"*Brady/Giglio* Policy"
of the Reno County District Attorney's Office
27th Judicial District

Consistent with the long-standing practices of the Reno County District Attorney's Office, 27th Judicial District, the following policy is intended to address the obligation of the District Attorney's Office to provide discovery to the defense in all criminal cases.

Purpose

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). "The prosecutor represents a sovereign whose obligation to govern impartially is as compelling as its obligation to govern all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Furthermore, "it is important to the public, as well as to individuals suspected or accused of crimes, that [the] discretionary functions of the prosecutor be exercised with the highest degree of integrity and impartiality and within the appearance of the same". *State v. Cope*, 30 Kan.App.2d 893, 895 (2002). This Brady/Giglio Policy is specifically designed to address the Reno County District Attorney's Offices response to those rare situations in which

law enforcement or government officers/agents have been determined to have engaged in misconduct involving dishonesty or false statements. It is hoped the policy will foster public respect by opening the door to public disclosure of administrative sanctions and guarantee all accused of a crime their constitutional right to due process.

I. HISTORICAL OVERVIEW

Since 1963, a series of United States Supreme Court and Kansas Supreme Court decisions have been released holding that prosecuting attorneys must disclose to defense evidence favorable to a defendant charged with a crime. This includes facts that may be used to impeach the credibility of government witnesses including police officers.

K.S.A. 22-3212 and 22-3213 set forth the statutory obligation of the Reno County District Attorney's Office to collect and provide complete discovery to the defense in all criminal matters. These discovery laws require a prosecuting attorney to provide all known incriminating information as well as any information that might reasonably be exculpatory to the defense. Exculpatory evidence refers to any evidence that might reasonably clear or tend to clear the accused from alleged fault or guilt. Evidence can be exculpatory without being exonerating; see *Haddock v. State*, 295 Kan. 738, 759 (2012). An example of discoverable exculpatory evidence is found in K.S.A. 22-3212(b), which specifically requires a prosecuting attorney to disclose to defense counsel any records of prior criminal convictions, involving crimes of dishonesty, by persons whom the prosecuting attorney intends to call as witnesses at a hearing or trial. See *State v. Humphrey*, 217 Kan. 352 (1975). Kansas Supreme Court Rule 3.8(d), which spells out one of the many Rules of Professional Conduct that govern the behavior

of Kansas prosecuting attorneys, states that prosecutors are ethically required to "make timely disclosure to the defense of all evidence or information know 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).

The United States Supreme Court has held that the failure of the prosecuting attorney to disclose evidence favorable to the defense may violate a defendant's right to due process and require the granting of a new trial, even if the failure to disclose the exculpatory evidence was negligent or passive and not intentional. ***Brady v. Maryland***, 373 U.S. 83 (1963). 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". The Kansas Supreme Court has adopted this rule. *State v. Walker*, 221 Kan. 381, 383 (1977). In ***Giglio v. United States***, 405 U.S. 150 (1972), the United States Supreme Court held that the *Brady* rule applied to information about the credibility of government witnesses without respect to the prosecuting attorney's knowledge. In *United States v. Agurs*, 427 U.S. 97 (1976), the United States Supreme Court held that it was the prosecuting attorney's duty to disclose such exculpatory evidence even in the absence of a specific defense request for it.

The result of these decisions was the creation of a so-called "Imputed Knowledge Rule" for prosecuting attorneys. In the simplest of terms, a criminal prosecutor is assumed to have a crystal ball and be able to know things not revealed by a law enforcement agency. If the law enforcement agency is aware of facts affecting the credibility of a law enforcement officer, legal osmosis dictates that the prosecuting attorney is also aware of the same facts. In *State v. Walker*, 221 Kan. 381, 383 (1977), the Kansas Supreme Court said, "The mere fact that a

prosecutor may not have actual knowledge of evidence which is in the possession of law enforcement officials does not prevent the imputation of knowledge to the prosecutor in the interest of justice."

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the United States Supreme Court imposed upon a prosecuting attorney an affirmative "duty to learn any favorable evidence known to the others acting on the government's behalf, including the police", and a resulting duty to disclose that evidence to the defense in a criminal case. They further held that there can be no question that "procedures and regulations can be established to carry [the prosecuting attorney's] burden to insure communication of all relevant information on each case to every lawyer who deals with it".

Stated another way, the obligation to disclose exculpatory information is collectively held by law enforcement and the prosecution. This demands cooperation and teamwork between law enforcement agencies and the Reno County District Attorney's Office. In *U.S. v. Blanco*, 392 F.2d 382, 394 (2004), the United States Court of Appeals in New York stated, "There is no ambiguity in our law. The obligation under ***Brady*** and ***Giglio*** is the obligation of the government, not merely the prosecutor. 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."

II. FIVE TYPES OF EXCULPATORY/IMPEACHMENT EVIDENCE

Impeachment evidence is exculpatory and therefore subject to ***Brady*** obligations. "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).

1. Inconsistent Statements

Under K.S.A. 60-422, prior inconsistent statements of any witness are admissible to cross-examine the witness. "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), *U.S. v. Triumph Capital Group*, 544 F.3d 149 (2nd Cir. 2008), and *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 as discovery.

2. Bias

Whether against a group, individual or issue, K.S.A. 60-420 permits a party to attack the credibility of a witness and allows the party to "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 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 Reno County District Attorney's Office.

3. Promises of Benefit

A witness may be questioned concerning his or her "relationship with the police". *State v. Humphrey*, 252 Kan. 6, 17 (1992). This includes any communications between the law enforcement agent and the witness that promise or imply certain benefits or consequences to the witness's testimony. Benefits include; (a) Dropped or reduced charges; (b) Immunity agreements; (c) Expectations for downward departure or reduced sentences; (d) Assistance in any criminal proceedings; (e) Consideration; (f) Monetary benefits; (g) Non-prosecution agreements; or (h) Assistance with immigration status. 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) and *State v. Hills*, 264 Kan. 437 (1998).

4. Prior Convictions Involving Dishonesty or False Statement

While evidence of prior criminal convictions not involving dishonesty or false statement are inadmissible for impeachment (i.e., Murder, D.U.I., Battery, etc.), K.S.A. 60-421 permits impeachment of witnesses for criminal convictions involving dishonesty or false statements. "The phrase 'dishonesty or false statements' 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, 711-712 (1990). Dishonesty or false statement convictions would also include Burglary, Theft, Possession of Stolen Property and Robbery. *State v. Thomas*, 220 Kan. 104 (1976), *Tucker v. Lower*, 200 Kan. 1 (1969), and *State v. Laughlin*, 216 Kan. 54 (1975). Juvenile

adjudications/convictions for crimes of falsehood or dishonesty are the proper subject of impeachment. *Davis v. Alaska*, 415 U.S. 308 (1974) and *State v. Deffenbaugh*, 217 Kan. 469 (1976). However – at this time – it does not appear that "dishonesty or false statement convictions" include diversions, expunged convictions or pending investigations. *Pope v. Ransdell*, 251 Kan. 112, 124 (1992), K.S.A. 21-6614, *State v. Sanders*, 263 Kan. 317 (1997), and *State v. Martis*, 277 Kan. 267, 279-289 (2004).

5. Opinion or Reputation Evidence Regarding Credibility and Truthfulness

Impeachment of a witness with a general opinion about their reputation for truthfulness has a long history in Kansas. *Stevens v. Blake*, 5 Kan.App.2d 124 §3 (1897). K.S.A. 60-446 permits introduction of such testimony. A witness's credibility may be attacked by showing the witness has character traits for dishonesty or lack of veracity, but those traits may only be proven by opinion testimony or evidence of reputation, and may not be proven by specific instances of the witness's past conduct. *State v. Patton*, 120 P.3d 760 (2005).

This rule of law constitutes the backbone of the Reno County District Attorney's Office's Brady/Giglio Policy. If a law enforcement officer has a known character trait for being untruthful among his superiors or peers, such information must be immediately disclosed to the Reno County District Attorney's Office so it can be properly provided to the defense and decisions regarding the prosecution of a crime can be appropriately addressed. "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*, 49 Kan.App.2d 276, 280 (2013) and *U.S. v.*

Kiszewski, 877 F.2d 210, 216 (2nd Cir. 1989).

III. ADMISSIBILITY V. REQUIRED DISCLOSURE

Other than prior convictions of crimes involving dishonesty or false statement, K.S.A. 60-447 bars the admission of character evidence of specific instances of conduct. If a witness has lied, stolen or been dishonest on a specific occasion; If such dishonesty did not result in a criminal conviction; and if the witness does not have a general reputation for being dishonest - - a previous isolated incident of dishonesty is not admissible impeachment evidence at a criminal trial.

The question remains whether evidence that would not be admissible under Kansas law is still subject to discovery and disclosure to defense counsel in a criminal case under ***Brady***? The United States Supreme Court's holding in ***Brady*** provides no answer to this riddle. Furthermore, Kansas case law is silent on the issue and there is a split of opinion among the various Circuits of the United States Court of Appeals. *U.S. v. Morales*, 746 F.3d 310 (2014). This ambiguity in the law necessitates the need for a Brady/Giglio Policy for the Reno County District Attorney's Office.

On one side, the First, Second, Third, Sixth and Eleventh Circuits of the United States Court of Appeals have held that, "inadmissible evidence may be material if it could have led to the discovery of admissible evidence". *Johnson v. Folino*, 705 F.3d 117, 130 (3rd Cir. 2013), *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc), *United States v. Gil*, 297 F.3d 93, 104 (2nd Cir. 2002), *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000), *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991), and *Milke v. Ryan*, 711 F.3d 998, 1006 (9th Cir. 2013).

In *Milke*, the United States Court of Appeals stated, "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 call for by long-standing Supreme Court case law."

Conversely, other Circuits of the United States Court of Appeals 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 States v. Silva*, 71 F.3d 667, 670 (7th Cir. 1995), *Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011), and *Hoke v. Netherland*, 92 F.3d 1350, 1356 (4th Cir. 1996).

Little guidance on the divided issue has come down from the United States Supreme Court. In *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995), the United States Supreme Court held that evidence of a polygraph examination – which was inadmissible under state law, even for impeachment purposes – "is not evidence at all". However, the United States Supreme Court then proceeded to analyze whether the withheld information might have led defense counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized.

Given the current status of the law, credibility evidence relating to a law enforcement officer's background must be assessed to determine if the issue could have led to the discovery of admissible impeachment evidence in a given criminal case. The Office of the Reno County District Attorney retains the option to request an *in camera* (private) inspection of the information to determine whether disclosure is required. After long deliberation, the only

potential admissible impeachment evidence that could be discovered, as a result of determining that a law enforcement officer has a previous specific incident of misconduct relating to veracity or truthfulness, would be general opinion evidence that the law enforcement officer has a reputation for dishonesty. That reputation would be admissible evidence under K.S.A. 60-446.

Evidence is not withheld if the accused or his counsel has knowledge of the exculpatory facts or circumstances, or if the exculpatory facts become available to him during trial. *United States v. Torres,* 719 F.2d 549 (2d Cir.1983), *United States v. Brown,* 582 F.2d 197 (2d Cir.1978) (no Brady violation where defense counsel was made aware of witness' contradictory statements shortly after the opening of trial and was able to use him as a witness on defense's behalf), *State v. Walker*, 221 Kan. 381, 383-384, 559 P.2d 381 (1977), *Lawrence v. State*, 244 So.2d 446 (Fla.App.1971), *People v. Hudson*, 38 Ill.2d 616, 233 N.E.2d 403 (1968), *United States v. Dye*, 221 F.2d 763, 767 (3d Cir. 1955), *United States v. Rutkin*, 212 F.2d 641 (3d Cir. 1954), and *In re Razutis*, 35 Cal.2d 532, 219 P.2d 15 (1950), cert. denied, 340 U.S. 842, 71 S.Ct. 32, 95 L.Ed. 617. Evidence is not "suppressed" if the defendant either knew, *see, e.g., United States v. Robinson*, 560 F.2d 507, 518 (2d Cir.1977), *cert. denied,* 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978), or should have known, *see, e.g., United States v. Brown*, 582 F.2d 197, 200 (2d Cir.1978), *cert. denied,* 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978), of the essential facts permitting him to take advantage of any exculpatory evidence. *United States v. LeRoy,* 687 F.2d at 618. See also *United States v. Stewart*, 513 F.2d 957, 960 (2d Cir.1975). *Brady* does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence. *United States v. McKenzie,* 768 F.2d 602 (5th Cir.1985) (no *Brady* violation for prosecution's failure to turn over videotape, where defendants

were aware of its existence before trial, did not move for discovery, and could have subpoenaed a witness's attorney for it). Newspaper articles are generally admissible to show public knowledge. *Ryan v. Kansas Power & Light Co.*, 249 Kan. 1, 2, (1991) and *Hudson v. City of Shawnee*, 245 Kan. 221, 231-232 (1989).

IV. POLICY IMPLEMENTATION

A. NOTIFICATION OBLIGATIONS OF LAW ENFORCEMENT AGENCY

i. Production of Materials

The Reno County District Attorney's Office will continue to require the production of all discoverable materials in each case charged in this jurisdiction from any law enforcement or government agency bringing cases to the Office for review and prosecution. This will include exculpatory evidence, material evidence relating to the case, as well as impeachment information relative to **any** witness – including law enforcement officers.

ii. Notification of Agent's Impeachment Status

The Reno County District Attorney's Office requires that each law enforcement agency, regularly participating as witnesses in criminal cases filed in this jurisdiction, immediately provide impeachment status information relative to its respective agents as that information becomes known to said agency. Departmental information that cannot be substantiated, is not deemed credible, has been unfounded or has resulted in the exoneration of the employee are not generally considered potential impeachment information. However, impeachment information that may be inadmissible under Kansas law – including diversions, expungements and pending investigations – must be provided to the Reno County District Attorney's Office on a

case-by-case basis to determine if the information may lead to the discovery of material and admissible evidence in the criminal case. While certain documented and verified disciplinary actions may not be admissible as evidence at trial, they still may need to be provided to defense counsel under **Brady/Giglio**.

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 Reno County District Attorney's Office did not know of the material. These legal principles necessitate the Reno County District Attorney's Office to require the cooperation of law enforcement agencies in providing it with said information. Failure to disclose such material has the potential to result in sanctions, suppression of evidence or the reversal of a conviction.

iii. Attestation Letter from Agency Head

The Reno County District Attorney's Office hereby requires the head of each law enforcement agency conducting business in Reno County to submit a letter on departmental letterhead to the District Attorney attesting to the following facts:

- The names and identifying information for all law enforcement officers employed by the agency, or who were employed but still have an association with a pending criminal case, having prior convictions for crimes involving dishonesty or false statement.
- The names and identifying information for all law enforcement officers employed by the agency, or who were employed but still have an association with a pending criminal case, who have a known general reputation for being dishonest.
- The assurance that after a diligent inquiry of all employed law enforcement employees' supervisors and peers, the department head is unaware of any further information suggesting that an employee/law enforcement officer has a general reputation for being dishonest.
- The assurance that the Reno County District Attorney's Office will be immediately notified in the future if information is discovered that an

employee/law enforcement officer has a conviction involving a crime of dishonesty or false statement, or has developed a general reputation for dishonesty.

B. RESPONSE OF THE OFFICE OF DISTRICT ATTORNEY

i. Brady/Giglio Committee

The Reno County District Attorney's Office will maintain a Brady/Giglio Committee consisting of at least three of its most senior prosecuting attorneys. This Committee will be tasked with assessing information related to a law enforcement or government agent brought to the Office of the Reno County District Attorney by any law enforcement agency.

When impeachment information about a law enforcement or government agent is made known to the Brady/Giglio Committee, the officer's information will be reviewed and a formal letter sent to the head of the law enforcement or government agency documenting the findings of the Committee.

ii. Brady/Giglio Classification of Officers

Upon review by the Reno County District Attorney's Office's Brady/Giglio Committee, there will be three potential classifications of officers or agents.

1. **Cleared**

- Any wrongdoing by the officer or agent is immaterial to his/her credibility in any criminal case.

2. **Giglio Impaired**
   - An officer or agent is determined to have a valid conviction involving a crime of dishonesty or false statement, to have a general reputation for dishonesty, or to have an unabsolved specific instance of misconduct involving dishonesty or false statement.
   - The Brady/Giglio Committee will review all cases involving the Giglio Impaired officer to decide whether a specific case handled by the officer should be filed, dismissed, or whether it can proceed to trial without using the testimony of the officer.

- If it is decided to continue with the prosecution of a criminal case with the Giglio Impaired officer/agent's testimony – the impeachable information may be disclosed to the defense. A motion requesting an in camera (private) inspection of the officer/agent's personnel file by the trial judge may be sought by the Reno County District Attorney's Office.

- Any affidavits provided to the Reno County District Attorney's Office by the Giglio Impaired officer, with an identified impeachment history subject to disclosure, will not generally be relied upon by the Reno County District Attorney's Office in support of the commencement of any criminal prosecution or the issuance of a warrant or summons.

3. Absolved

An officer or agent determined to have a valid conviction involving a crime of dishonesty or false statement, or to have a general reputation for dishonesty, will never fall into this Absolved category.

An officer or agent determined to have a valid specific instance of misconduct, involving dishonesty or false statement that did not result in a criminal conviction, may be absolved for purposes of **Brady/Giglio** if the following requirements are met.

- The specific instance of misconduct (i.e., falsifying a time sheet, falsifying a training record, lying to a superior, material omission or untrue statement in affidavit, etc.) must be handled administratively with the imposition of an appropriate sanction.

- The law enforcement agency employing the officer/agent must issue a press release to the Hutchinson News detailing the misconduct and imposed administrative sanction. A copy of the press release and associated newspaper article need to be provided to the Reno County District Attorney's Office for its records.

- The law enforcement agency employing the officer/agent must publish the details of the misconduct and imposed administrative sanction on its departmental website.

- The head of the law enforcement agency employing the officer/agent must write a letter on departmental letterhead to the Reno County District Attorney attesting to the following.

    - The name and identifying information the officer/agent.

    - The assurance that after a diligent inquiry of all the officer/agent's supervisors and peers, the department head is unaware of any further information suggesting that the officer/agent has a general reputation for being dishonest.

    - Verification that the officer/agent, with the exception of the specific act of

misconduct involved in the administrative action, has a general reputation for truthfulness.

- An assurance that the Reno County District Attorney's Office will be immediately notified in the future if information is discovered the officer/agent has developed a general reputation for dishonesty.

iii. Maintenance of a Brady/Giglio File

All records provided by law enforcement agencies relating to prior convictions, general reputation for truthfulness, and administrative disciplinary actions, will be stored in a secured file by the Reno County District Attorney and/or Deputy District Attorney. Such information may be disclosed to defense counsel if required by law. Such information regarding specific officers/agents may be disseminated to other staff within the Reno County District Attorney's Office to ensure the prosecutors in the Office tasked with handling individual cases are able to identify any witness they intend to call for possible impeachment information that would require disclosure.

iv. Effect of Brady/Giglio Classification of Officers

The Reno County District Attorney's Office takes no position on the job assignment or discipline of any law enforcement or government officer/agent by virtue of that employee having impeachment information in his or her past that is subject to disclosure. That is a matter for the respective law enforcement or government agency.

Policy Adopted on September 4, 2014.

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