

A. All evidence that government and state law enforcement,³ undercover officers, informants, paid or otherwise, or employees or agents of private security firms,⁴ instigated, participated, facilitated, or any in any way encouraged the commission of violent acts on October 27, 2016, or the setting of any fires including fuel or other supplies necessary to ignite fires.

B. All evidence that government and state law enforcement, undercover officers, informants, paid or otherwise, or employees or agents of private security firms were involved in the planning or suggestion of acts of violence and/or fires on October 27, 2016, in connection with the events of that day involving the vicinity of County Road 34 and Highway 1806, including the barricade alleged to have been ignited by Defendant Giron and any acts of violence directed towards the law enforcement officers at the scene of the retaking of North or treaty camp on October 27, 2016.

C. Any evidence of law enforcement or private intelligence or security firm personnel behavior or actions on or before October 27, 2016, which would support the defense of

under *United States v. Agurs*, 427 U.S. 97 (1976) to particularize the nature of exculpatory evidence and related impeachment and the necessary scope of the prosecutor's search necessary to ensure that all such evidence is disclosed by the Government in a timely manner.

³ For the purposes of this motion, the term "law enforcement" refers to all members of the various federal and state agencies arrayed at the October 27 barricade and the forced removal of water protectors at Treaty Camp (also known as North Camp) and the surrounding areas: including Morgan County Sheriff's office, Mandan Police Department, Burleigh County Sheriff's office, North Dakota Highway Patrol, South Dakota Highway Patrol, North Dakota Bureau of Criminal Investigation, ND National Guard, Department of Homeland Security, US Army Corps of Engineers, out of state law enforcement mustered under the Emergency Management Assistance Compact including but not limited to Mercer County Sheriff's Office, Stutsman County Sheriff's Office, Cass County Sheriff's Office, Williams County Sheriff's Office, Barnes County Sheriff's Department, West Dakota SWAT, N.D. Parks and Recreation, South Dakota Highway Patrol, Wyoming Highway Patrol, Pennington County Sheriff's Office (SD), and Hennepin County Sheriff's Office (MN), FBI, Bureau of Indian affairs (BIA), ATF, Bismarck Police Department, Mandan Fire Department and all informants and citizens influenced, encouraged or paid by them.

⁴ For the purposes of this motion, the term "private security firm" includes a Leighton Security Services, Russell Group Security, 10- Code, SRG Security, Silverton, HE Security, and TigerSwan Security (a North Carolina security firm hired by Energy Transfer Partners) and persons paid, influenced or encouraged by them.

outrageous governmental misconduct or entrapment in connection with the acts of violence alleged on October 27, 2016, by water protectors also knowns as protesters, and the setting of fires on that day. The request includes all evidence regarding persons recruited, paid, encouraged, sponsored, or directed by law enforcement or private firms, including all investigations of private security, federal or state, by law enforcement for suspected crimes and reports provided to State's and US Attorneys. Request includes organization chart and/or incident organization chart listing the commanding officers and indicating the command structure which would include both law enforcement and private intelligence and security personnel.

D. All evidence and documentation of property confiscated, intercepted, seized by state, law enforcement or private security or which was left behind or abandoned by water protectors or protestors on October 26-30, 2016.

E. All evidence of land ownership, land claims and disputes, non-ceded territory claims, the existence of sacred sites, BIA communications and enforcement authority, involvement with the Meyer's Ranch, communications regarding law enforcement and private security presence on Turtle Hill, and communications regarding law enforcement permissions given to Water Protectors as to access to land, provision of services at the Oceti Sakowin camp, and access to sacred sites.

F. All evidence that the violent acts used as predicates for the 'civil disorder' alleged in Counts 1 and 2 were influenced, encouraged, facilitated, or otherwise promoted by persons employed or recruited by state and federal law enforcement agencies and private security firms, and any cooperators testified for purposes of this motion.

G. All evidence that would serve to impeach, contradict or otherwise provide evidence of inconsistent statements by state and federal law enforcement and private security firm witnesses called by the government or the defense in their trial or pretrial hearing testimony including claims that no such informants, provocateurs or other citizen cooperators were involved in the instigation, initiation, suggestion, planning, aiding, encouragement or commission of violent acts or arson on October 27, 2016. This includes but is not limited to law enforcement's personal phone and email communications relevant to the DAPL and Water Protector operations, additional video evidence including GoPros, body cams, officers personal cell phone photographs, helicopter and aircraft video, forward looking infrared (FLIR), drone video and photos and intercepted cellular traffic and all radio communications.

As grounds counsel states:

***Brady and Giglio* require the disclosure of exculpatory *and* impeachment information including any evidence that would contradict or cast suspicion on the trial testimony of Government witnesses.**

1. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution. The disclosure obligation imposed by *Brady* and its progeny is grounded in the constitutional guarantee of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. Consequently, the Government's failure to disclose material exculpatory evidence violates the defendant's constitutional right to a fair trial. *Smith v. Secretary of the New Mexico Department of Corrections*, 50 F.3d 801, 823 (10th Cir. 1995); *see also White v. Helling*, 194 F.3d 937, 944 (8th Cir. 1999) (stating that a

defendant's right to due process is violated when the Government violates its disclosure duties under *Brady*).

2. Evidence may be material and favorable to the accused even if it will only impeach the testimony of a prosecution witness. *See Giglio v. United States*, 405 U.S. at 154-155. "Because impeachment is integral to a defendant's constitutional right to cross examination, there exists no pat distinction between impeachment and exculpatory evidence under *Brady*." *United States v. Hughes*, 33 F.3d 1248, 1253 (10th Cir. 1994). This is especially true where a witness' credibility is material to the question of guilt. *Ibid*; *see also Smith v. Secretary*, 50 F.3d at 825.

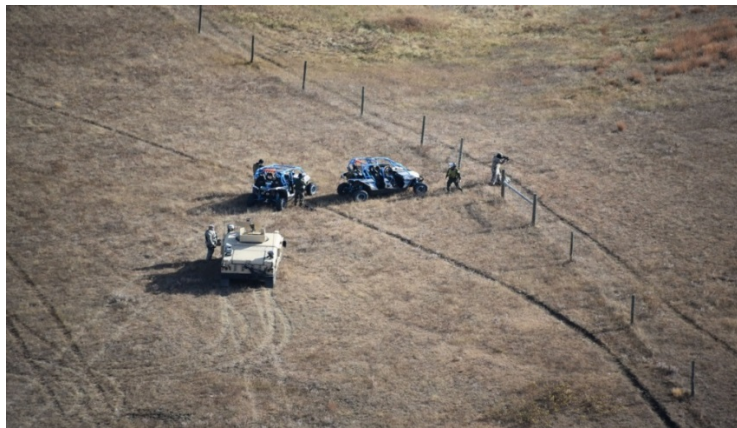
3. In addition, the *Brady* doctrine encompasses evidence that would support core, exculpatory defenses (factual innocence, entrapment, outrageous government misconduct) based on any role that law-enforcement or private security firm personnel or their agents, infiltrators, or provocateurs were instrumental in encouraging, facilitating or instigating violence and arson on October 27, 2016, at the 1806 barricade or elsewhere during the sweep by law enforcement and demonstrations by water protectors.

Members of the "Prosecutorial Team" subject to Brady and Giglio include private security firms and those recruited or hired by them.

4. The response to the various protests in connection with the building of the Dakota Access Pipeline was widespread and prolonged. A vast of array of state and federal agencies were called in to assist. They are listed in part in footnote 2 above. In addition, various private security firms were hired by the builders of the pipeline, Energy Transfer Partners, and other Corporate entities as listed in footnote 3 above.

5. The extensive involvement of private security firms in collaborating with and assisting law enforcement is indisputable. Some examples include;

- a. Private security firms were present on the ground during the police actions of October 27, 2016, often traveling in ATVs in plain clothes. The photos below depict DAPL security ATVs dropping off law enforcement sniper/ surveillance personnel near the Co Rd 134 barricade on October 27, 2016.



- b. TigerSwan issued periodic “Daily Intelligence Updates” to law enforcement updating them on events over the months of protests involving the construction of the pipeline. Those memos can be found at <https://theintercept.com/2017/06/03/standing-rock-documents-expose-inner-workings-of-surveillance-industrial-complex/>. An example from October 26 is attached. *See Exhibit A*



- c. TigerSwan conducted briefings which often included law enforcement. A briefing occurred on October 26, 2016, discussing the situation on the eve of the law enforcement sweep of Treaty Camp on October 27, 2016. Morton County Sherriff Dean Danzeisen and Morton County Sherriff Deputy Lynn Wanner are reported to have received the presentations. In press interviews, Morton County Sherriff Kyle Kirchmeier admitted that law enforcement and DAPL security sometimes worked together “depending on the circumstance”. <https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/> at page 16. These memos – titled DAPL SITREPs – explicitly detail planned meetings between TigerSwan and Law Enforcement at a joint law enforcement and private security Mandan “Fusion” Center. *See* <https://theintercept.com/document/2017/06/03/internal-tigerswan-situation-report-2016-10-10/> .
- d. According to the State of North Dakota, at the time of the events leading to these charges, TigerSwan was providing private security services to Energy Transfer Partners concerning the pipeline and coordinating with other security providers and local law enforcement in carrying out those services. At the time of the alleged civil disorder, TigerSwan had placed, or attempted to place, undercover private security agents within the protest group on behalf of ETP and others. See Exhibit B (Verified Complaint and Request for

Injunction in *ND Private Investigative and Security Board (NDPISB) v. TigerSwan, et al*, [Burleigh County Case No. 08-2017-CV-01873] at p. 1, ¶3, at p. 3, ¶10(4) and at p. 3, ¶10(7)).

[¶3] TigerSwan is a limited liability company organized under the laws of the State of North Carolina with its principal place of business located in Apex, North Carolina, and is registered as a foreign limited liability company with the State of North Dakota providing “security services.”

At p. 1, ¶3.

[¶10] TigerSwan’s Situation Reports summarize the scope of work TigerSwan provided for Energy Transfer Partners. A copy of samples of these reports are attached to this Complaint as **Exhibit B**, and include but are not limited to the following activities:

4. TigerSwan provided private security services to Energy Transfer Partners concerning the pipeline, and coordinated with other security providers and local law enforcement in carrying out these services.
7. TigerSwan placed or attempted to place undercover private security agents within the protest group to carry out investigative and surveillance activities against these groups on behalf of Energy Transfer Partners and others.

At p. 3, ¶10(4) and ¶10(7).

- e. Some security firms went so far as to hire current law enforcement members to work on protest related work on moonlighting contracts above and beyond their official duties. Documents obtained via Freedom of Information Requests show a high-ranking member of the law enforcement team handling the DAPL protest response is listed as being on the payroll of TigerSwan/SRC Security. For example, Chad Kaiser, Sheriff of Stutsman County, is listed as

an employee of TigerSwan in this reporting form, a list of employees that SRC Security delivered to the NDPISB as part of a regulatory requirement, *See* attached Exhibit C, provided a pilot and helicopter and co-pilot for extensive photographing surveillance of the demonstrations, including the protests of October 27, 2016. Photos below depict DAPL and/or Tiger Swan employees piloting a DAPL owned helicopter in the surveillance and filming of demonstrations on October 27, 2016.



- f. One indisputable example of the actions of private security firms working in conjunction with law enforcement in infiltrating, or attempting to infiltrate, the group of water protectors on October 27, 2016, is Kyle Thompson, an employee of Leighton Security. Thompson drove his personal white pickup truck in among the water protectors gathered in the area north of the

backwater bridge and the vicinity of treating can. Neither he nor his pickup was identifiable as Leighton Security.



He carried a VHF security radio and other communication devices in his truck. When confronted, he was armed with a M16 which he brandished repeatedly. He had attempted to pass himself off as a water protector. A can of white gas or other liquid accelerant was later found in the burned-out shell of his truck.



Although he was intercepted and identified by water protesters as a private security firm undercover infiltrator, upon information and belief, many others were not on October 27, 2016. Instead, acting like Thompson, they successfully infiltrated undetected and may have brought accelerants and firearms into the group of water protectors/protesters and advocated for, agitated for, or committed acts of violence. Those actions, like Thompson's, were calculated to encourage violence, suggest and facilitate the use of arson, and otherwise undermine the theme of peaceful prayer which permeated the water protector camp, culture and teachings.

g. Captain Jay Gruebele writes in ND BCI investigation report on unlicensed private security relating to the 9/3/16 dog bite assault that as of 10/18/16

“TigerSwan security is in charge of the DAPL intelligence and overall supervisor of the other security companies.” TigerSwan situation report from 9/14/2016 to Energy Transfer Partners (ETP), *see* attached Exhibit D, notes on page 4-5 that:

“a. ND- Excellent comments from lead LEOs (Law Enforcement Officers) today regarding planning and communication from our personnel. Having the LNO (Liaison Officer) in the JOC (Joint Operations Center) (LEO) has been a huge improvement.

b. Excellent comments on coordination and security support from Construction Supervisors at all levels today. Asked for a repeat of operation tomorrow.”

7. TSI PROGRAM MANAGERS COMMENTS AND RECOMMENDATIONS

- a. ND - Excellent comments from lead LEOs (Law Enforcement Officers) today regarding planning and communication from our personnel.

TigerSwan

Prepared for Energy Transfer Partners

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**INFORMATION CONTAINED IN THIS REPORT IS PROPRIETARY AND SENSITIVE
DO NOT RELEASE OUTSIDE OF AUTHORIZED AND APPROVED RECIPIENTS**

Having the LNO (Liaison Officer) in the JOC (Joint Operations Center) (LEO) has been a huge improvement.

- b. Excellent comments on coordination and security support from Construction Supervisors at all levels today. Asked for a repeat of the operation tomorrow.

DSOC - We have a couple of solutions to improve our capability to distro data in a timelier manner.

6. The broad definition of “exculpatory” and the inclusive nature of what constitutes the “prosecutorial team” are well established. It is irrelevant for *Brady* purposes whether the suppression of material, exculpatory evidence was the result of negligence or design. *Smith v. Secretary, supra*, 50 F.3d at 823 (quoting *Giglio*, 405 U.S. at 154). On the contrary, “if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” *United States v. Agurs*, 427 U.S. 97, 110 (1976); *see also United States v. Long*, --- F.3d ---, 2017 WL 3711755 at *5 (8th Cir. 2017). Moreover, just because a particular piece of information is not in the prosecutor’s files does not mean that *Brady* is satisfied because an “individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in a case.” *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995). Therefore, for *Brady* purposes, the prosecution includes not only the attorneys who are prosecuting the case, but also the prosecutor’s entire office, law enforcement **personnel** associated with the case and other arms of the state which are a part of the prosecution “team.” *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008) (stating that “Brady’s protections also extend to actions of other law enforcement officers such as investigating officers.”); *see also Giglio v. United States*, 405 U.S. 150 (1972).

The search for exculpatory information must include both law enforcement and cooperating private security firms and must be granular and detailed as required by law and the US Attorney's Manual.

7. This duty under *Brady* and *Giglio* to search broadly among all involved agencies, including in this unique instance the files and reports of assisting private security firms, was reaffirmed in the guidance given all federal AUSAs in the “Ogden Memo” in the aftermath of the misguided Senator Stevens prosecution imbroglio where respected USDC DC AUSAs in the flagship office of the US Attorney’s Office suppressed key *Giglio* and *Brady* material that was discovered only after trial.⁵ See Memorandum for Department Prosecutors (hereinafter “Ogden Memo”) dated January 4, 2010, by David W. Ogden, attached as *Exhibit A*, Deputy Attorney General (regarding criminal discovery guidelines indicates that “members of the prosecution team include federal, state and local law enforcement officers and other government officials participating in investigation and prosecution of the criminal case against the defendant”). Available at <http://www.justice.gov/dag/discovery-guidance.html> at p. 6, checked on June 5, 2011⁶

⁵ Although it is clear that the Ogden Memo is not intended to have the force of law, or create any additional rights for defendants, it is nonetheless sets out specific expectations of every Assistant United States Attorney across the nation, to be used in fulfilling their discovery obligations in every case.

⁶ The Ogden memo is cited in and remains as guidance in the US Attorney’s Manual at 9-5.100. <https://www.ustice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings> .

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JUSTICE NEWS

MEMORANDUM FOR DEPARTMENT PROSECUTORS

Monday, January 4, 2010

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. See USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

<http://www.justice.gov/printf/PrintOut2.jsp>

8. The same inclusive definition is contained in the US Attorney's Manual at 9-

5.0001:

B(2) The prosecution team. It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

The scope of materials to be reviewed by the Government to comply with the obligation to search for potential *Brady* and *Giglio* material is equally broad.

9. The heavy and close involvement by private security firms requires that their internal documents and reports be reviewed by the case AUSAs to no less thorough a degree than the federal and state law enforcement materials. The Ogden memo spells out the types of

documents and communications that should be reviewed by the AUSA in the case to ensure all *Brady/Giglio* has been disclosed:

- a. As part of the *Giglio* disclosure process, the **investigative agencies’ entire investigative files**, including documents such as the FBI (or ATF) electronic communications (EC), inserts, emails, etc. should be reviewed by the prosecutors for discoverable information, including *Brady* and *Giglio*. In support, the Ogden Memo referred to above discusses, Exhibit E at page 2, the materials to be reviewed by the Government in determining whether discoverable *Brady* and *Giglio* materials are contained in the file. The Ogden Memo suggests that if *Brady* and *Giglio* is contained in documents that are considered “internal” documents, such as an email, an insert, an administrative document, or an EC, “it may not be necessary to produce [to the defense] the internal document, but it will be necessary to produce all of the discoverable information contained in it”. *Id.*
- b. *Giglio* requires the review of **confidential informant (CI)/witness (CW)/human source (CHS) and source (CS) files** by the prosecutors. The Ogden Memo also instructs Assistant U.S. Attorneys to review informant/witness files described above for discoverable information and copy relevant portions for discovery purposes. *See* Exhibit E, Ogden Memo at p. 2, ¶(B)(2). In the Giron case, given the length of time that the investigation has pursued, the number of agencies that were involved, together with the large number of witnesses identified in the Government’s most recent witness list,

the defense requests the prosecutor conduct that comprehensive review regarding all of the witnesses that fall into these various categories, as well as non-witnesses, to disclose any *Brady* and *Giglio* information.

- c. The prosecutorial review of **substantive case related communications** is also necessary to ferret out all *Giglio* material. As set out in the Ogden Memo, substantive, case-related communications can occur between prosecutors and agents, prosecutors and witnesses and/or victims, and between victim witness coordinators, and/or victims. Whether memorialized in emails, memorandums, or notes, such substantive communications are to be reviewed by the prosecutor, under the Ogden Memo, and *Brady* and *Giglio* materials contained therein disclosed. *See* Exhibit E, Ogden Memo p. 3, ¶ 5.
- d. A prosecutorial review of information obtained in **all witness interviews** is necessary to comply with *Brady* and *Giglio*. The Ogden Memo also obligates Assistant United States Attorneys to review agent and prosecutor notes and original records of substantive interviews with witnesses. The prosecutor should ensure that during the interview of witnesses “material variances in a witness’ statement should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.” *See* Exhibit E, Ogden Memo at p. 4 ¶8(a). Even trial preparation meetings between prosecutors and witnesses may produce new or inconsistent information disclosed by the witness. “New information that is exculpatory impeachment information should be disclosed consistent with the provisions

of USAM § 9-5.001, even if the information is first disclosed in a witness preparation session.” *See* Exhibit E, Ogden Memo at p. 4, ¶ 8(b).

- e. The prosecutorial review of **agent rough notes** is also requested by the Defense, consistent with the dictates of the Ogden Memo. The Ogden Memo also instructs prosecutors to review agent notes “if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent’s account of the interview”. *See* Exhibit E, Ogden Memo at p. 4, ¶ 8(c).
- f. Even information obtained for witnesses in **trial preparation meetings** are within the scope of the *Brady/Giglio* review by the case AUSAs.

9. By separate Memo, *see* attached Exhibit F, on that same day, January 2, 2010, Deputy Attorney General Ogden requested that each United States Attorney’s Office in each district develop a discovery policy that establishes a discovery practice within the district or component consistent with the guidance given by the memos issued that date. Defendant Giron hereby requests a copy of that discovery policy for the District of North Dakota so that additional issues and obligations brought to light by the local plan be available to the defendant.

10. Defendant requests oral argument in support of this motion pursuant to D.N.D. Crim. L.R. 47.1(D) as well as an evidentiary hearing on any disputed facts including the presence of a close working relationship between private security firms and law enforcement throughout October and November 2016 and in particular before and during the events of October 27, 2016.

11. A draft copy of this motion was emailed to the Government for their position on November 20, 2017. No response has been received by the time of filing. The Government's opposition is therefore presumed.

WHEREFORE, Defendant places the Government on notice, and makes the Court aware, of the categories directly of exculpatory evidence described above and the painstaking requirements of the requested review of their case files as well as the files of cooperating private security firms, under Department of Justice guidelines to ensure that the Government has completely fulfilled its *Brady* and *Giglio* obligations and asks the Court to order the thorough review of both law enforcement materials and private security firm records on the topics described.

Respectfully submitted,

ROTHSTEIN DONATELLI LLP

/s/ Peter Schoenburg

By: _____

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Attorneys for Defendant Michael Giron

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system which will send notification of such filing to all parties associated with this case.

/s/ Peter Schoenburg

Peter Schoenburg