

WHATCOM COUNTY PROSECUTING ATTORNEY

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Brady Policies and Protocols

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A handwritten signature in black ink, which appears to be "Eric J. Richey", is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval shape.

Eric J. Richey WSBA# 22860

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 Whatcom County Prosecutor's Office to strictly adhere to our *Brady* obligations, while remaining mindful of the statutory and privacy rights of peace officers involved.

It is 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 our obligations under CrR 4.7. This protocol focuses on 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 recurring government witnesses, such as employees of the crime lab or other experts who routinely testify for the State.

Allegations of misconduct by recurring government witnesses may 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 written protocol is designed to achieve this goal, and to foster clarity and uniformity in the way *Brady* issues regarding recurring government witnesses are resolved. All Whatcom County deputy prosecuting attorneys are required to know and follow this protocol and all relevant law concerning *Brady* obligations. Internal training events will be held in addition to the regular trainings provided by the Washington Association of Prosecuting Attorneys.

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

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 prosecutor's duty to disclose applies even if the defense has not requested that piece of information. Information known to law enforcement is deemed to be information within the prosecutor's knowledge, even if it is unknown to the prosecutor.

VII. The *Brady* List

A secure electronic database shall be maintained by the Panel with copies of all *Brady* material. Hard copies of any *Brady* material will be kept in a secure location. Access to the *Brady* materials will be limited to the members of the *Brady* panel and their support staff. The *Brady* materials will be considered to be attorney work product and will, in general, be considered to be exempt from disclosure under the Public Records Act (PRA), chapter 42. RCW. However, nothing in this policy shall affect the rights provided for by the PRA.

The *Brady* panel will conduct an audit of the *Brady* list immediately upon its formation. 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. The only other information provided on the *Brady* list will be the name of the witness, the employing agency, and the date they were added to the list.

Ten years after a witness is added to the *Brady* list, and every five years thereafter, the *Brady* Panel will conduct a review of the witness's placement on the *Brady* list. The purpose of the review will be the consideration of whether the witness still satisfies the potential impeachment disclosure standard, by a preponderance of the evidence, presented upon review. The review will include, but not be limited to: a review of the initial materials that resulted in placement on the *Brady* list, any substantiated or unsubstantiated reports that would constitute *Brady* material occurring after placement on the *Brady* list, instances of impeachment with *Brady* information that occurred after placement on the *Brady* list, any ascertainable impact that impeachment had on factfinders after placement on the *Brady* list, and the potential vacation/expungement of criminal convictions. If the panel is satisfied that the witness no longer meets the standard for potential impeachment disclosure, by a preponderance of the evidence, the witness may be removed from the *Brady* list, or the *Brady* Panel may reserve the right to keep or remove the officer from the list as necessary to comply with our *Brady* obligations.

VIII. Procedures To Follow When A Deputy Prosecuting Attorney Discovers That A Potential Trial Witness Is On The *Brady* List

In all cases, and as early as is practical in the course of discovery, DPAs should cross reference the potential witnesses that might be called in their cases with 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 Panel about the nature of the *Brady* material. If the Chief Criminal Deputy 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 *Brady* Panel.

In all other instances, the DPA should discuss with the Chief Criminal Deputy 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 Chief Criminal Deputy the need for a protective order. The DPA shall notify the *Brady* Panel if (1) they receive 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 Chief Criminal Deputy 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 Chief Criminal Deputy immediately. The Chief Criminal Deputy will then notify the *Brady* Panel. That witness will then 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* Panel 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.

“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 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 also *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 disclosing evidence that might be exculpatory, or that could serve as impeachment evidence, as early in discovery as is possible.

Information that is disclosed is not necessarily admissible; these issues must be kept separate. See *State v. Gregory*, 158 Wn.2d 759, 797 (2006). 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 this office on: the admissibility of evidence, 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. Whatcom County Prosecutor’s *Brady* Panel Composition

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

IV. Information Submitted To Us By Law Enforcement And Government Agencies

Law enforcement agencies will be asked to provide the *Brady* Panel with information on sustained findings of misconduct involving officer dishonesty. This includes any sustained findings of false verbal or written statements. The *Brady* Panel will also request all criminal convictions pursuant to CrR 4.7 and *Brady*. The *Brady* Panel will also request any sustained findings for biased policing, racial profiling, malicious harassment, or any other misconduct that

suggests bias against a class of people (e.g. race, ethnicity, age, sexual orientation, gender, disability, economic status, or other personal characteristic).

Officers with sustained findings of misconduct involving dishonesty, bias, or criminal convictions pursuant to ER 609, will be added to the *Brady* list without additional review by the *Brady* Panel. If new evidence comes to light or if the finding of misconduct is later dismissed, the *Brady* Panel 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 our *Brady* obligations.

Government agencies, such as crime labs, will also be asked to provide the *Brady* Panel with information on sustained findings of dishonesty, bias, and criminal convictions pursuant to CrR 4.7. In addition, government agencies will be asked to provide the *Brady* Panel 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, bias, criminal convictions pursuant to ER 609, or confirmed performance errors that compromise the expert's conclusions, will be added to the *Brady* list without additional review by the *Brady* Panel. If new evidence comes to light or the finding is overturned, the *Brady* Panel should be informed so it can decide whether the employee should be removed from the *Brady* list.

The *Brady* Panel conclusions will be limited to whether the recurring government witness will be added to the *Brady* list. The Panel 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 Chief Criminal Deputy.
2. If the Chief Criminal Deputy 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 Chief Criminal Deputy shall present the memorandum and all related material/evidence to the *Brady* Panel.

VI. *Brady* Panel Review Procedure

1. When the Panel receives a notification form from the Chief Criminal Deputy, 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 Panel may conduct any additional investigation it deems necessary. The Panel will review the memorandum, related materials, and any additional evidence it obtains, to answer the following question:

Is the Panel 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 Panel 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 Panel to consider, in writing within 30 days from the date of notification.

* Witnesses should be aware that if a trial date is pending, the Panel 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 within 30 days, 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 Panel will review the additional evidence and again ask the following question:

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

- a. If the answer is no, the inquiry is finished. The relevant agency will be informed of the decision.

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 Panel and ask it to reconsider its decision. Additionally, the Panel may reconsider a witness's placement on the *Brady* list based upon court rulings that help define or clarify the issue. The Panel may modify this procedure when necessary.