



Matthew Ellis, District Attorney  
Kara Davis, Chief Deputy District Attorney  
Sally Carpenter, Deputy District Attorney  
511 Washington St., Ste. 304 • The Dalles, OR 97058  
p: [541] 506-2680 • f: [541] 506-2681 • www.co.wasco.or.us

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Amber Hollister, General Counsel  
Oregon State Bar  
PO Box 231935  
Tigard, OR 97281

Ms. Hollister:

After consulting with the ethics hotline, it appears we have an ethical obligation pursuant to Rule 8.3 to provide information concerning possible ethical violations involving former Wasco County District Attorney, Eric Nisley (OSB 951049) and former Wasco County Chief Deputy District Attorney, Leslie C Wolf (OSB 964627). The rules we believe may have been violated are Rules 1.1, 1.3, 3.3, 3.4, 3.8, and 4.1.

Factual Background

During the summer of 2010, Attorney Brian Aaron began inquiring into the nature of the relationship between Wasco County Chief Deputy DA Leslie C Wolf and Officer Jeff Kienlen from The Dalles City Police. Mr. Aaron was defending Gerardo Garcia Gonzalez in CR09-280, a case where Officer Kienlen was the lead investigator and Ms. Wolf was prosecuting. Mr. Aaron believed that Ms. Wolf and Officer Kienlen were having an affair and that the affair gave Officer Kienlen motive or bias to shade his testimony or twist what he was saying to assist Ms. Wolf in securing convictions in her cases. In response to Mr. Aaron's motion to present evidence of their affair for bias, Mr. Nisley assisted Officer Kienle in drafting an affidavit, which was filed with the court, attesting to Kienlen's close personal relationship with Ms. Wolf, but denying an affair.

During a hearing on the admissibility of evidence concerning the relationship between Ms. Wolf and Officer Kienlen, Officer Kienlen reiterated the information in his affidavit. Ms. Wolf attended the hearing. Mr. Nisley argued the case for the state. Judge Kelly ruled from the bench that information regarding the nature of Ms. Wolf and Officer Kienlen's friendship relationship was admissible as impeachment evidence for bias. He cited case law while making his ruling. However, he said outside information regarding the rumors of an affair were not admissible. The defense was allowed to ask Officer Kienlen about his relationship and no other witnesses concerning the alleged affair were allowed. At the trial, Mr. Garcia Gonzalez was convicted of Rape in the First Degree and Sex Abuse in the Frist Degree. He was sentenced to 300 months.

While Mr. Aaron was inquiring into the relationship and attempting to admit evidence of the relationship in cases prosecuted by Ms. Wolf, Officer Kienlen was also being investigated for potential

misconduct concerning the handling of a gun that was seized by the local narcotics taskforce. As a result of that investigation, a chief of the criminal division of the Oregon DOJ expressed concerns regarding the ethics of Officer Kienlen. Additionally, Officer Kienlen was reprimanded by the police chief for bringing discredit to the office. His formal reprimand occurred on December 3, 2010.

During the week of February 7, 2011, Officer Kienlen attended a training in Eugene. He requested his own room during the conference. The police chief denied this request. Officer Kienlen then requested use of the city vehicle to stay with a cousin nearby. The chief granted this request. Officer Kienlen had no cousin anywhere in the area. Instead, he used the city gas card to gas up the city vehicle and drove from Eugene to Salem to stay in a hotel room with Ms. Wolf, who was attending a different conference there, on two separate occasions during the training.

When Officer Kienlen returned from the training he met with the police chief and another officer regarding the gun incident and the conference. On February 17, 2011, the chief issued a notice of discipline in the form of a letter demoting Officer Kienlen from Detective Sargent to patrol officer. The basis for the demotion was violating the City of the Dalles Police Department policy for truthfulness. The chief repeatedly describes Officer Kienlen's statements as "false". He states that Officer Kienlen has lost the respect of his officers and writes "When you lie to me, I look at the person that is supposed to be a leader of our officers and wonder, where did I fail? Disappointment is huge." During our *Brady* hearing with Officer Kienlen, he stated that he attempted to have the police chief re-write the notice with different language or for violation of a different rule but the chief refused.

This letter, finding that Officer Kienlen lied and demoting him for lying, was never disclosed to any defense attorney. It was discovered in Mr. Nisley's former desk when Mr. Ellis took office. We have spoken to the other Deputy District Attorney and staff in our office. It is clear that no remaining staff in the Wasco County District Attorney office was aware of the notice of discipline. Mr. Nisley had possession of the letter and requested a criminal investigation into Officer Kienlen regarding potentially false sworn statement. Ms. Wolf was contacted by DOJ regarding this investigation and, from the content of interviews that were conducted, was aware Officer Kienlen was demoted for lying regarding staying in a hotel room with her.

In April of 2011 Brian Aaron made a public records request. He specifically requested a letter that concerned Officer Kienlen's demotion for involvement with Ms. Wolf. Mr. Nisley denied the request. He did not acknowledge that the letter existed and stated that even if it did not exist he did not need to disclose it because lies of a personal nature are not *Brady* material. Also in April of 2011, local media ran a series of article relating to Officer Kienlen and the gun incident. While the district attorney's office made available information regarding the incident, the office never released information regarding the discipline for lying.

In November 2011, the Kevin Hester case, former defense attorney, current Judge John Olson made a discovery request that included all *Brady* material. In response to the request, Mr. Nisley asked for an *in camera* review of materials. Officer Kienlen was the lead officer on the Hester case. He was also the only witness that testified at grand jury which was conducted by Ms. Wolf. Judge Crowley (now retired) did the *in camera* review. He determined none of the material was admissible. None of the exhibits turned over to the court are currently in the District Attorney's file. Judge Stauffer unsealed the evidence in the file. While all the information in the file was related to Officer Kienlen, it did not contain the letter demoting Officer Kienlen for lying. The motion was made *after* Mr. Nisley was in possession of

the letter. Judge Crowley has stated to Mr. Ellis that if such a letter were included with the motion, he would have ordered disclosure. Mr. Hester was later convicted of Delivery of Methamphetamine, Possession of Methamphetamine, Delivery of Marijuana, two counts of Fleeing/Attempt to Elude, Reckless Drive, Criminal Mischief 3.

Our office is still investigating whether other cases such as the Hester matter occurred and reviewing for conviction integrity.

On January 11, 2021, the letter of discipline was located in Mr. Nisley's old desk. This office notified Officer Kienlen we would be holding a *Brady* hearing to determine our next steps. We also notified the current chief of police and made a public records request to the City of The Dalles. We reviewed the materials we received, spoke to current and former defense attorneys in the area, consulted with other prosecutors, and reviewed comments on various social media. The material regarding Officer Kienlen being demoted for lying was never made available. It appears from comments on social media and former old news articles, that most members of the public that were aware of Officer Kienlen's demotion believed he had been demoted for the gun incident. From discussions with employees that were located within this office, the same is true – that people prosecuting cases within this office were unaware of the *Brady* material involving the officer.

#### Possible Violations

The most serious concerns we have regard rules 3.3: Candor Toward the Tribunal, 3.4: Fairness to Opposing Party or Counsel, Rule 3.8: Special Responsibilities as a Prosecutor, and Rule 4.1: Truthfulness in Statements to Others.

As to Mr. Nisley – He filed a motion for in camera inspection of documents. The documents he had the judge inspect were regarding Officer Kienlen. He disclosed information to attorneys, judges, and staff that made it appear he was being entirely forthcoming regarding the evidence he had in his possession. However, none of the disclosures included the letter disciplining Officer Kienlen for lying. In fact, the disclosures he did make obfuscate and deliberately conceal the fact that the letter exists. The nature of his disclosures made it appear as though not only the letter did not exist, but that Officer Kienlen was demoted for the gun incident instead of lying. He denied the existence of and refused access to material that accuses an officer of lying by his own police chief then continued to use the officer as a witness in cases for over a decade. Impeachment evidence is clearly *Brady* evidence. Information that a person is a liar or has a reputation for dishonesty is clearly impeachment evidence.

As to Ms. Wolf – She was aware of Officer Kienlen's conduct as she was present for portions of it. She was aware of the Judge Kelly's ruling that her relationship with Officer Kienlen was impeachment evidence as she was present in court for it. She was aware of Officer Kienlen's demotion as a close personal friend and as evidenced by statements made by mutual friends and the Department of Justice's attempts to interview her and her husband. However, she continued to prosecute cases with Officer Kienlen as a witness, including assisting with the Kevin Hester Case. Just months after prosecuting a Jessica's Law case where Officer Kienlen signed an affidavit stating he was not having a sexual relationship with her, he drove to stay overnight in her room while they were at separate trainings/conference, yet she made no attempt to correct this evidence in future cases. She did not

correct the withholding of information in the in camera inspection to Judge Crowley. She did not notify any defense attorneys of the reason for Officer Kienlen's demotion. She did not make her own *Brady* disclosure. At the time of these incidents, she had over a decade of experience practicing law as a prosecutor and was aware of her obligations under *Brady*.

We believe that the fact that the letter demoting Officer Kienlen from Detective Sargent to patrol office for lying is unambiguously *Brady* material. We reviewed case law prior to the hearing with Officer Kienlen and making any final decision. We relied on many Supreme Court cases finding that impeachment material is *Brady* material. A fairly complete summary of those cases can be found in this 9<sup>th</sup> Circuit case:

Horton v. Mayle, 408 F.3d 570 (9th Cir. 2005) –

"We conclude that the state's failure to disclose McLaurin's leniency deal undermines confidence in the outcome of the trial for two reasons. First, McLaurin's testimony was central to the prosecution's case. See *Kyles*, 514 U.S. at 444, 115 S.Ct. 1555 (finding that non-disclosed evidence tending to undermine the reliability of key witness testimony was material); *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (finding that undisclosed deal with key prosecution witness was material non-disclosure); see also *Banks v. Dretke*, 540 U.S. 668, 699-703, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (finding that non-disclosure of paid-informant status of key prosecution witness was material). Second, the deal would have provided powerful and unique impeachment evidence demonstrating that McLaurin had an interest in fabricating his testimony. See *Napue v. Illinois*, 360 U.S. 264, 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (holding that some evidence of bias did not diminish value of other evidence of bias); *Banks*, 540 U.S. at 702-03, 124 S.Ct. 1256 (finding that impeachment evidence was not "merely cumulative" where the withheld evidence was of a different character). We therefore hold that the California Supreme Court's summary dismissal of Horton's *Brady* claim was an unreasonable application of clearly established federal law as determined by the United States Supreme Court in *Brady* and related cases."

Additionally, we found that the United Supreme Court has ruled that evidence that a witness is a liar is sufficient to overturn an otherwise lawful verdict even when the evidence of the witness's propensity for lying did not come to light until after the trial. This concerned us because the evidence that was in this office's possession for 10 years specifically involved his truthfulness. It also called into question Officer Kienlen's judgment as he had been sanctioned by his office less than 2 months before engaging in activity that he knew could further harm his career. See *Cash v. Maxwell*, 132 S. Ct. 611 (2012).

Finally, prior to drafting this letter, we checked to ensure that providing impeachment evidence that a witness had lied, had a reputation for lying, had been sanctioned for dishonest, etc. was a well-established rule at the time the letter was provided to Mr. Nisley. It was. In a 9<sup>th</sup> Circuit opinion, the court ruled the requirement to provide impeachment evidence was well-established in 1997/98. The impeachment evidence that had been withheld in that case was that the main witness's sister told a police officer that her sister was a liar and to not believe her. The court ruled the officer did not have qualified immunity because this was a well-established constitutional violation when it occurred. *Mellen v. Winn*, 900 F.3d 1085 (9<sup>th</sup> Cir. 2018). Because it was such a well-established constitutional violation to not provide *Brady* material such as this to the defense, any argument from Mr. Nisley or Ms. Wolf that they were unaware this constituted *Brady* material would violate Rule 1.1 – Competency and 1.3 –

Diligence. They should have been aware of the law and both had a duty to ensure this material was discovered.

Both Mr. Nisley and Ms. Wolf were aware that Officer Kienlen was sanctioned severely for lying. By any *Brady* standard, even if he was not placed on the Wasco Co DA *Brady* list, they had a duty to disclose the letter in any case where he could appear as a witness. Neither one disclosed this information to defense attorneys defending cases in which Officer Kienlen was a witness. They continued to use him as a witness without disclosing evidence regarding his credibility through 2020. Our office had to dismiss open misdemeanor cases, return to grand jury on a pending matter where Officer Kienlen testified, and now have to consider retroactively dismissing and expunging matters, such as the Hester case, due to this continuous willful discovery violation. Both Mr. Nisley and Ms. Wolf were present and aware that Judge Kelly had ruled that bias concerning a relationship between a prosecutor and witness would be relevant evidence, and they made a great effort to show that the relationship between Ms. Wolf and Officer Kienlen was just a friendship. Neither one informed defense attorneys defending such cases that there had been a substantial development in the nature of their relationship since the affidavit had been signed or the hearing had occurred<sup>1</sup>. Further, Ms. Wolf never disclosed the nature of her relationship and continued to prosecute cases where Officer Kienlen was a witness. Simultaneously, her husband Judge John Wolf, recused himself from all Wasco County criminal cases during this same time period due to his spousal relationship with Ms. Wolf, the Wasco Co Chief Deputy District Attorney.<sup>2</sup> Mr. Nisley made public statements that *appeared* to be full disclosures of all allegations against Officer Kienlen but deliberately withheld information regarding the letter. This created a false impression in the community that Officer Kienlen's demotion was due to the gun incident. Ms. Wolf did not correct that impression. Mr. Nisley asked for *in camera* inspections that gave the appearance that he had a judge review all available impeachment evidence against officer Kienlen, but he withheld the letter. It is not clear that Ms. Wolf knew what Mr. Nisley submitted for *in camera* review though she actively prosecuted the Hester case.

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<sup>1</sup> We are not alleging, nor is it our business, that Officer Kienlen and Ms. Wolf had an affair. However, Officer Kienlen testified under oath that he and Ms. Wolf were friends. He stated repeatedly, "just friends". Their relationship was clearly of an intimate nature that transcends the average person's reasonable understanding of the definition of close friends. The contention by defense was that Officer Kienlen was willing to risk his career by twisting his testimony to assist Ms. Wolf in obtaining convictions. This argument has significantly more merit once a person knows that he didn't just risk his career – he ruined it – to spend 2 nights in a hotel room with her.

<sup>2</sup> We are not alleging it is inappropriate for a deputy district attorney to have an intimate relationship with an officer in law enforcement. It is inappropriate for that prosecutor to continue to prosecute cases using that officer as a witness, however. Any case involving that officer as a witness should be handled by another attorney in the District Attorney's office.

We have attached the relevant documents for your review. We submit this information to you after reviewing our ethical obligations under rule 8.3 and with the ethics office. If you have any questions, please do not hesitate to contact either of us.

Sincerely,

/s/ Matthew Ellis  
Wasco County District Attorney

Sincerely,

/s/ Kara K. Davis  
Wasco County Chief Deputy District Attorney

#### Included Documents

Notice of Discipline Dated February 17, 2011  
Written Letter of Reprimand Dated December 3, 2010  
Public Records Request Dated March 17, 2011  
Affidavit of Jeff Kienlen in CR09-280  
Public Records Response from Gene Parker, City Attorney  
Order Relating to Public Records Request by Brian Aaron Dated April 12, 2011  
Transcript of Interview Between Kienlen and former heads of The Dalles City Police, Waterbury & Baska  
Indictment in State v. Hester, CR11-256  
Discovery Request in State v. Hester, CR11-256  
State's Motion for In-Camera Inspection and Protective Order in State v. Hester, CR11-256  
Judge Crowley's response to the in camera inspection in State v. Hester, CR11-256