

**IN THE SEVENTH JUDICIAL DISTRICT
District Court, Douglas County, Kansas**

State of Kansas

Plaintiff

vs.

Case No. **2022-CR-000107**

Judge Sally D. Pokorny, Division 2

Steven C Drake

Defendant

**Order Concerning *Brady/Giglio* requests from the
District Attorney to Law Enforcement**

History of the Case

On November 12, 2021, the District Attorney disseminated to the five law enforcement agencies within Douglas County, Kansas, what the District Attorney entitled the “final’ “Brady/Giglio Policy of the District Attorney” along with a “Law Enforcement Checklist”.

The court is unclear as to the extent of law enforcement’s input into the checklist. However, based upon the number of pleadings and objections filed by law enforcement as it relates to what the District Attorney believes has been their failure to comply with the checklist, this Court can assume law enforcement is not taking “ownership” for the creation of the checklist.

The Court has attached the checklist prepared by the District Attorney.

This matter comes before the Court, based upon the District Attorney’s actions when she believes law enforcement has not sufficiently responded to the checklist. Those actions include subpoenaing the Chief of Police and the Sheriff and the Undersheriff to appear at scheduled jury trials for the entirety of the jury trial, with an order to bring the personnel files of every law enforcement officer who was involved in any manner in the investigation of the case. This has occurred in at least twenty-eight cases.

Law enforcement is asking the Court to solve the issue, because they believe the checklist is too broad. Additionally, the District Attorney has requested access to

confidential personnel files in order to make her own determination of *Giglio* or *Brady* materials.

There has been some thought the Court should review all personnel files and make a determination concerning *Giglio* or *Brady* materials. Such a thought is unrealistic and not within the purview of the Court, which shall be addressed more fully.

The Legal History and Meaning of *Brady* and *Giglio*

Brady v. Maryland, 373 U.S. 83, 835.Ct.1194, 10 L.Ed 2d 215 (1963) requires prosecutors to disclose to defendants any favorable, material evidence known to any member of the prosecution team, including the police. A *Brady* violation has three elements. First, the evidence in question must be favorable to the defendant because it is either exculpatory or impeaching. Second, the prosecutor must have suppressed the evidence, either by hiding it or by failing to learn of and disclosing it. Good or bad faith on the part of the prosecutor is irrelevant. Finally, the suppressed evidence must be material enough that its disclosure would create a "reasonable probability" of a different outcome as to guilt or punishment. (Quoting "Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team" 67 Stan. L. Rev. 743 (2015).

In 1972, the United States Supreme Court expanded the *Brady* doctrine in *Giglio v. United States* 405 U.S. 150, 92 S.Ct.763, 31 L.Ed 2d 104 (1972) to include impeachment evidence.

In *Kyles v. Whitley*, 514 U.S. 419, 115.S.Ct.1555, 131 L.Ed.2d 490 (1995) the United States Supreme Court ruled that prosecutors have a *duty to learn* about *Brady/Giglio* information. The duty to learn has not been defined or outlined explicitly. "Neither the prosecutor nor the police have an affirmative obligation under *Brady* to conduct any particular kind of investigation or to seek out exculpatory evidence not in their possession." That is to say, it did not obligate prosecutors to personally review police files in search of exculpatory information.

The government is not required to produce evidence simply because it might be exculpatory. *United States v. Agurs*, 427 U.S. 97, 110, n. 16 (1976) states: ("It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information."); *United States v. Fleming*, F.3d 1325, 1331 (10th Cir. 1994) (noting "[t]he mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard."). Moreover, the Court does not have a duty to directly supervise the government's disclosure of *Brady* information, as such supervision would necessitate a complete review of all material gathered during the government's investigation. (Emphasis added) See *United States v. McVeigh*, 923 F. Supp. 1310, 1313 (D. Colo. 1996). Rather, the duty to determine what disclosure is

required under *Brady* rests with the prosecution. *United States v. Cordova*, No. 1:19-CR-0754-KWR, 2020 WL 5603686, at *3 (D.N.M. Sept. 18, 2020)

The Sheriff's department, the police department, and the District Attorney's office are all members of the executive branch. It is the executive branch that has the duty to disclose *Brady* and *Giglio* material, not the Court's duty.

Additionally, as a practical matter, the Court does not have the time to scour personnel files and the entire investigative files to search for *Brady/Giglio* evidence. How would the Court, without intimate knowledge of the case, know what evidence is exculpatory or impeachment evidence? The ability to determine that lies with law enforcement and the prosecutors.

Conclusion

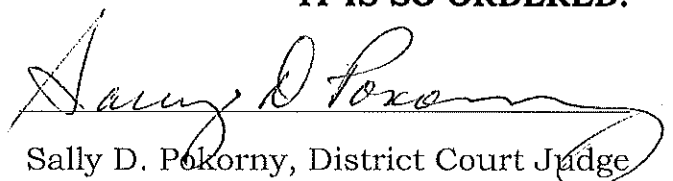
Kansas has no statutes outlining procedures for the District Attorney and law enforcement to work together to discover *Brady/Giglio* material and, if found, to disclose it to the defense. The guidance from other jurisdiction encourages the prosecution and defense to work together to fulfill the mandate of *Brady/Giglio*.

In *Stacy v. Stale*, 2021 WL 5144816 (Alaska Ct. App. Nov 5, 2021) the Court found personnel files are confidential (as they are in Kansas), and held law enforcement could do the investigatory work for the prosecution.

In *United States v. Perla*, No. Cr 20-281, 2022 WL 1270944, @ * 1-2 (W.D. Pa. Apr. 28, 2022) the Court found that because the prosecution had sent *Giglio* requests to law enforcement and received no impeachment evidence in return, the prosecution had met its duty and was not required to personally inspect the files. (Emphasis added)

In Kansas, the request for *Brady/Giglio* evidence from the prosecutor to law enforcement is based on trust. The Court cannot force one executive branch to trust another executive branch. The Court will no longer be placed in the middle of this disagreement.

IT IS SO ORDERED.


Sally D. Pokorny, District Court Judge