BRADY/GIGLIO COMPLIANCE FORM

Name of Witness: _____

Case Name: _____

1. Length on Employment with Agency: _____

2. Does this witness have any findings of misconduct during the course of their employment?

☐**YES** ☐**NO**

If YES, in a sperate document, please provide details of the misconduct related to dishonesty or credibility.

3. Does this witness have any prior criminal convictions?

☐**YES** ☐**NO**

If YES, in a sperate document, please provide details of the criminal conviction.

4. Are you aware of any current or ongoing investigations related to dishonesty, credibility, or criminal activity pending against this witness.

☐**YES** ☐**NO**

If YES, in a sperate document, please provide details of the pending or ongoing investigation.

5. Are you aware of any other issues involving dishonesty or credibility for this witness that could be considered impeachment evidence?

☐**YES** ☐**NO**

If YES, in a sperate document, please provide details.

Delta County Prosecutor's Office

Lauren M. Wickman
Prosecuting Attorney
Civil Counsel
Beth Wickwire
Chief Assistant Prosecutor
Deputy Civil Counsel

February 15, 2024

Sheriff Ed Oswald, Delta County Sheriff's Office
Director John Gudwer, Escanaba Public Safety
Director Ron Robinson, Gladstone Public Safety
F/Lt Gregg Cunningham, Michigan State Police
D/Lt Tim Sholander, Upper Peninsula Substance Enforcement Team
Chief Jeff Hanson, Hannahville Tribal Police Department

Re: Continuing Duty to Disclose Exculpatory and Favorable Impeachment Evidence

Gentlemen,

I'm writing with a general reminder about exculpatory and favorable impeachment evidence – a lackluster but critically important subject. To begin, we must be guided by the principle that "society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." To that end, we (the "prosecution team") are under a continuing duty to disclose to the defense (after formal charges are filed) any known evidence favorable to an accused which is material either to guilt or to punishment.

The "prosecution team" includes, by definition, all law enforcement officers and all Prosecuting Attorneys involved in the investigation or prosecution of a given case. The phrase "all law enforcement officers" includes everyone involved no matter how minimal their role.

There are two types of evidence considered "favorable to an accused:"

> 1) Exculpatory evidence – evidence or information which tends to exonerate or prove that a defendant is not guilty or less culpable or blameworthy than alleged OR information which would tend to make the sentence less severe. This is called "Brady material," after a 1972 U.S. Supreme Court case bearing that name.

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2) Impeachment evidence – evidence or information which could be used by a defendant to impeach the credibility of a key prosecution witness and thus make a defendant's conviction less likely or punishment less severe. This is called "Giglio material," after another 1972 U.S. Supreme Court case bearing that name.

The law presumes that the "prosecution team" is aware of anything known to an "individual" team member. Failure to disclose such information may well violate the Due Process Clause of the Constitution and result in reversal of any conviction. Withholding such evidence may also have serious adverse personal consequences on members of the prosecution team and their careers. Note that even a delay that prejudices the defense could be a violation.

Brady requires that the officer-in-charge advise the assigned Prosecuting Attorney immediately if and when exculpatory evidence is discovered. The officer-in-charge is in the best position to know the facts uncovered by the investigation. If there is uncertainty about the exculpatory nature of the evidence, he/she should notify the assigned Prosecuting Attorney. It is ultimately the Prosecutor's responsibility to determine what evidence must be disclosed to the defense.

Exculpatory evidence includes:

a) evidence inconsistent with one or more elements of a crime,
b) failure of a witness to identify defendant,
c) information linking someone else to the crime,
d) information casting doubt on the accuracy of the evidence, and
e) information favorable and material to sentencing.

Likewise, under Giglio, the officer-in-charge must also advise the assigned Prosecuting Attorney immediately if and when he/she becomes aware of any impeachment evidence favorable to the defendant. Although the law does not impose the affirmative duty to investigate and discover all impeachment evidence, when such information comes to the attention of any member of the prosecution team, we are all held to that knowledge. Giglio evidence includes:

a) inconsistent statements by a single witness,
b) evidence of witness bias (including any inducements to cooperate),
c) any past criminal convictions or evidence of misconduct involving witness dishonesty, and
d) any factor that could affect the witness's ability to perceive, recall or communicate the facts (reputation for untruthfulness, substance abuse, mental or physical disability, etc.).

Again, if there is uncertainty about the impeachment value of the evidence, investigators should notify the assigned Prosecuting Attorney. It is penultimately the Prosecutor's responsibility to

make the determination. It is equally important that the officer-in-charge remain informed and notify the assigned Prosecuting Attorney if any member of the team discovers information which may be used to impeach a potential government witness. (Please take a minute to review the attachment regarding special concerns relating to law enforcement witnesses.)

Please convey this information to those under your command. Feel free to contact me if you have any questions or would like additional information.

Sincerely,

Lauren M. Wickman
Delta County Prosecuting Attorney

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Continuing Duty to Disclose Exculpatory and Favorable Impeachment Evidence

ADDENDUM REGARDING LAW ENFORCEMENT WITNESSES

As with all exculpatory and favorable impeachment evidence, the law presumes that the "prosecution team" is aware of anything known to an "individual" team member. However, impeachment evidence relating to law enforcement witnesses presents special concerns. If that member is called as a witness, knowledge of his/her entire history, including anything contained in a personnel file, is imputed to the prosecution. If there is anything in that witness's background that can be used to impeach their testimony and we fail to disclose it, we may run afoul of the Due Process Clause resulting in the reversal of the conviction. Thus, it is important that our office receive the following information concerning any member of your agency who has served or will serve as an affiant or testify in court:

a) 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,

b) any past or pending criminal charge brought against the employee,

c) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation,

d) any prior finding by a judge that the 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,

e) 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 to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence,

f) failure to follow mandatory protocols with regard to the forensic analysis of evidence,

g) information that may be used to suggest that the officer is biased for or against a particular defendant, and

h) information that the witness's ability to perceive and/or recall the truth is impaired.

Any law enforcement officer who expects to be an affiant on a search warrant or a witness in any hearing/trial must disclose any potential impeachment evidence to the Prosecuting Attorney or Chief Assistant Prosecuting Attorney. Please be aware that impeachment information relating to law enforcement witnesses disclosed to our office will not automatically be disclosed to the court or to the defense. Rather, our policy is that such information will be reviewed by the Prosecuting Attorney or Chief Assistant Prosecuting Attorney, who will decide whether further exploration of the facts should be made

with the involved agency. No decision about disclosure will be made without consultation with the leadership of the agency involved.

If you have any questions about impeachment evidence relating to law enforcement witnesses, please contact me immediately.

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