

## 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 Aikens, 261 Kan. 346, 382 (1997). Further, “*evidence may be exculpatory without being exonerating.*” Haddock v State, 295 Kan. 738, 759 (2012).

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

### ii. Impeachment information

*“One of the most important areas of the law of evidence relates to impeaching witnesses. To impeach a witness means to call into question the veracity of the witness by means of evidence offered for that purpose, or by showing that the witness is unworthy of belief.”* State v Stinson, 43 Kan.App.2d 468, 479 (2010), quoting State v Barnes, 164 Kan. 424, 426 (1948).

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

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

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

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

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

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

In Lumry v State, 49 Kan.App.P2d 276, 280 (2013) (petition for review granted on other grounds, June 2014), an action brought by a former KBI agent who had been placed on administrative leave for falsifying a time sheet and then later claimed retaliatory discharge, the Court noted the State's clear disclosure obligation under Giglio v U.S., 405 U.S. 150 (1972), in light of concerns expressed by Lumry's former supervisor concerning Lumry's "*credibility as a government witness*":

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

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

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

Kansas Statutes Annotated 60-421 states, "*[e]vidence of the conviction of*

*a witness for a crime **not** involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. (emphasis added)”*

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

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

### 3. Promises of benefit

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

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

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

The admissibility of evidence concerning a witness's character trait for truthfulness is governed by Kansas Statutes Annotated 60-446 and 60-447. Kansas Statutes Annotated 60-446 provides that when a person's character is in issue, such character can be proved by opinion or reputation evidence, or by specific instances of conduct, subject to the limits of Kansas Statutes Annotated 60-447. Kansas Statutes Annotated 60-447 governs character traits offered as evidence to prove conduct. Specifically, Kansas Statutes Annotated 60-447 states that "when a trait of a person's character is relevant as tending to prove conduct on a specified occasion," that trait may be proved as provided by Kansas Statutes Annotated 60-446, except that "evidence of specific instances of conduct" are inadmissible other than certain prior convictions. As such, where a party seeks to admit evidence of a person's character to prove the charged conduct charged, it may only be admitted in the form of reputation or opinion evidence, not specific instances of conduct. See State v Price, 275 Kan. 78 (2003).

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

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

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

*“As affecting the credibility of a witness... (b) extrinsic evidence of prior contradictory statement, 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 Brown, 235 Kan. 688, 689 (1984); See also U.S. v Triumph Capital Group, 544 F.3d 149 (2<sup>nd</sup> Cir. 2008); State v Osbey, 246 Kan. 621, 631 (1990).

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

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

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

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

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

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

## REQUIRED DISCLOSURE VS. ADMISSIBILITY

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

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

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

- i. Expunged convictions – a witness may not be impeached in a civil case with his or her prior expungement. Pope v Ransdell, 251 Kan. 112, 124 (1992). See Kansas Statutes Annotated 21-6614 (formerly 21-4619). To date, the issue has not specifically been raised in a criminal case in Kansas.
- ii. Diversion – a witness may not be impeached with his or her prior diversion. State v Sanders, 263 Kan. 317 (1997);
- iii. Pending Investigation – evidence of a pending investigation of any crime that has not yet resulted in a conviction. State v Martis, 277 Kan. 267, 279-289 (2004).

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

On one side, the First, Second, Third, Sixth, Ninth and Eleventh Circuits have held that *"inadmissible evidence may be material if it could have led to discovery of admissible evidence."* Johnson v Folino, 705 3d 117, 130 (3d Cir. 2013); Ellsworth v Warden, 333 F.3d 1, 5 (1<sup>st</sup> Cir. 2003)(en banc); United States v Gil, 297 F. 3d 93, 04 (2d Cir. 2002); Bradley v Nagle, 212 F.3d 559, 567 (11<sup>th</sup> Cir. 2000); United State v Phillip, 948 F.2d 241, 249 (6<sup>th</sup> Cir. 1991). See also Milke v Ryan, 711

F.3d 998, 1006 (9<sup>th</sup> Cir. 2013) (“*Instead of examining this claim in light of Giglio – asking whether the evidence was favorable, whether it should have been disclosed and whether the defendant suffered prejudice, see Stickler [citation omitted] – the state court focused on the discoverability of the evidence and the specificity of the claim. This is not the inquiry called for by long-standing Supreme Court caselaw.”)*

Conversely, other circuits have held “evidence that would not have been admissible at trial is immaterial because it could not have affected the trial court’s outcome. United State v Silva, 71 F.3d 667, 670 (7<sup>th</sup> Cir. 1995); Jardine v Dittmann, 658 F.3d 772, 777 (7<sup>th</sup> Cir. 2011); and Hoke V Netherland, 92 F.3d 1350, 1356 (4<sup>th</sup> Cir. 1996)

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

Given the current status of the law, while evidence of a diversion, 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 Office of the District Attorney retains the option to request an *in camera* inspection of the information to determine whether disclosure is required.