under "search" *Brady* obligations. *Id*. at 1680. While some states use a limited definition of prosecution team, federal courts take an expansive view as to who is considered part of that "team." *Id*. at 1681-82 (citing *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (holding the prosecution team "includes both investigative and prosecutorial personnel"); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) ("*Brady*…applies only to information possessed by the prosecutor or anyone over whom he has authority"); *Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) ("*Brady* applies to information held by 'a state instrumentality closely aligned with the prosecution'"). Under this view (though competing views of constructive possession, whether broader or narrower, do exist), evidence within the possession of an investigative agency qualifies as evidence within the possession of the prosecutor. *See id.* at 1681-83.

This view is in line with the Supreme Court's holding in *Kyles*, where the Supreme Court held the prosecutor remains responsible for any *Brady* violation even when a state agent fails to inform the prosecutor of that evidence. 514 U.S. at 421. To further this position, the Supreme Court stated that a "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id*. at 437. Prosecutors are held strictly liable for any violation of due process, even if that prosecutor was unaware that exculpatory or impeachment evidence exists. Hochman, at 1693. In holding prosecutors to a high standard, the Supreme Court hopes to ensure that defendants are not disadvantaged simply because information was withheld from the prosecution. *Id*. at 1708.

Several federal districts have broadened *Brady*'s application beyond that required in Federal Rule of Criminal Procedure 16. Peter Joy, *The Criminal Discovery Problem: Is Legislation a Solution?*, 52 W.L.J. 97 (2012) (citing Laural Hooper et al., *A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases: Final Report to the Advisory Committee on Criminal Rules*, Fed. Judicial Ctr. 11 (Feb. 2011)). As of 2011, thirty-eight federal districts had local rules or orders requiring that the government disclose any exculpatory and/or impeachment evidence without a request from the defense – a higher standard than that required in Rule 16. Joy, at 42, n. 38. Additionally, ten districts had eliminated the "materiality" requirement of *Brady*, showing that *any* impeachment evidence required disclosure. *Id*. This trend of disclosing more than is required under *Brady* has continued in federal jurisdictions. In 2019, Andrew Goldsmith, the Justice Department's National Criminal Discovery Coordinator stated that "discovery is a bedrock priority for the [Justice] Department," and that discovery training has become mandatory for all federal prosecutors. *Advisory Committee on Criminal Rules*: *Rule 16 Mini-Conference*, Federal Rules of Criminal Procedure Advisory Committee (2019).

The Justice Manual (formerly the United States Attorney's Manual) provides additional guidance for impeachment evidence under *Brady*. § 9-5.100 prefaces its requirements by stating "[t]he purposes of this policy are to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), and to ensure that trials are fair, while protecting the legitimate privacy rights of Government employees." § 9-5.100, Preface, Justice Manual (issued 1997, currently in effect). The preface lists a non-exclusive list of impeachment evidence including specific instances of conduct, opinion about, or reputation of

a witness's character for truthfulness. *Id*. The Justice Manual continues with a longer, non-exclusive list dictating in § 9-5.100(5)(c):

> "Potential impeachment information relating to agency employees may include, but is not limited to, the categories listed below:
> i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;
> ii) any past or pending criminal charge brought against the employee;
> iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
> iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowingly false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
> v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – that the prosecutor intends to rely on… Accordingly, agencies and employees should disclose findings or allegations that relate to substantive violations…;
> vi) information that may be used to suggest that the agency employee is biased for or against a defendant…"

When considering allegations deemed unsubstantiated, not credible, or those that have resulted in exoneration, the Justice Manual states such allegations are "generally not considered to be impeachment information." § 9-5.100(6). However, the Justice Manual continues, noting that "[t]he agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration." *Id*. The Justice Manual, in addition to local rules and orders of many federal districts, go beyond the requirements of *Brady*. This is in line with the Supreme Court's intention of protecting defendants through *Brady* disclosures. Hochman, at 1708.

The Tenth Circuit follows the interpretation of *Brady* advocated by Robert Hochman and most federal courts. In *Simpson v. Carpenter*, 912 F.3d 542, 569-70 (10th Cir. 2018), the court held "[e]vidence is suppressed for *Brady* purposes if the prosecution fails to disclose favorable

exculpatory or impeachment evidence known either by it or the police, 'irrespective of the good faith or bad faith of the prosecution.'" One of the most striking examples comes from *McCormick v. Parker*, 821 F.3d 1240, 1242 (2016), where the court promoted the same view of the "prosecution team" as that advocated by Hochman.

In *McCormick*, the court sought to determine whether a sexual assault nurse examiner ("SANE nurse") qualified as a member of the prosecution team for *Brady* purposes. *Id*. The SANE nurse conducted an examination of the victim. *Id*. at 1243. The nurse testified that she was certified to conduct the examination. *Id*. However, that nurse was not certified at the time of her testimony. *Id*. at 1244. The court acknowledged that a prosecutor's duty under *Brady* exists "even if the prosecutor has no 'actual knowledge of the existence of the evidence at issue' because – for *Brady* purposes – the 'prosecution' includes 'not only the individual prosecutor handling the case, but also…the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture.'" *Id*. 1246-47. As the SANE nurse had conducted the physical examination of the victim as part of a criminal investigation, the court held that the nurse was part of the prosecution team. *Id*. at 1247. The expansive view adopted by the Tenth Circuit is in accordance with the Supreme Court's view of *Brady* obligations.

Kansas courts have also followed federal courts' interpretations of *Brady* requirements. Multiple courts have held that prosecuting attorneys are under a positive duty to disclose to a defendant any exculpatory evidence within the state's possession. *State v. Hill*, 211 Kan. 287 (1973) (overruled on other grounds); *State v. Taylor*, 225 Kan. 788 (1979) (overruled on other grounds); *State v. Auman*, 57 Kan.App.2d 439 (2019). The duty to disclose favorable exculpatory or impeachment exists irrespective of the good or bad faith of the prosecutor, showing that

prosecutors are liable for due process violations even if unaware of the existence of material evidence. *See Auman*, 57 Kan.App.2d at 444. This view aligns with the Tenth Circuit's view of "prosecution team," and the primary goals of *Brady* as envisioned by the Supreme Court.

The Law Enforcement Checklist issued by the District Attorney was created with the intention of upholding the duties placed on prosecutors under *Brady* through providing a framework for the types of material law enforcement officials should search for when reviewing personnel files. Exculpatory or impeachment evidence known to the individual prosecutor, or anyone within the prosecution team, must be disclosed in order to ensure a fair trial. The Supreme Court decisions interpreting *Brady* requirements show that a defendant's due process rights are violated any time impeachment evidence is withheld, even if the prosecutor is unaware of that evidence; this places a duty on the Douglas County District Attorney's Office to learn of any evidence that might be favorable to a defendant. *Kyles* 514 U.S. at 437.

Additionally, asking law enforcement agencies about allegations of bias or misconduct is synonymous with requirements dictated in the Justice Manual. § 9-5.100(5)(c). The Tenth Circuit's application of *Brady* to a SANE nurse's credibility shows that federal courts take an expansive view of how *Brady* applies. Kansas courts are largely in accordance with the Tenth Circuit, and the Supreme Court. The Supreme Court held that "the prudence of the careful prosecutor should not therefore be discouraged." *Kyles*, 514 U.S. at 440.

CONCLUSION

The Law Enforcement Checklist issued by the District Attorney falls in line with the intentions of the Supreme Court. Though there has been reluctance on the part of some law enforcement agencies to complete the checklist, none of those agencies have provided any legal authority contrary to the District Attorney's position. To the extent that the District Attorney's

policy commands more than the bare minimum required by law, it should be noted that law enforcement professionals and prosecutors are – and should be – held to a higher standard. The public demands that we err on the side of accountability and transparency to uphold integrity and promote faith in the criminal justice system.

Respectfully Submitted:

/s/ Suzanne Valdez
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/s/ Joshua David Seiden
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Certificate of Service

I hereby certify that on December 21, 2022, I electronically filed the above and foregoing with the Clerk of the Court and also transmitted true and accurate copies to the Court and counsel of record via email.

By,

/s/ Joshua David Seiden
Joshua David Seiden, #24811

ATTACHMENT A

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Suzanne Valdez
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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

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/Gilgio* 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 Statues 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 Kanas 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

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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

DOUGLAS COUNTY DISTRICT ATTORNEY

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Suzanne Valdez
District Attorney

Joshua D. Seiden
Deputy 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

ATTACHMENT B

From: Jay T. Armbrister
Sent: Friday, February 25, 2022 3:43 PM
To: Command Staff
Subject: Brady-Giglio Checklists
Attachments: DG Giglio Checklist_FINAL (1).pdf

It was brought to my attention yesterday that we still need to complete our Brady-Giglio forms for all officers and deputies as well as any civilian staff that may testify. This is a big undertaking since we have so many folks, but we need to get moving on it.

I don't want to tell you all how to run your houses, but I was thinking this may be best handled by the Admin Captains for each division (Sorry KB and Gremmy). If not, please let me know who should be doing it and we can get moving.

I have attached the form that needs to be filled out on each person. -Jay

Sheriff Jay Armbrister
Douglas County Sheriff's Office
785.841.0007

"Nobody hates a bad cop more than a good cop"

ATTACHMENT C

THE LAWRENCE TIMES

CRIME & COURTS MAY 6, 2022 - 8:44 PM

Douglas County sheriff's personnel file was not reviewed, cleared by judge as he stated

by Mackenzie Clark

Douglas County Sheriff Jay Armbrister

No judge reviewed Douglas County Sheriff Jay Armbrister's personnel file and cleared him of untruthful behavior, as the sheriff wrote in response to questions last month.

Armbrister said Friday that he was mistaken when he wrote that a judge had conducted an "in camera," or in chambers, review of his personnel file.

In response to questions we sent to all area law enforcement in April about policies on officer truthfulness, one of Armbrister's answers contained a statement that "The Judge in that case viewed my personnel file 'in camera,' and he found there was nothing to show I had

done anything toward untruthful behavior, nor with intent."

But that didn't happen. Douglas County District Court Chief Judge James McCabria confirmed Friday that there was nothing in the court's records to indicate that such a review had occurred.

Armbrister said the statement was because he "was either misinformed or simply misunderstood some information" in regards to a case he investigated.

In a July 2017 sex crime investigation, Armbrister lost a recording of an interview with the accuser, other material evidence was not collected from the scene, and a search warrant to collect the defendant's DNA had gone missing. McCabria determined that there was "no evidence of bad faith" by the involved officers.

"Attention to detail, careful scene investigation and coordinated follow-up can be fairly characterized here as unimpressive. Even mystifying and confounding," the judge wrote in a memorandum — but he did not dismiss the case over those issues.

"If the State chooses to go to trial with evidence that leaves itself open for attack in the manner that has been presented in the course of these motions, (the defendant's) due process will be provided when the State is required to try to convince a jury that this evidence should support the crime charged" to the standard of proof beyond a reasonable doubt, McCabria wrote.

However, the defense attorney on the case filed a formal complaint against Armbrister and the other two sheriff's office employees on the case. The complaint was investigated by the Johnson County Sheriff's Office. The investigation concluded in October 2020 — about two months after the Democratic primary, when Armbrister was presumed to be the next sheriff because he faced no challenger in the November general election.

The external investigation ultimately determined that Armbrister had violated department policies, but not the law. He said Friday that he had been suspended without pay for five days as a result.

Armbrister said the prosecutor on the case "had said an in-camera review was the next step and I never heard otherwise so my mistake was thinking that step took place. And I could have sworn Judge McCabria had conducted the review but I was wrong."

We asked Armbrister what the public is supposed to think if, whether in good faith or bad and whether he believed the review had happened or he didn't, he had fabricated an event that never occurred by saying that a judge did an in camera review of his file and cleared him. We also asked whether that is the standard of accuracy he expects employees to apply in investigations and whether it is OK for employees to write in a report that something happened if it didn't, just because they think it did.

Armbrister responded, "People make mistakes." He made comments about the defense attorney who filed the complaint, then continued, "I believed the file had been reviewed. I said that. I was wrong and I'm trying to make it right. Take it or leave it."

We asked, to clarify, if he thought the judge was going to make a ruling that could impact whether he was able to testify in Douglas County District Court but didn't ask what the results of the judge's review were.

"I was under the impression the defense would stop at nothing to get to my file and the in-camera review was standing in her way so that's what happened. And then the case was resolved. I knew what any review would find… that I had never been untruthful or intentionally corrupt, so I didn't follow up once the case was concluded," Armbrister said.

The defendant in the case had initially been charged with aggravated criminal sodomy, a level-1 felony punishable by anywhere from roughly 12 to 50 years in prison. He ultimately pleaded no contest to two misdemeanor battery charges and was sentenced to a year of probation.

The answer in which Armbrister wrote that the judge had reviewed his file was a response to a question about how to determine whether evidence is "material." It asked nothing about law enforcement leadership's own experiences. Asked why, in an article about officer truthfulness issues, he answered with so much more than he needed to say without first verifying that what he was saying was accurate, Armbrister said, via text message, "I said so much because I HAVE NOTHING TO HIDE!"

The district attorney's office had not yet responded substantively Friday to an email sent Tuesday, asking whether they had any information about an in camera review of the sheriff's personnel file.

Here is the question we sent April 18 and Armbrister's full answer, which we received April 21:

Q: The legal standard is whether evidence is "material" to innocence or guilt. To someone without a law degree, that sounds like a fairly subjective standard. How should law enforcement assess whether evidence is material? Under this policy, if materiality of certain evidence is questionable, should officers err on the side of disclosure or nondisclosure?

> **Armbrister:** I believe the third definition in Black's Law Dictionary of "material" that "of such a nature that knowledge of the item would affect a person's decision making" is most germane in this case. I think you are right in that the term can be ambiguous and subjective, so I will err on the side of caution when deciding what needs to be disclosed and what does not.
>
> My own personal situation and experience plays deeply into this. A well-publicized allegation was made against me and my truthfulness during a criminal investigation. Based on that allegation, an independent investigation was completed by an outside agency. The findings were clear that I had acted in good faith but in poor practice and violated department policies in that I unintentionally failed to move a recorded interview to the proper server to be preserved as part of an investigation. There was absolutely no information showing I acted maliciously or nefariously, nor with intent. In fact, it showed that I had, at NO POINT, tried to hide my mistakes or obscure them from both the defense and courts. I did not know that the recorded interview had not been uploaded or saved to the system until the case proceeded to trial.
>
> And to that end, I received administrative punishment for the policy violations, and the District Attorney at the time reviewed the investigation and found there was no criminal conduct or intent to obscure information on my part. **The Judge in that case viewed my personnel file "in camera," and he found there was nothing to show I had done anything toward untruthful behavior, nor with intent.**
>
> My case is an excellent example: There is an allegation of untruthfulness; however, after the system has looked at it from a Brady-Giglio standard, it remains an allegation and not "material" information "of such a nature that knowledge of the item would affect a person's decision making." So, if I had a deputy in my agency with these exact set of facts presented to me, I would retain all information in the personnel file, but I would not state he or she has any material Brady Giglio findings that should be disclosed as that is the standard the law requires. Honest mistakes and intentional deceit are two entirely different things and will be handled as such.

In response to a separate question last month, Armbrister wrote, "I now have an extra layer of accountability in that I have told you and the public how I intend to handle these situations, and if I stray from my promise, you and the community will hold me accountable. I want to avoid letting the community down as I'm trying to maintain community trust, rather than tear it down."

Read the full article:

Full disclosure: How law enforcement answered questions about officer truthfulness policies

In the interest of giving each Douglas County law enforcement agency a fair opportunity to respond to questions about complex issues surrounding officer truthfulness, we are publishing each agency's full responses.

LT The Lawrence Times

Here's the statement Armbrister sent via email Friday:

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To: Mackenzie Clark @ The Lawrence Times

From: Sheriff Jay Armbrister #S203

Re: State v. Hart In-Camera File Review

Mackenzie Clark (she/her), reporter/founder of The Lawrence Times, can be reached at mclark (at) lawrencekstimes (dot) com. Read more of her work for the Times here. Check out her staff bio here.

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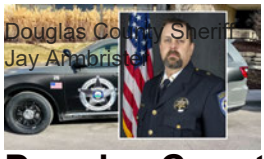

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