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Clark County Prosecuting Attorney's Office *Brady* Policy and *Brady* Committee Protocol

I. Overview

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Strickler v. Green*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady*, 373 U.S. 83, 87 (1963). It is the policy of the Clark County Prosecutor's Office to strictly adhere to our *Brady* obligations.

This written protocol is designed to achieve this goal, and to foster county-wide uniformity in the way *Brady* issues are resolved. *All Clark County deputy prosecuting attorneys are required to know and follow this protocol.*

It has always been the policy of this office to resolve questions related to *Brady* in favor of disclosure, and this protocol does not change that policy, or our interpretation of CrR 4.7. This protocol addresses only how this office will handle and retain *Brady* material regarding witnesses who, due to their profession, are likely to testify in future cases. This will most often occur with police officers or other government witnesses, such as employees of the crime lab or other experts who routinely testify for the State.

A law enforcement officer's or forensic expert's privacy interest does not prevent disclosure of disciplinary records, as such records are considered to be of legitimate concern to the public. See, e.g. *Dawson v. Daly*, 120 Wn.2d 782, 795-96, 845 P.2d 995 (1993); *Cowles Pub'g Co. v. State Patrol*, 44 Wn. App. 882, 724 P.2d 379 (1986), rev'd on other grounds, 109 Wn.2d 712, 748 P.2d 597 (1988).

The *Brady* disclosure standard depends on what a reasonable person could believe. It does not necessarily reflect the belief of this office or a law enforcement agency. Consequently, disclosure may be required in cases where this office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion. The fact that this office concludes that it is aware of information concerning an officer that it is obligated to disclose to comply with *Brady* does not reflect a conclusion that the officer committed misconduct or that the officer is not credible as a witness.

The *Brady* disclosure standard requires consideration of all relevant circumstances. Because this office is not an investigatory agency, it lacks the ability to ascertain those circumstances. Consequently, this office relies on law enforcement agencies to conduct investigations into allegations of officer misconduct, and to advise this office of the results of those investigations.

Allegations of misconduct by recurring government witnesses come to our attention in a number of ways. For example, cases are sometimes submitted to the Prosecuting Attorney in which the recurring government witness is a suspect in a crime. Or, a deputy prosecuting attorney may develop concerns about whether certain conduct -- observed, reported or documented by others -- falls within the purview of *Brady*. At other times, a court may enter a factual finding, or rule on a request to disclose disciplinary information, that implicates *Brady*.

This area of law is dynamic, so this protocol may be refined as further guidance is received from courts or the legislature

II. Basics of *Brady*

The United States Supreme Court's decision in *Brady v. Maryland* requires the prosecution to disclose to the defense any evidence that is "favorable to the accused" and "material" on the issue of guilt or punishment. *Brady*, 373 U.S. at 87. Failure to disclose violates the defendant's right to due process. *Id.* 86-87. The test is the same whether the issue arises before, during, or after trial. The prosecutor's duty to disclose applies even if the defense has not requested that piece of information.

"Exculpatory evidence" is evidence favorable to the defendant and likely to change the result on an issue of a defendant's guilt or his or her eventual punishment if convicted. "Favorable evidence" includes not only exculpatory evidence but also evidence that may impeach the credibility of a government witness, whether that witness is a law enforcement officer or a civilian. *Strickler v. Greene*, 527 U.S. at 281-82. "Impeachment evidence" is defined by Evidence Rules 607, 608, and 609. It generally includes any evidence that can be used to impeach the credibility of a witness.

Brady evidence regarding recurring government witnesses usually falls into one of several general categories: misconduct involving dishonesty; evidence of the improper use of force; evidence tending to show a bias or some motive to lie; and -- for expert witnesses -- a pattern of confirmed performance errors that could compromise the expert's conclusions.

The prosecution does not have an obligation to disclose preliminary, challenged or speculative information. *United States v. Agurs*, 427 U.S. 97, 109 n.16 (1976). Nevertheless, the United States Supreme Court has stated that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 108. See *United States v. Acosta*, 357 F.Supp.2d 1228, 1233 (2005) (recognizing that because it is extremely difficult, if not impossible, to discern before trial what evidence will be deemed "material" after trial, the government should resolve doubts in favor of full disclosure). Thus, we should err on the side of providing timely discovery. This is particularly so in the light of two recent cases from the United States Court of Appeals for the 9th Circuit that hold that materials from ongoing investigations are favorable (have either exculpatory or impeachment value) and must be disclosed under *Brady*. See *United States v. Kohring*, 637 F. 3d. 895, 903-904 (9th Cir. 2011) and *United States v. Kenneth Olsen*, 704 F. 3d 1172, 1182 (9th Cir. 2013).

Information that is disclosed is not necessarily admissible; these issues must be kept separate. *State v. Gregory*, 158 Wn.2d 821, 850-51 (2004). Thus, there will be many times when we disclose *Brady* material, but argue strenuously against its admissibility. The mere fact that a recurring government witness has been added to the *Brady* list is not necessarily a comment by the Committee on that individual's future viability as a witness, on his or her reputation, or on the person's ability to serve in his or her current capacity.

III. Brady Committee Composition

A *Brady* Committee will be established to implement this protocol. The Committee will be comprised of four Senior Deputy Prosecuting Attorneys, and led by a Chief Deputy Prosecuting Attorney. A quorum shall consist of three or more members; a majority vote of those present shall determine a given issue. The Committee will keep a record of all the decisions made in the review proceedings described in section IV and VI.

IV. Information Submitted To Us by Law Enforcement and Government Agencies

Law enforcement agencies will be asked to provide the *Brady* Committee with information on sustained findings of misconduct involving officer dishonesty. This includes any sustained findings or violations of a false verbal or written statement. We will also request all criminal convictions pursuant to CrR 4.7 and *Brady*.

Officers with sustained findings of misconduct involving dishonesty, or criminal convictions pursuant to ER 609, will be added to the *Brady* list without additional review by the *Brady* Committee. If new evidence comes to light or if the finding of misconduct is later dismissed, the *Brady* Committee should be informed so it can decide whether the officer should be removed from the *Brady* list or if other modifications need to be made. In general, negotiated resolutions in lieu of discipline will not result in an officer being removed from the list. In general, dismissals of an allegation obtained through recognized due process procedures will result in the officer being removed from the list. In both scenarios, we reserve the right to keep or remove the officer from the list as necessary to comply with the *Brady* obligations.

Government agencies, such as crime labs, will also be asked to provide the *Brady* Committee with information on sustained findings of dishonesty, and criminal convictions pursuant to CrR 4.7. In addition, government agencies will be asked to provide the *Brady* Committee with information on a confirmed performance error that compromises the expert's final conclusions.

As with officers, State expert witnesses with sustained findings of misconduct involving dishonesty, criminal convictions pursuant to ER 609, or a pattern of confirmed performance errors that compromise the expert's conclusions, will be added to the *Brady* list without additional review by the *Brady* Committee. If new evidence comes to light or the finding is overturned, the *Brady* Committee should be informed so it can decide whether the employee should be removed from the *Brady* list.

The *Brady* Committee's conclusions will be limited to whether the recurring government witness will be added to the *Brady* list. The Committee will not give advisory opinions.

V. Deputy Prosecuting Attorney Responsibilities

1. If a DPA or any staff member becomes aware of potential *Brady* material regarding a recurring government witness, the deputy or staff member shall inform the appropriate Team Leader or one of the Chief Deputy Prosecuting Attorneys.

2. If the Team Leader or one of the Chief Deputy Prosecuting Attorneys believes that the information could constitute *Brady* material, he or she will direct the DPA to prepare a memorandum summarizing the material. The memo should focus only on facts and avoid conclusions or speculation.
3. The Team Leader or one of the Chief Deputy Prosecuting Attorneys shall present the memorandum and all related material/evidence to the *Brady* Committee.

VI. *Brady* Committee Review Procedure

1. When the Committee receives a notification form from a Team Leader or one of the Chief Deputy Prosecuting Attorneys, it will make an initial determination by asking the following question:

If proven true, does the allegation constitute *Brady* material?

- a. If the answer is no, the inquiry is finished.
- b. If the answer is yes, the formal review will continue.

2. The Committee may conduct any additional investigation it deems necessary. The Committee will review the memorandum, related materials, and any additional evidence it has obtained, to answer the following question:

Is the Committee convinced by a preponderance of the evidence that the allegation is true?

- a. If the answer is no, the inquiry is finished.
- b. If the answer is yes, the government witness and the relevant agency will be notified per section 3.

3. The Committee will notify the relevant agency that potential *Brady* material has been found. It will be left to the discretion of the relevant agency to notify the witness.

- a. The witness and the relevant agency will be allowed to submit a response, with additional evidence they would like the Committee to consider, in writing within 20 days.

1. Witnesses should be aware that if a trial date is pending, the Committee may decide that it is necessary to disclose the material in its possession before a response has been submitted.

- b. If no response is received, the government witness shall be added to the *Brady* list and notification should be sent to the witness and the relevant agency.

4. If a response is received, the Committee will review the additional evidence and again ask the following question:

Is the Committee convinced by a preponderance of the evidence that the allegation is true?

- a. If the answer is no, the inquiry is finished. The witness and the relevant agency should be informed of the decision.
- b. If the answer is yes, the witness shall be added to the *Brady* list and notification should be sent to the witness and the relevant agency.

If new evidence comes to light after the time period provided for a response under section 3(a) has expired, the witness may send that evidence to the Committee and ask it to reconsider its decision. Additionally, the Committee may reconsider a witness's placement on the *Brady* list based upon court rulings that help define or clarify the issue. The Committee may modify this procedure when necessary.

VII. Brady List

A secure electronic database shall be maintained by the Prosecuting Attorney's Office Administration with copies of all *Brady* material. Hard copies of the *Brady* material will be kept in a single secure location. Access to the *Brady* materials will be monitored.

All criminal DPAs, legal assistants and interview schedulers will be notified about who is on the *Brady* list and will be notified when there are any changes to the list. The composition of the *Brady* list is confidential and will only be secondarily disclosed consistent with the provisions of this policy.

Witnesses on the *Brady* list will be classified as having either potential impeachment evidence (*Brady* material), or criminal convictions that do not encompass a crime of dishonesty or false statement.

VIII. Procedures to Follow When a Deputy Prosecuting Attorney Discovers That a Potential Trial Witness Is On the Brady List

When a DPA becomes aware that a subpoenaed witness is on the *Brady* list, the DPA should request more detail from the Chief Criminal Deputy Prosecuting Attorney about the nature of the *Brady* material. If the Team Leader and the DPA determine that the potential *Brady* material is not discoverable, due to the specific facts of the case and the witness's anticipated testimony, the DPA shall notify the Chief Criminal Deputy Prosecuting Attorney.

In all other instances, the DPA should discuss with the Team Leader or one of the Chief Deputy Prosecuting Attorneys whether the material should be disclosed directly to the defense attorney, or if it should be submitted to the court for an *in camera* review. The DPA should also discuss with the Team Leader or one of the Chief Deputy Prosecuting Attorneys the need for a protective order. The DPA shall notify the *Brady* Committee if (1) he or she receives any new information about the *Brady* material and/or (2) if a judge in their case makes a ruling regarding the admissibility of the *Brady* material.

IX. When Potential Brady Material Is Discovered During Trial or Under Time Constraints

The DPA should talk to the Team Leader and one of the Chief Deputy Prosecuting Attorneys to determine an appropriate action. When time permits, the formal procedure should be utilized.

X. When A Deputy Prosecuting Attorney Learns About A Pending Investigation Of A Recurring Government Witness.

When a DPA is advised that an investigation is pending concerning a recurring government witness, the DPA shall notify the *Brady* Committee immediately. That witness will be added to a “pending review” list to be monitored regularly for sustained findings of misconduct related to dishonesty or falsehood. On pending cases involving the recurring government witness, the DPA shall notify defense counsel of the existence of the open investigation and direct further inquiry to the investigating agency. If the allegations are sustained and they involve misconduct related to dishonesty or falsehood, the investigating agency shall notify the *Brady* Committee pursuant to section IV of this protocol. The witness will then be added to the “Brady List.” If the allegations are determined to be unfounded, the witness will be removed from the “pending review” status. *See United States v. Olsen, supra.*