

## STANDING ORDER ON DISCOVERY IN CRIMINAL CASES

### Introduction

The State's obligation to disclose information during discovery in a criminal case is governed in part by K.S.A. 22-3212. In relevant part, the statute requires the State to provide the Defendant, upon request, "books, papers, documents . . . which are or have been within the possession, custody or control of the prosecution, and which are material to the case and will not place an unreasonable burden upon the prosecution." K.S.A. 22-3212(b)(1). Discovery under K.S.A. Supp. 22-3212 generally must be completed no later than 21 days after arraignment or "at such reasonable later time as the court may permit." K.S.A. 22-3212(h).

Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), and its progeny, the State has a continuing obligation to produce all evidence required by law. See *Brady*, 373 U.S. at 87 (holding that due process requires disclosure of "evidence [that] is material either to guilt or to punishment" upon request); *Giglio v. U.S.*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 765, 31 L. Ed. 2d 104 (1972) (holding that *Brady* encompasses impeachment evidence); *U.S. v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976) (holding that the duty to disclose exculpatory evidence applies even when there has been no request by the accused); *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995) (holding that the obligation to disclose includes producing evidence "known only to police investigators and not to the prosecutor" and that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf . . . including the police"). Where doubt exists as to the usefulness of the evidence to the Defendant, the State is to resolve all such doubts in favor of full disclosure.

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for the PROSECUTION FUNCTION includes in relevant part;

Standard 3-5.4 Identification and Disclosure of Information and Evidence

(a) After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.

(b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.

(c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order. (Regarding discovery prior to a guilty plea, see Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.

(d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.

(e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case and "boilerplate" requests and responses should be disfavored.

(f) The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.

(g) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

(h) A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with these authorities absent court order.

Kansas prosecutors are also bound by the Kansas Rules of Professional Conduct which provide in relevant part:

3.8 Advocate: Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

. . . (d) 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The State's obligations under the relevant Kansas statutes, *Brady* and *Giglio*, and the individual prosecutor's ethical obligation to provide discovery and exculpatory evidence in a timely manner is not diminished by the fact that such evidence also may constitute evidence that must be produced later pursuant to K.S.A. 22-3213.

The Defendant is bound by the precept of reciprocal discovery. Under K.S.A. 22-3212(c), if the defense seeks discovery and inspection under subsections (a)(2) or (b) of K.S.A. 22-3212, the defense must then:

(1) Permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defense intends to produce at any hearing, are material to the case and will not place an unreasonable burden on the defense; and

(2) provide for the attorney for the prosecution a summary or written report of what any expert witness intends to testify, including the witness' qualifications and the witness' opinions, at a reasonable time prior to trial by agreement of the parties or by order of the court.

Further, should the defense wish to rely on evidence of a mental disease or defect, it must serve upon the State and file with the Court written notice of such intent. This notice must be served and filed before trial and not more than 30 days after entry of the plea of not guilty. K.S.A. 22-3219. Failure to comply with K.S.A. 22-3219 or this Order will result in the prohibition of admission of evidence of such a mental disease or defect. Finally, should the defense intend to rely on an alibi defense, it must comply with the rules in K.S.A. 22-3218.

Without such compliance, the defense will be prohibited from offering evidence that Defendant was at some other place at the time of the crime charged.

**ORDER**

Accordingly, the Court, *sua sponte*, directs counsel to promptly meet and confer regarding discovery in each pending criminal case. Counsel for the State and the Defendant shall cooperate in discovery and reach agreement on the time, place, and manner of making the discovery and inspection permitted, avoiding the need for court intervention.

Barring unusual and unique circumstances, discovery from the State is to be completed 14 days following the filing of an entry of appearance by an attorney for the defendant or an order appointing defense counsel whichever is earlier in time. The State is to produce to defense counsel all discovery as contemplated in K.S.A 22-3212 and specifically any evidence in its possession that is favorable to the Defendant and material either to Defendant's guilt or punishment. The State's obligation under this Order is ongoing and includes producing, during plea negotiations, any exculpatory evidence in the State's possession.

All reciprocal discovery shall be furnished by the Defendant to the State within 21 days after the State makes its disclosures under this order and/or K.S.A. 22-3212.

The State is further directed to produce all discoverable evidence in a readily usable form. For example, the State must produce documents as they are kept in the usual course of business or must organize and label them clearly. The State must also produce electronically stored information in a form in which it is ordinarily maintained unless the form is not readily usable, in which case the State is directed to produce it in a readily usable form. If the

information already exists or was memorialized in a tangible format, such as a document or recording, the information shall be produced in that format.

If the information does not exist in such a format and, as a result, the State is providing the information in a summary format, the summary must include sufficient detail and specificity to enable the Defendant to assess its relevance and potential usefulness.

The obligation imposed on the State herein includes producing evidence known only to police investigators. The State has a duty to learn of any evidence subject to discovery by the Defendant which is known to others acting on the government's behalf including others in the district attorney's office and law enforcement officers and agencies.

The responsibility to provide material evidence to the defense is not a duty limited to prosecutors. Rather, because law enforcement officers act with state authority, "law enforcement's knowledge of evidence is imputed to the State." *State v. Warrior*, 294 Kan. at 506, 277 P.3d 1111. The State therefore runs afoul of this principle—that is, commits a *Brady* violation—"when the prosecutor withholds material evidence that is not known to the prosecutor but is known to law enforcement." 294 Kan. at 506, 277 P.3d 1111.

If applicable, the State is to provide a summary or written report of what any expert witness intends to testify to on direct examination, including the witness' qualifications and the witness' opinions no later than 7 days prior to a final pretrial hearing or at some other time as may be agreed to by the parties or established in a separate court order.

Counsel have a continuing obligation under this Order to supplement discovery in a timely fashion.

Defense counsel shall not share with or disclose to the Defendant or any person not an agent of defense counsel any personal information (address, phone number, SSN, date of birth, etc.) of any victim or witness contained in materials provided in discovery. Defense

counsel shall not give, loan, or reproduce any audio or video recordings for or to any person not an agent of defense counsel.

Finally, if the State has identified any information which is favorable to the Defendant but which the government believes not to be material, the State shall submit such information to the Court for in camera review.

If any party fails to comply with this Order or the governing language of K.S.A. 22-3212, the Court may, at its discretion, issue additional orders relating to discovery, grant a continuance in this matter, prohibit the non-disclosed evidence from being used at trial, or provide any other relief it deems appropriate. K.S.A. 22-3212(i).

IT IS SO ORDERED.

*C. William Ossmann*

C. WILLIAM OSSMANN  
District Judge  
Chair Criminal Department

Effective May 15, 2024