SPECIAL REPORT:

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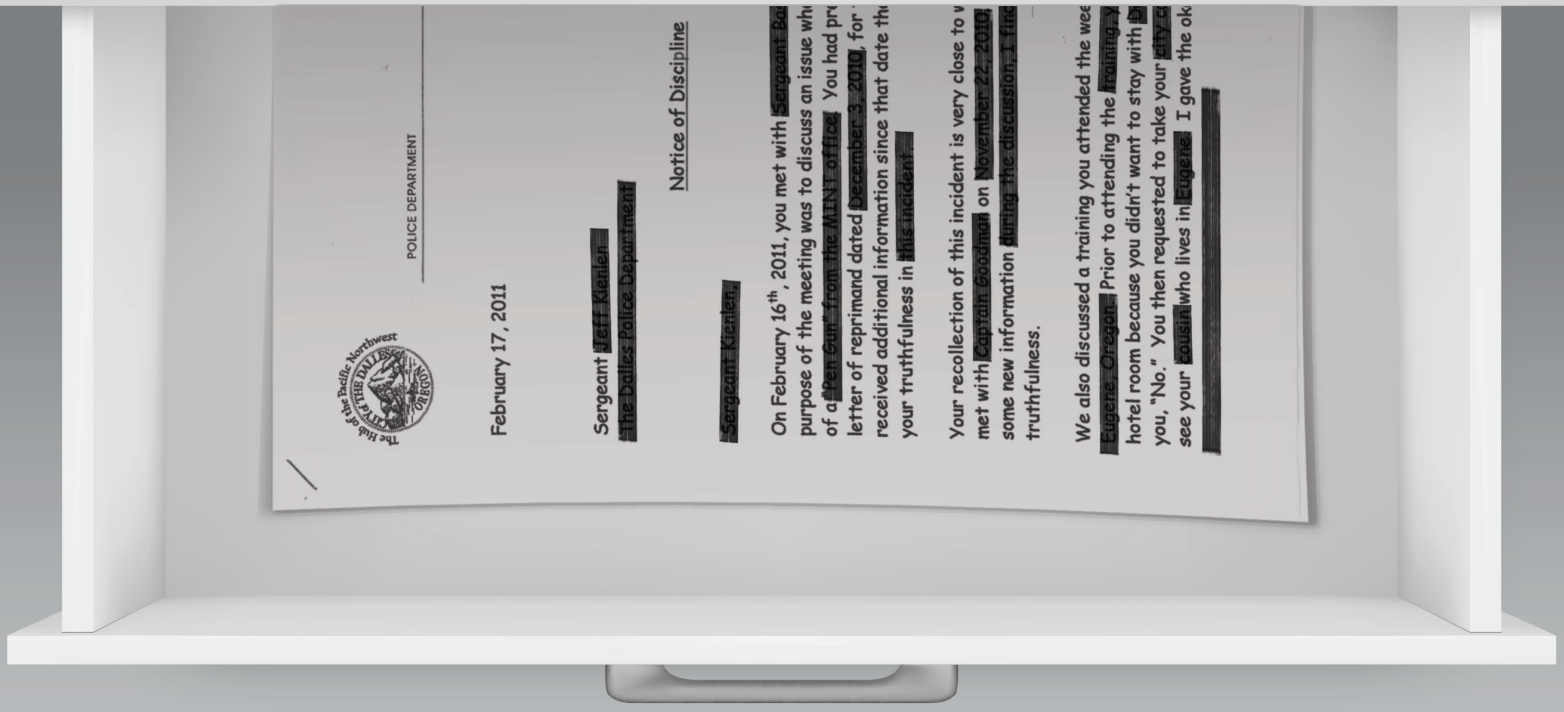
The Impacts of Secrets Held By Police and Prosecutors.



Malori Maloney, J.D., and Brittney Plesser, J.D.

The Oregon Justice Resource Center (OJRC) is a 501(c)(3) nonprofit founded in Portland, Oregon, in 2011. We work to promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them. Our clients are currently and formerly incarcerated Oregonians. We work in partnership with other, like-minded organizations to maximize our reach to serve underrepresented populations, train public interest lawyers, and educate our community on civil rights and civil liberties concerns. We are a public interest law firm that uses integrative advocacy to achieve our goals. This strategy includes focused direct legal services, public awareness campaigns, strategic partnerships, and coordinating our legal and advocacy areas to positively impact outcomes in favor of ending mass incarceration.

The FA:IR Law Project of OJRC launched in October 2021 to address systemic failures and create a more fair, just, and humane criminal legal system. Specifically, the FA:IR Law Project seeks to: reverse, vacate, and prevent wrongful and unjust convictions and sentences and mitigate and prevent excessive sentences. The FA:IR Law Project is a product of our decade of experience representing people impacted by failures and injustices at every stage of Oregon's criminal legal system. Working together with our direct representation projects, including the Oregon Innocence Project, our work encompasses broad challenges based on, among other things, changes in science, laws, and community standards; best practices; and evidence of misconduct. This is accomplished through individual casework, mass case reviews, data analysis, policy change, and community education.

Brittney Plesser, J.D.
Co-Director, FA:IR Law Project

Malori Maloney, J.D.
Staff Attorney, FA:IR Law Project

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Executive Summary

FORMER OFFICER JEFFREY KIENLEN was involved in the investigation of hundreds of criminal cases in The Dalles before his documented dishonesty was revealed to the public in 2021. When Wasco County District Attorney Matthew Ellis took office, he discovered a long-concealed letter in the desk of his predecessor, Eric Nisley. Chief of Police Jay Waterbury penned the letter in 2011, and in it, demoted Kienlen from sergeant to officer. Waterbury wrote in part:

> The integrity of police service is based on truthfulness. If you are not truthful, you have no integrity. Without integrity you can't be a good police officer. You are a Sergeant, yet tell your officers falsehoods. Because of things like this, you can't wonder why you have lost respect of the officers.

Constitutional due process, Oregon law, and Oregon rules of professional conduct required Nisley and his deputies to provide that letter to the defense in each case in which Kienlen was involved, but they never did. What's more, Chief Deputy District Attorney Leslie Wolf hid the fact of her close personal relationship with Kienlen even as she prosecuted the cases he investigated.

When prosecutors fail to provide information or material that may be favorable to the defense, wrongful convictions result. A wrongful conviction occurs when any person is convicted without the benefit of constitutional safeguards intended to ensure fair trials. In the United States, all accused persons are entitled to know with what crimes they are charged and what evidence exists against them; an

accused person cannot make an informed decision about their case without having access to this crucial information.

Jointly recognizing that Kienlen's dishonesty and Nisley's and Wolf's omissions resulted in a decade's worth of potentially wrongful convictions, the FA:IR Law Project (FLP) and the Wasco County District Attorney's Office (WCDA) entered into an agreement in which FLP would conduct an independent review of the cases in which Kienlen was involved. We examined 251 cases, recommending dismissal or expungement in 169 of them. The WCDA agreed with our recommendations in all but nine cases.

During our review, we discovered that dishonesty wasn't Kienlen's only documented issue; the documents we examined showed a clear pattern of aggressive behavior, unreliable investigative work, and poor recordkeeping. Often, other officers were present to see Kienlen behaving badly. Though the undisclosed demotion letter prompted our review of Kienlen's cases, the patterns of conduct we uncovered caused us to broaden our focus and ask how Kienlen was allowed to continue in his role as a police officer for so long despite known and documented wrongs committed against the people of The Dalles. Contrary to the "bad apple" myth of policing, what we saw evinced persistent and systemic issues. Such institutional problems cannot be adequately addressed on a case-by-case basis; instead, we need broad changes that get closer to the roots.

Reforms, while not solutions, can serve as starting points in the effort to reduce the harms caused by unchecked policing and unfair prosecutions. Recommendations for police aimed at reducing these harms include creating clear and robust duty to intervene and use of force policies that encourage transparency and accountability; conducting audits to ensure that these policies are being enforced; and prioritizing the constitutional rights of the accused by always providing prosecutors with all materials and information related to an investigation. Recommendations for prosecutors include contacting an independent review team to help advise on what steps to take when misconduct is discovered; auditing every active officer's personnel record for disciplinary action; practicing open-file discovery; tracking patterns of bad behavior exhibited by law enforcement witnesses; and refusing to call as witnesses officers who exhibit bad behavior.

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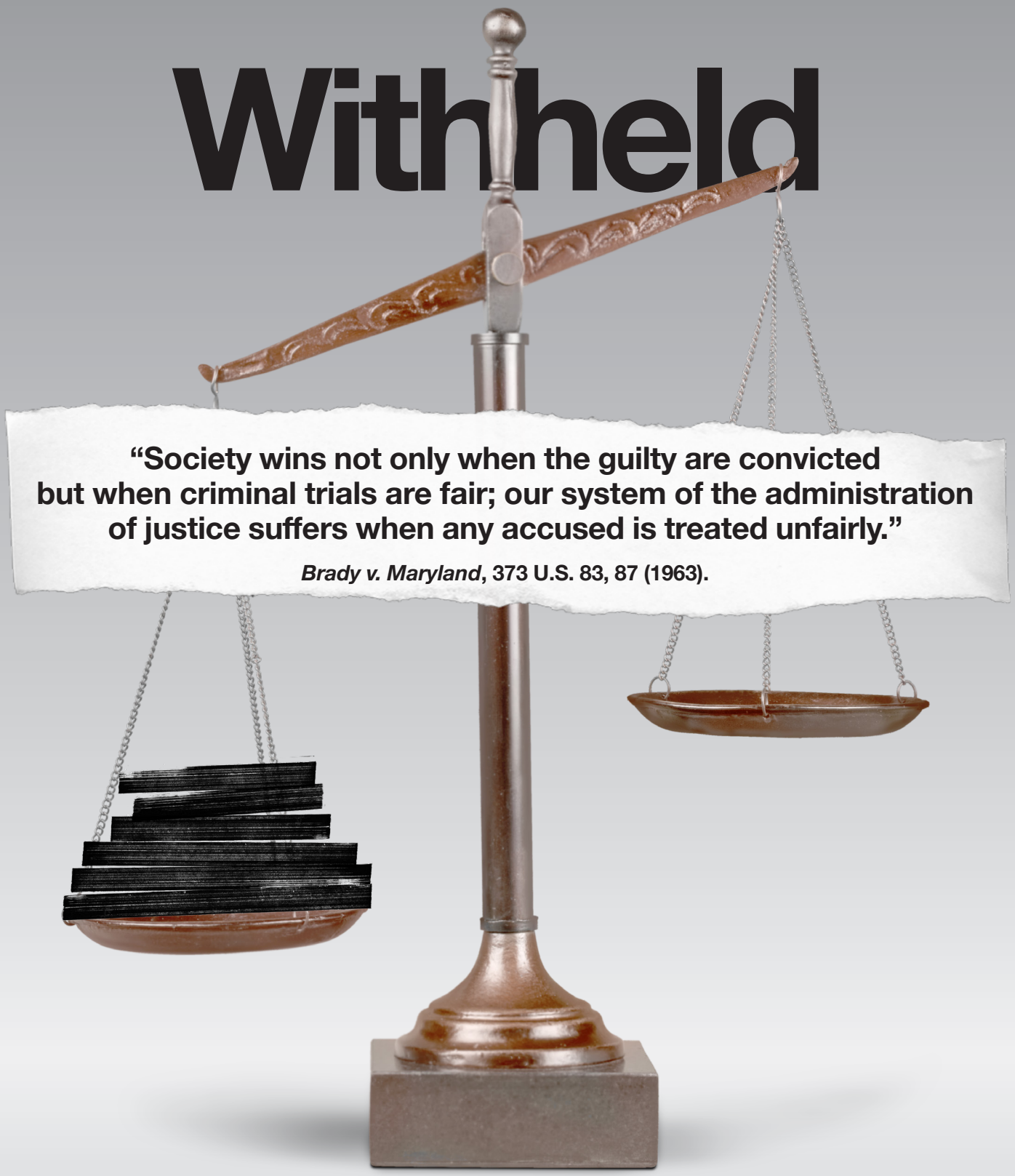

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

***Brady v. Maryland*, 373 U.S. 83, 87 (1963).**

Authors: Malori Maloney, J.D. and Brittney Plesser, J.D.

**Special thank you to Stevie Riley and the entire FLP team, and to Alice Lundell, Brian Decker, and Amanda Lamb for your contributions.*

I. Prosecution

A. The Obligations of a Prosecutor

Prosecutors have an affirmative duty "to see that a person on trial is not deprived of any of his statutory or constitutional rights."[1] One of the ways in which prosecutors are obligated to protect a defendant's constitutional rights is to disclose information and evidence that is favorable to the defense. The Due Process Clause of the United States Constitution, as interpreted in *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to disclose to the accused favorable evidence when it (1) is admissible, (2) can be used to impeach a witness (even if not itself independently admissible), or (3) could lead to the discovery of admissible evidence.[2] The *Brady* rule is codified in Oregon law, which mandates that prosecutors disclose "any material or information that tends to: (A) [e]xculpate the defendant; (B) [n]egate or mitigate the defendant's guilt or punishment; or (C) [i]mpeach a person the district attorney intends to call as a witness at the trial."[3] The Oregon Rules of Professional Conduct similarly have a special rule regarding prosecutors:

1 *Lane v. Marion County D.A.'s Office*, 310 Or App 296, 305 (2021) *(quoting State v. Osborne*, 54 Or 289, 296 (1909).

2 *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989).

3 ORS 135.815(1)(g).

> "The prosecutor in a criminal case shall: []make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[4]

The ORPCs also prohibit any lawyer from "knowingly and unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value."[5]

B. *Brady* Violations and Wrongful Convictions

Prosecutorial non-disclosure of favorable evidence or information not only violates due process, state law, and professional ethics rules; it is also a leading cause of wrongful convictions. The problem of wrongful convictions is vast and persistent. Some wrongful convictions involve individuals who are factually innocent of the crimes charged (i.e., someone else committed the crime or no crime occurred). But even convictions that are wrongful for reasons other than factual innocence cause extreme harm to the people convicted. Harms include higher criminal charges, lengthier sentences, higher fines, higher sentencing grid score calculations, discrimination, physical violence, license suspension, DHS involvement, increased insurance costs, lost education, housing, and other social service opportunities, etc.

Upholding the *Brady* rule is critical to preventing wrongful convictions.[6] Though it is impossible to know how many cases are affected by information that is concealed or otherwise

4 OR. RULES OF PROF'L CONDUCT r.3.8 (Or. State Bar).

5 OR. RULES OF PROF'L CONDUCT r.3.4 (Or . State Bar).

6 Additional causes of wrongful conviction include biases (e.g., discriminatory jury selection practices), junk or outdated forensic or social science, inadequate legal representation, police and prosecutorial misconduct, and false accusations, among myriad others. When any of these is present, the reliability of a conviction is compromised.

withheld unless and until the non-disclosure is discovered, The National Registry of Exonerations, which conducted a study on known cases of factual innocence, found that 30 percent of exonerations involved law enforcement officials concealing impeachment evidence.[7] Prosecutors were responsible for the concealment of impeachment evidence about two-thirds of the time.[8]

Violations of discovery obligations by prosecutors are particularly grave because "[p]rosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory[.] [W]hile they are required to provide exculpatory evidence to the defense . . . it is very difficult for the defense to find out whether the prosecution is complying with this obligation."[9] The high rate of cases resolved via plea negotiation[10] makes it even more difficult to discover material and information that has not been disclosed as required. In these cases, prosecutors wield extreme power over the accused with virtually no oversight. Violations of discovery obligations thrive under these conditions, and when the defense is not given the opportunity "to subject the prosecution's case to meaningful adversarial testing," it renders "the adversary process itself presumptively unreliable."[11]

C. *Brady* Violations in Wasco County

On January 11, 2021, just days after Wasco County District Attorney Matthew Ellis took office, he discovered a letter of discipline against City of The Dalles Police Department Officer Jeffrey Kienlen in former District Attorney Eric Nisley's old desk.[12] The letter was dated February 11, 2011, and demoted Kienlen from Sergeant to Officer

7 Samuel R. Gross, et al., Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement (2020) at 32, https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

8 *Id*. at 86.

9 Hon. Alex Kozinski, *Preface, Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc, at xxii (2015).

10 Roughly 90 to 97 percent of cases are resolved via plea negotiation. Vera Institute of Justice, In the Shadows: A Review of the Research on Plea Bargaining (2020), at 1, https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining-fact-sheet.pdf.

11 *United States v. Cronic,* 466 U.S. 648, 659 (1984).

12 Attachment 2 (Nisley, Wolf Bar Complaint) at 3, Attachment 1 (Kienlen Demotion Letter).

for violating the DPD policy for truthfulness.[13] Soon thereafter, Ellis conducted a *Brady* hearing determining Kienlen was unfit to testify as a witness for the prosecution.[14]

On April 13, 2021, after determining the demotion letter had never been disclosed to any defendant and/or their attorney, Ellis and Chief Deputy District Attorney Kara Davis filed a complaint with the Oregon State Bar against Nisley and former Chief Deputy District Attorney Leslie Wolf alleging violations of ORPC 1.1 Competence, 1.3 Diligence, 3.3 Candor Toward the Tribunal, 3.4 Fairness to Opposing Party and Counsel, 3.8 Special Responsibilities of a Prosecutor, and 4.1 Truthfulness in Statements to Others.[15] The Oregon State Bar indicated that the concerns raised with regard to Wolf may also implicate ORPC 1.7 Conflict of Interest.[16]

The facts alleged in the complaint are as follows:

13 Attachment 2 at 2.

14 *The Dalles Police Officer Kienlen placed on Brady List*, Col. Gorge News (Mar. 2, 2021), https://www.columbiagorgenews.com/news/the-dalles-police-officer-kienlen-placed-on-brady-list/article_d135bf6c-7bb9-11eb-b224-87444509c608.html.

15 Attachment 2 at 1-3. Deputy District Attorney Sarah Carpenter also filed a separate complaint against Nisley, alleging violations of ORPC 1.3 Diligence and 8.4 Misconduct. Attachment 3 (Nisley Bar Complaint). In a later letter to the Oregon State Bar, DDA Carpenter wrote, "When Mr. Nisley buried Jeff Kienlen's demotion letter […] Mr. Nisley buried reputation evidence of Kienlen's character for untruthfulness. This evidence not only could negate the guilt of many suspects whom Kienlen investigated but could also mitigate many offenses which Kienlen investigated. Mr. Nisley kept this information from me, his deputy. Mr. Nisley kept this information from our colleagues in the defense community. Mr. Nisley kept this information from our judges. The consequences to our community are incalculable." Attachment 4 at 2 (Carpenter Bar Letter).

16 Letter from Susan R. Cournoyer to Lawrence Matasar and Wayne Mackeson (Jan. 25, 2022)

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

April 13, 2021

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.

OJRC's Wrongful Conviction Review Program (now FA:IR Law Project) submitted a letter to the Oregon State Bar in support of the complaint. In the letter, we argued that Nisley and Wolf were required to disclose the demotion letter and were in violation of *Brady*, ORPC 3.3 and 3.8, and ORS 135.815 for not doing so.[17] Had the letter been disclosed to any defendant and/or their attorney in cases on which Kienlen was a key participant, they could have used that information in plea negotiations or during trial to question the integrity of Kienlen's work, and therefore, the integrity of the prosecution. For example,

(1) "the Chief of Police would opine that his own employee—a police officer, sworn to uphold the law and testifying with the assumed credibility that the position confers—had a reputation

17 Attachment 5 (WCRP Bar Letter) at 1, 3.

for dishonesty. It is not speculative to conclude that such testimony would have impacted the outcome of the case[;].”[18]

(2) “Kienlen could have been questioned about the fact of his demotion. This inquiry is unquestionably within the scope of cross-examination[;]”[19]

(3) “the letter of discipline would have buttressed any claims of access to Kienlen’s personnel file,” where more impeachment evidence might have been located;[20] and

(4) “Kienlen could have been questioned about bias related to his relationship with Ms. Wolf. Evidence of bias is always admissible. *State v. Hubbard*, 297 Or. 789 (1984); *Davis v. Alaska*, 415 U.S. 308 (1974) (state rule of procedure yielded to the “vital [] constitutional right [of] effective cross-examination for bias of an adverse witness.”). While Kienlen and Ms. Wolf deny that the relationship was sexual in nature, that denial alone is not dispositive. The fact that Kienlen risked his job by lying about driving to another town, over an hour away from his conference, in order to spend the night alone in Ms. Wolf’s hotel room is evidence of a close personal relationship sufficient to show bias. Indeed, as the complaint noted, Judge Kelly ruled that information regarding the nature of Ms. Wolf and Officer Kienlen’s friendship relationship was, in fact, admissible as impeachment evidence for bias.”[21]

18 *Id*. at 5.

19 *Id*. at 6.

20 *Id.*

21 *Id.*

II. Mass Review of Kienlen's Cases

Former Officer Kienlen's dishonesty and Nisley and Wolf's abdication of their discovery obligations resulted in hundreds of potentially compromised convictions from 2011 to 2021. District Attorney Ellis sought our help to independently evaluate whether wrongful convictions occurred in each criminal case in which Kienlen was involved from the time the discipline letter was drafted to the time of its discovery. In January of 2022, we entered a Memorandum of Understanding in which we agreed to conduct an independent review of all relevant cases. Upon completion of our review, we would make non-binding recommendations to the Wasco County District Attorney.

A. Nisley's and Wolf's Violations Will Result in More than 100 Case Dismissals

We reviewed 197 cases in which Kienlen was involved that resulted in convictions.[22] Of those cases, we recommended that 115 be dismissed and vacated—in 109 of those cases, we recommended that all counts be dismissed; in six, we recommended that one count be dismissed and that no action be taken as to one or more other counts. In those six cases, Kienlen's involvement warranted dismissal of one count, but not of the other(s). In one case, we recommended the charge in one be reduced to a lesser offense and that no action be taken on the remaining 82. **The WCDA agreed with our dismissal recommendations in 106 of 115 cases**. A breakdown of recommendations by case type is as follows:

22 Attachment 6 (Case Review List).

- **FELONIES:** We recommended dismissal of 41 cases in which the highest convicted count was a felony. The WCDA's Office agreed with the recommendation in 37 cases.

- **MISDEMEANORS:** We recommended dismissal of 60 cases in which the highest convicted count was a misdemeanor. The WCDA's Office agreed with the recommendations in 55 cases.

- **CONTEMPT FINDINGS:** We recommended dismissal of six cases involving findings of contempt. The WCDA's Office agreed with the recommendations in all six cases.

- **VIOLATIONS:** We recommended dismissal of eight cases in which the highest convicted count was a violation. The WCDA's Office agreed with the recommendation in all eight cases.

- **ARRESTS:** There were 54 additional cases in which there was no conviction, but an arrest record remained. We recommended that all 54 cases be expunged if eligible, and the WCDA's Office agreed. FLP did not review any materials for these cases.

B. Our Methodology

1. Case Identification

The WCDA's Office ran an audit of all cases in which Kienlen was involved in Karpel, its case management system, and provided us with the list. The WCDA's Office limited the review of cases to those initially filed between 2011 and 2021, but Kienlen had been an officer with the City of the Dalles Police Department since 1995.[23] FLP identified 191 cases prosecuted between 2011 and 2021 in which defendants were convicted and one case in which charges were filed and still pending. FLP became aware of one additional affected case when reviewing case materials from one of the 192 cases from the Karpel-generated list. The WCDA's Office also flagged four pre-2011 cases for review. Finally, we identified 54

23 https://www.bpl-orsnapshot.net/PublicInquiry_CJ/EmployeeSearch.aspx (follow "Kienlen, Jeffrey A." hyperlink).

additional cases prosecuted between 2011 and 2021 in which all charges were disposed of by dismissal or acquittal.[24]

The process for identifying cases in which Kienlen was involved was an imperfect one. The list the WCDA's Office generated using Karpel was not comprehensive. The information Karpel produced was only as good as the information inputted. For example, in one case Kienlen investigated, his name was not entered into Karpel when the electronic casefile was created. FLP only became aware of that case by happenstance, during the review of a different case. FLP does not know how many other cases were missing from the Karpel list due to the same type of omission.[25]

2. Case Review

To conduct the review, FLP developed a guiding inquiry that would determine whether action should be taken in a particular case:

If the* Brady *material regarding Kienlen's dishonesty had been appropriately considered by the prosecution and/or disclosed to the defense, could it have reasonably affected the outcome of the case?

Factors relevant to this inquiry were (1) the nature and extent of Kienlen's involvement, (2) whether Kienlen was a unique source of evidence, and (3) who prosecuted the case. Considerations relevant to the nature and extent of Kienlen's involvement included whether Kienlen:

- testified before the grand jury,
- observed a traffic violation that resulted in a stop,
- interviewed witnesses or the accused,
- conducted any searches,
- seized any evidence, and
- tested any substances or otherwise analyzed any evidence at issue.

24 We did not review 372 cases prosecuted before the 2011 demotion letter.

25 In an attempt to account for these errors, FLP requested from The Dalles Police Department a list of all cases in which Kienlen was involved. Upon receipt of the DPD list, however, FLP found it impractically difficult to compare it with the Karpel list, as the case numbers did not match up.

The question of whether Kienlen was a unique source of evidence became relevant in any case wherein he conducted an interview or search, seized evidence, tested substances, or engaged in any other investigatory activity. We considered whether other officers were present, whether those officers wrote reports, and whether those reports were consistent with Kienlen's account. Regarding the prosecutor assigned to a given case, we viewed cases prosecuted by Leslie Wolf with more scrutiny than those prosecuted by others due to the nature of her relationship with Kienlen and the potential bias it caused.

If the case outcome could have reasonably been affected by appropriate consideration and/or disclosure of the *Brady* material, we recommended that the WCDA's Office move to have the charging instrument dismissed and the judgment vacated. To ensure consistency in recommendations, we employed this same standard of review in each case regardless of the nature or severity of the conviction(s) at issue, the prior or subsequent criminal history of the defendant, or any other circumstances.

The review process for each case began with a determination of which offenses the affected individual had been convicted. The reviewer then examined the case materials, beginning with the charging instrument and including each police report relating to the convicted offense(s).[26] The reviewer evaluated the case based on the three factors discussed above and prepared a document summarizing the analysis. Reviewers consulted with one another in cases in which the appropriate recommendation was unclear.

We broke the project down into digestible subsets, allowing for FLP and WCDA to discuss the project as it proceeded and make adjustments to the recommendation process as needed. In total, we provided the WCDA's Office with 20 "Final Case Documents," each

26 We did not review post-disposition reports related to probation violations, as these did not bear on the reliability of the underlying conviction.

of which included a subset of cases.[27] At least two FLP reviewers read the recommendations contained in each final case document before it was sent to WCDA. FLP reviewers met with WCDA regularly to discuss recommendations and address any questions or concerns. Because District Attorney Ellis used to be a defense attorney in Wasco County, the potential for a conflict of interest arose in a number of cases. For the cases in which we determined there was such a potential conflict, we submitted separate Final Case Documents to Chief Deputy Davis and had separate case discussions with her.

3. Case Dismissal

FLP recommended that the charging instruments in affected cases be dismissed and the judgments vacated. Oregon law does not provide a mechanism by which a prosecutor may unilaterally dismiss a charging instrument or vacate a judgment, so court involvement was required. WCDA and FLP agreed that the most effective means by which to move the court to act would be to submit joint motions laying out the circumstances of each conviction and the Constitutional infirmities resulting from the discovery violation.

When WCDA agreed with FLP's recommendation that action should be taken in a particular case, FLP endeavored to contact the affected individual and determine whether they would like FLP to represent them. The representation would be limited to drafting

27 Case subsets:

- Cases from 2011 to 2021 in which Kienlen is documented in Karpel as being the only witness;
- Cases specifically identified by the WCDA's Office as needing review;
- Cases from 2011 to 2021 in which Kienlen is documented in Karpel as being the only officer;
- Cases from Final Case Document I that did not initially have relevant case materials uploaded to Karpel;
- Supplemental information related to select cases from Final Case Document IV;
- Case of individual held in custody on a probation violation where Kienlen was involved in the underlying case;
- Cases from 2011 to 2021 involving individuals who were listed in Karpel as having multiple Kienlen cases;
- Cases from 2011 to 2021 involving individuals still serving sentences;
- All remaining cases from 2018 to 2021;
- All remaining cases from 2011 to 2017;
- Cases from Final Case Documents II, III, and VI that did not initially have relevant case materials uploaded to Karpel; and
- Supplemental information related to one case from Final Case Document II and one case from Final Case Document IX.

pleadings to be filed by WCDA[28] and advising clients on remedies to collateral consequences flowing from the wrongful conviction. In cases where FLP was unable to reach the affected individual, FLP provided WCDA with pleadings to be filed without the defendant joining the motion.[29]

Though the review has been completed, pleadings for affected individuals continue to be filed. To date, the court has granted each motion filed.

28 These pleadings included joint motions to dismiss the charging instrument and to vacate the judgment in the interest of justice, a supporting declaration, a proposed order granting the motions, and a certificate of service.

29 FLP worked with OJRC's Immigrant Rights Project to ensure any motions filed were drafted to minimize the risk of immigration consequences.

Sharon's Story

We had the opportunity to speak with many of the people whose lives were impacted by the violations alleged in this report. Time and again, we heard Kienlen described as hostile, aggressive, and arrogant. Years after encountering him, community members recalled experiences that left them feeling disrespected or even frightened. One woman we spoke to told us that she met with an officer at The Dalles Police Department to file a report against Kienlen after he violently arrested her during a traffic stop; instead, she was simply told she could hire a lawyer if she wished, as others who had problems with Kienlen's behavior had done. Another woman described feeling intimidated and goaded by Kienlen during a traffic stop: "He said, 'You're testing my patience. I'm getting irritated and you don't want to see that.' [. . .] I felt that he wanted me to do something so that he could react in a violent way, like use force, hurt me." Sharon, whose story is below, spoke to us in depth about her experience.

Though Kienlen was demoted for his dishonesty, community members in The Dalles continued to be prosecuted based on his word alone. Sharon was a mother of six in her mid-forties when Kienlen claimed that she committed a felony offense against him. Despite there being no other witnesses or corroborating evidence—and despite knowing of Kienlen's unreliability—Nisley moved forward with the case.

When asked about the impact the case had on her, Sharon described being physically assaulted by Kienlen during her wrongful arrest: "he slammed me face-first into the ground and started kicking me." Sharon was then taken to jail, where she was held until her family was able to gather enough funds to post her bail. When she finally met with her attorney, she described Kienlen's assault and told the attorney she wanted to report it. The attorney dissuaded her, saying "it wouldn't do a bit of good" because Nisley was the DA.

The assault left Sharon so terrified that she uprooted from the community where she had lived for decades, pulled her kids out of their schools, and moved into a little trailer in another town. "I packed up a week or two before my trial and left The Dalles with nothing. I knew I wouldn't have a fair trial and I was afraid something might happen before the trial." When asked to elaborate, Sharon says she believed she might face physical violence in retaliation for fighting her case. Feeling that she had no real choice, Sharon ultimately pleaded guilty to a crime she maintains she did not commit.

The conviction marked Sharon a felon and created a host of challenges she had never dealt with before. "Do you know how hard it is to try to find a place to live with a felony on your record?" she asks during our interview. "It's been a lot of years that I've had to live as a felon. I couldn't get on HUD or anything because I was a felon. I had to survive on my disability payments. I couldn't get a job even if I wasn't sick because most people don't want to hire felons." Despite her difficult financial circumstances, Sharon had

to pay thousands of dollars over the course of her three years on probation.

Sharon said the most significant effect of the case, however, was on her relationship with her children: "It wasn't the money I lost. I lost years with my kids trying to defend myself for something I didn't do." Sharon's children had to stay with other people for part of the time the case was pending, and DHS became involved due to her arrest. Though the DHS case is closed and Sharon's conviction has been dismissed, she and her family continue to struggle with that period of disruption in their lives.

Today, after Sharon's dismissal, she says: "I feel like I'm totally free now. I feel like a big weight has been lifted off me. I can't change what happened. It made my life different in so many ways. There's another word for how I feel: vindicated. A lot of people just wouldn't listen to my story. They didn't believe me. But now it's so freeing because I have the [dismissal] papers. I almost want to frame them and put them on my wall."

Sharon's story is representative of many others. Additional harms community members have suffered as a result of Kienlen, Nisley, and Wolf's misconduct include over-prosecution, over-sentencing, fees associated with over-sentencing, such as community correction costs, increased insurance costs, harsher sentences in the future due to criminal history score calculations, criminal record stigma, and difficulty applying for housing and employment. Though we are working to remedy some of these harms, Sharon explains: "There's no way you can really gain that back. No amount of money could ever replace the damage that's already been done. [] It's ruined people's lives. That's what they don't understand: it's ruined our lives and you can't replace what's been taken from you."

"to ~~protect~~ and to ~~serve~~"

III. Policing

During the course of examining hundreds of police reports, we noted a number of Kienlen's concerning patterns of behavior. Kienlen's own reports reveal his tendency to respond with disproportionate aggression when he claimed to perceive a community member as uncooperative or noncompliant. Kienlen was ultimately included on the WCDA's *Brady* list due to his dishonesty; however, documents from the case materials we reviewed demonstrate that the harms he caused in The Dalles community go far beyond his dishonesty.

A. Violence, Escalation & Apathy

The cases below are representative of Kienlen's behavior, but they do not constitute a comprehensive list. These cases raise questions about Kienlen's effectiveness as a law enforcement officer and how he remained in his role for as long as he did. Kienlen exhibited hostility toward people he engaged with and a disregard for unambiguous departmental policies, including those relating to the use of force, encounters with people experiencing mental health crises, the unholstering of firearms, and the use of Tasers. One notable pattern involved the frequency with which Kienlen escalated interactions with community members into violent encounters. In many instances, the victims were particularly vulnerable due to immutable cognitive or physical impairments. The facts in the

examples below are taken from police reports and associated case materials unless otherwise noted.[30]

1. R.C.

R.C. was driving his car at 15 miles per hour with his hazard lights on when Kienlen stopped him. Notes in the district attorney case file indicate that R.C. identifies as being autistic and reports that he is unable to read or write. When Kienlen asked R.C. for his license, R.C. responded that he needed to make a phone call. After a short exchange, Kienlen opened the car door and grabbed R.C.'s arm. R.C. yelled at Kienlen not to touch him and, according to Kienlen's report, "angrily sprang from the driver's seat towards" Kienlen. Kienlen grabbed him by the throat and pushed him against the car, grabbed his right arm, and tried to put his hands behind his back. R.C. tried to break free while yelling, "I'm handicapped." At some point, two other officers arrived. Upon seeing Kienlen with his Taser on the back of R.C.'s neck, one of the other officers put his knee against R.C.'s back. In a purported effort to detain R.C., Kienlen used his knee to strike R.C. in the groin, tripped him, grabbed his hair and deployed the Taser against his ribcage and neck.[31]

2. B.K.

B.K. was driving with her two young children when Kienlen saw that she wasn't wearing a seatbelt. Kienlen tried to pull B.K. over, but she didn't yield. Instead, B.K. swerved, slowed, and accelerated again. Body camera footage showed her stopping her car and another officer approaching the passenger side screaming, "pull over." At the same time, Kienlen approached the driver's side and tried to open the door. B.K. unrolled her window and Kienlen ordered her to pull over. B.K. pulled over and the other officer ordered her to get out of the car. B.K. began to get out of the car and Kienlen, who had momentarily stepped away to move his patrol car, yelled at B.K. to stay in her car. Realizing the other officer ordered B.K. to get out of the car, Kienlen then asked B.K. whether she wanted to remain in or get out of the car. After a brief exchange, Kienlen ordered B.K. out of the car before suddenly grabbing her by the arms, forcefully removing her from the car, and taking her to the concrete ground, where she appeared to hit her head. The other officer and a Wasco County sheriff's deputy joined Kienlen in aggressively restraining B.K. As they do so, B.K. can be heard saying, "Ow! Okay, okay, I'm sorry! You guys? I'll come. I'll come with you. Ow! I'm sorry! Oh my god, you guys, no!" Eventually, Kienlen handcuffed B.K. and the other officer took her to a patrol car. B.K. did not immediately step into the car and the other officer shoved her in.

Body camera footage from a few minutes later revealed Kienlen informing a supervisor that B.K. reached for the gear shifter before he took her from the car and threw her down. However, the earlier footage showed this did not happen. During the same conversation with the supervisor, Kienlen said B.K. "may have 59 issues." The Dalles Police Department Policy Manual indicates that the code '10-59' means 'mental subject.' During questioning, B.K. revealed that she lives with her children in a "safe house" through Haven, a local organization supporting survivors of stalking, sexual and domestic violence. B.K. also makes a comment about not initially realizing that the officers who

30 The names of officers who witnessed or participated in the incidents described below have been omitted. While the case examples in this report are illustrative, they are not all-inclusive; officers other than those who witnessed or participated in the incidents summarized in this report were involved in case examples that are not included. The naming of some officer-witnesses or participants may wrongly imply that others within the department were not also complicit. Conversely, naming some and not others might suggest that any remaining problems that exist within the department may be addressed by disciplining those specific officers, ignoring systemic failures.

31 R.C. later initiated a federal case based on civil rights claims against Kienlen, two other officers, and The City of The Dalles. The parties settled out of court.

arrested her were "real cops." Officers contacted DHS while on scene and the State of Oregon filed a dependency petition the following day.

3. A.J.

A.J., a "developmentally delayed woman," was at a hearing in The Dalles Municipal Court when the judge sentenced her to seven days in jail for the probation violation of "not obeying house rules."[32] While A.J. was seated at counsel table with her attorney, Kienlen "arrested her by grabbing the bun on top of her head and doing a 'hair take down,'" putting A.J. face down on the floor. Kienlen then "knelt with one knee in her back and struck the back of her head twice with his fist."

Then-District Attorney Eric Nisley filed a complaint charging A.J. with one count of Resisting Arrest and three counts of Harassment. While her case was pending, a psychological evaluator hired by her counsel opined that her "chronic and untreatable cognitive impairments" were such that she would not ever "develop[] the reasoning skills to make thoughtful decisions about her legal case." More than nine months after levying the charges against A.J., DA Nisley filed a motion to dismiss them. The bases of his motion were that "the interest of justice will not be served by further retention of this as a pending case" and that A.J. "agreed not to pursue any civil litigation regarding this case."

4. G.S.

After seeing G.S. stop suddenly in front of a car following closely behind him, Kienlen tried to pull over G.S.'s car. Instead of yielding, G.S. sped away, crossing into the oncoming lane as he did so. Eventually, G.S. quickly stopped on the shoulder of the highway. Kienlen stayed behind the driver's door of his car and drew his gun, pointing it at G.S. Kienlen ordered G.S. to turn off the car and drop the keys out of the window. Initially, G.S. didn't respond, but after Kienlen repeated the order several times, G.S. replied that he couldn't comply because he was having a heart attack. Kienlen saw G.S. lean into the passenger's compartment "as if he was attempting to get something from either the center console, or in the passenger's compartment."

When a Wasco County sheriff's deputy arrived, he and Kienlen approached G.S. in his car. They ordered G.S. to put his hands up, and G.S. did. The deputy grabbed one of G.S.'s arms and Kienlen grabbed the other. They ordered G.S. out of the car, but he said he couldn't get out. In response, the deputy and Kienlen "used an arm bar to force him out of the seat, and onto the road."

G.S. repeated that he was having a heart attack. Kienlen proceeded to question him, asking him "why he did not pull over if he was indeed having a heart attack." Kienlen continued to interrogate G.S. and the deputy called for an ambulance. The ambulance took G.S. to Mid-Columbia Medical Center, where doctors determined he needed to be admitted because of a problem with his lungs. A letter from G.S.'s defense attorney to the court stated that G.S. is "a very ill man" who "takes 18 pills a day" and was scheduled for quadruple bypass surgery.

5. N.L. and W.S.

In the case of N.L., Kienlen responded to a reported trespass and saw that N.L. was unconscious. Rather than assisting N.L., Kienlen first spoke to the reporting party. Then, he tried to revive N.L. with a sternum rub. N.L. remained unconscious, so Kienlen called for an ambulance. When paramedics arrived, they determined N.L. was overdosing on an opiate and administered NARCAN.

32 Karpel contained no police reports related to A.J.'s case; facts in this section are from a defense motion.

Similarly, in the case of W.S., Kienlen responded to a report of a person in an alley and found W.S. lying against a fence between two homes. W.S. was nonresponsive, but Kienlen didn't approach him until a second officer arrived. At that point, Kienlen called for an ambulance and performed a sternum rub, and W.S. regained consciousness.

6. B.B.

Kienlen was dispatched to do a welfare check on B.B. after her receiving a report that she had taken pills and drank alcohol in an effort to take her life. Kienlen arrived at B.B.'s home and knocked, but no one answered. Kienlen called the reporting party, who said B.B. said she was lying in her mother's bed. Kienlen knew B.B.'s mother lived at the address until her recent death. Kienlen got B.B.'s phone number and called her. B.B. answered and told Kienlen she wanted to die and would be dead soon. She said she had taken pills and beer but wouldn't say what the pills were and would not open the door. Kienlen knocked on the door again. B.B.'s teen answered and said that his mother was in the bedroom and that he didn't know what Kienlen was going to be able to do. Kienlen came in the house, went into the bedroom, and saw B.B. on the bed. B.B. was unwilling to tell Kienlen what pill she had taken. B.B. told Kienlen to leave and started drinking a beer. Kienlen told her to stop but she didn't. B.B. stood up and said she was leaving. Kienlen said she wasn't free to go and that he was arresting her on a police officer's mental health hold. B.B. tried to push Kienlen out of her way and Kienlen tried to handcuff her. B.B. tried to break free and Kienlen used an arm bar takedown to put her on the bed. He continued to use force as he tried to arrest B.B., pulling and twisting her hair. Another officer came in as Kienlen finally handcuffed B.B. Once in the patrol car, B.B. spit at Kienlen. Kienlen told her she was now also under arrest for harassment. The other officer took B.B. to Mid-Columbia Medical Center, and subsequently prosecuted for Aggravated Harassment, a felony, against Kienlen. After she pleaded guilty, she was sentenced to probation and ordered to pay a $250 fine that would be dispersed to Kienlen.

7. T.Y.

T.Y. was a passenger in a van driven by a man who police knew to have a warrant. Officers stopped the van. Kienlen saw T.Y. and believed he was pretending to be asleep. Kienlen "was afraid that he may have a weapon." Kienlen knocked on the window and told T.Y. to show him his hands but T.Y. did not respond. Kienlen reported that this convinced him that T.Y. was pretending to be asleep, so Kienlen drew his firearm, pointed it at T.Y., and ordered him to show his hands. T.Y. opened his eyes and showed his hands. Kienlen had T.Y. get out of the van and another officer handcuffed him.

8. K.M.

Kienlen saw A.A. driving and knew she didn't have a valid license or current registration. When he stopped A.A.'s car, she told Kienlen that she knew her rights and didn't need to provide an identification. She and her passenger, K.M., told Kienlen they had called 911 and that they wanted another officer. The emergency dispatch report summary from the incident confirms this. A.A. also told Kienlen that he was stalking her, and that she had come to the location to buy a gun and she knew how to use it. A.A. eventually provided an identification and got out of the car as Kienlen ordered. Kienlen detained A.A.

Meanwhile, several other officers were trying to arrest K.M. Kienlen saw this and "ran to assist" them. He saw that "[K.M.] was on her back, and the officers were having a hard time getting control of her hands so that she could be rolled onto her stomach." Kienlen drew his Taser, "pressed against the side of her neck at the base of her jaw, and told her that if she did not stop resisting [he] was going to use the Taser." K.M. continued

to resist so Kienlen "pressed the button" and "held the Taser in place until it stopped delivering a shock."[33] Officers then handcuffed K.M.

B. Unreliable Investigation Tactics

In addition to using violence and intimidation to investigate cases, Kienlen also often appeared to draw conclusions about what had occurred prior to his arrival on scene and then tailor his interviews to coercively elicit statements that confirmed his premature conclusions. Often, he would not commence recording of the interview until the subject of the interview had conformed their statement to Kienlen's understanding of the case. This approach to investigations compromises their integrity and increases the risk of wrongful convictions.

1. R.B.

J.N. and R.B. were involved in a traffic collision with a car driven by D.O. J.N. told law enforcement she was the driver; D.O. told police she did not see who was driving the other car. A defense motion to suppress indicates that during questioning of J.N. and R.B., Kienlen told them that D.O. had seen R.B. driving, and that J.N. could go to jail for lying.[34] R.B. and J.N. subsequently stated R.B. had been driving.

2. E.S.

Sixteen-year-old E.S. was suspected of assaulting a classmate. Kienlen and a DPD sergeant interviewed E.S., who said he heard that the classmate was beaten up but that he wasn't there. Kienlen told E.S. there was video on the house near where the incident occurred. Kienlen went on to say that by being dishonest, this was the last thing E.S. would go on record saying; Kienlen asked if this was the last thing he wanted to go on record saying. Then Kienlen told E.S. that by not being honest, he looks like he was involved. Kienlen proceeded to tell E.S. that they (Kienlen and the sergeant) "would have to put him in jail for assault II and robbery I, which are [M]easure 11 crimes."[35] At that point, E.S. admitted to witnessing the incident: "alright I saw him, I walked into an alley and then I saw him, and then I seen all my friends go after him, and then I ran the other way." But for the sergeant's report, Kienlen's involvement in the interrogation would not have been apparent from the written case materials, as Kienlen makes no mention of it in his own report.

3. C.L.

N.L. was laying down on a bed when Kienlen came in the room and asked N.L. to tell him what happened. Kienlen came to the residence after receiving a report of a fight between a man and a woman; an anonymous caller said that the

33 Though Kienlen admits in his report to pressing the Taser against K.M.'s neck and deploying it, a different officer wrote in his report that Kienlen "used a drive stun on [K.M.'s] upper torso." It is unknown whether the inconsistency was intentional.

34 The motion to suppress appears to take facts from body worn camera footage, though it does not explicitly so state.

35 Coercive statements are prone to have a particularly profound effect on youth, who are often more vulnerable to pressure applied by investigators. *See, e.g.,* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform* (2014), https://web.williams.edu/Psychology/Faculty/Kassin/files/Kassin%20(2014)%20-%20PIBBS%20review.pdf.

woman was hitting the man in the face. N.L. told Kienlen that he and his wife, C.L., were having an argument but everything was fine. Kienlen asked N.L. what they were arguing about, and N.L. told Kienlen that it was the second anniversary of the day C.L.'s father had been murdered and she was having a hard time. He elaborated that she had been drinking and was upset but maintained that nothing other than arguing had occurred between them. Kienlen questioned N.L. about red marks on his neck and wrist. N.L. said he didn't know what had caused them. Kienlen told N.L. that someone had reported seeing C.L. hit him several times. According to Kienlen, N.L. "hung his head, and said that he did not want [C.L.] to go to jail, and he did not think that she meant to injure him. He now told me that she had scratched him with her fingernails, and bit him on his bicep." At this point, Kienlen began to record the interview.

C. Poor Recordkeeping

Complete and accurate documentation of a criminal investigation is important to the prosecutor who may eventually file charges, to the court that may review police-authored reports in making a probable cause determination for a search or arrest warrant, and for the accused. Our review of Kienlen's cases demonstrates a pattern of poor recordkeeping. In some cases, Kienlen's reports omitted important details about his role in cases in which he was involved. In others, Kienlen's narrative revealed that he elected to record only

part of an interview, often only after eliciting crucial information from witnesses. The following cases highlight these issues.

1. M.D.: Another officer's report states that Kienlen spoke to M.D. and took a photo of an injury she said was sustained during the incident for which she was charged, while Kienlen's report omits any mention of him having direct contact with her.
2. E.S.: Another officer's report makes clear that Kienlen was an active participant in the interrogation of E.S., while Kienlen's report omits his role.
3. R.B.: Kienlen's report failed to note the coercive tactics he used to elicit statements from R.B. and his companion.
4. C.S.: During an interview with the complaining witness, Kienlen elicited several details about the incident before he began to record the conversation.
5. C.L.: The complaining witness initially denied that anything physical occurred between him and C.L.; Kienlen only began recorded the interview once the complaining witness said that C.L. had scratched and bitten him. In cases such as this and C.S., above, it is impossible to know the nature and extent of the unrecorded portion of the interview. Kienlen is the only witness to the statements, and he is the source of the narrative regarding the interview.

IV. Recommendations

We must confront the larger questions raised by Kienlen's career. How was he able to operate in such a manner for so long without anyone taking action to curb harmful behavior toward people he encountered in his work? Did his approach to policing reflect only his own flawed conduct, or was it representative of the department in general? If Kienlen's behavior was not representative, why did other officers, including those above him in the chain of command, accept him acting out in ways that did not comport to the rules, goals, and standards of the department?

The so-called "bad apple" myth of policing seeks to excuse bad behavior by police by ascribing it to the actions of malign individuals within police departments. These "bad apples" are somehow to be understood as not really the responsibility of the wider department or of the prosecutors who rely on their work, oftentimes because they sought to conceal or obfuscate their wrongdoing, sometimes "getting away with it" for years. This framing of police misconduct tends to lessen or remove responsibility from the chain of command or from fellow officers who, it's posited, could not have been expected to know or take care of the problems caused by the "bad apple." This is not an excuse we should accept, no matter how regularly we hear it from departments who have hired and continued to employ badly behaved and harmful officers.

Police departments should have standards that protect the public and ensure that there is swift accountability for wrongdoing by officers that is proportionate to the harm done. There should be transparency about how departments are identifying and addressing misconduct and which officers are responsible for both the harm and the response to it. Without this approach, public trust in the police is undermined and community relations break down.

This is not to say, however, that we should assume that the ultimate goal is to maintain the basic aims and objectives of policing as they are today and at the scale of law enforcement that currently exists in our communities. The origins of policing in the US involve the protection of wealth and power to the detriment of the marginalized and powerless as a support structure of white supremacy. This lens of understanding policing allows us to see that while necessary and important changes can be made by police departments today to reduce harm and protect the public, there is a larger mission. We must be engaged in interrogating the reliance on law enforcement that we have collectively allowed to build up in our communities. When we reimagine our approach to combating harm, how do we construct solutions that do not rely on police as omnipresent enforcers of the law? Our recommendations should be understood in this light: these proposals will enhance public safety and strengthen accountability but should be part of a larger conversation about change.

Lessons we've learned from reviewing 197 Wasco County convictions and how Oregonians can do better. A starting point …

A. For Police

- Regularly review and modify use of force policies to ensure they are in line with the law and best practices. Use of force policies are meant "to prevent unnecessary force" and "ensure accountability and transparency" in law enforcement.[36] One event that may trigger policy review and modification is when a particular incident of bad behavior results in a finding that the behavior was nevertheless within policy.

    - Policies should include clear processes by which uses of force are reviewed and evaluated for policy compliance. The processes should include, at a minimum, the involved officer writing a use of force report and a supervisor reviewing that report and any relevant body camera video to determine whether the use of force violated policy.

36 *See* Campaign Zero, *Model Use of Force Policy*, https://campaignzero.org/wp-content/uploads/legacy/static/55ad38b1e4b0185f0285195f/t/5deffeb7e827c13873eaf07c/1576009400070/campaign+zero+model+use+of+force+policy.pdf (last visited Dec. 23, 2022).

- Policies should include a clear process to investigate alleged use of force violations and to determine the appropriate level of discipline. This includes fully investigating incidents in which force is used, and, when appropriate, holding officers accountable via demotions, removal from office, and reports to the Department of Public Safety Standards and Training.

- Policies should require that use of force reports should be included in case files and submitted to the district attorney's office when a case is being forwarded for prosecution. ORS 135.815 requires a prosecutor to disclose to the defense, among other things, "[t]he names and addresses of persons whom the district attorney intends to call as witnesses at any stage of the trial, together with their *relevant written or recorded statements* or memoranda of any oral statements of such persons." Emphasis added. Police reports, including use of force reports, are subject to this law. Prosecutors are obligated to disclose such statements regardless of whether they know the statements exist or whether they are in actual possession of them.[37]

- Regularly conduct trainings and audits to ensure use of force policy violations are being properly identified.

- Create and regularly review duty to intervene policies to ensure they are in line with the law and best practices. Consistently communicate with officers regarding their duties to intervene. Create processes to ensure those who intervene or report misconduct are shielded from retaliation. Duty to intervene policies are meant to address misconduct within a law enforcement office. They are necessary but will not be effective unless there is a clear mandate. Regularly conduct trainings and audits to ensure officers understand the duty to intervene and those policies are being enforced.

37 "In a prosecution, the prosecutor is responsible for evidence in the possession of the police." *State v. Warren*, 304 Or 428, 433 (1987).

- Create and regularly review suspect and witness interview policies, practices, and trainings to ensure they are in line with the law and best practices. Best practices should include but not be limited to begin recording before taking any statements; if the witness begins offering information before recording has begun, memorialize what they say in a report; separate parties before interviewing them; ask open-ended, non-leading questions; caution interviewees not to guess; and let the interviewee talk without interrupting or offering opinions. Regularly conduct trainings and audits to ensure interviews are being properly conducted.

- Create and regularly review policies for documenting community member complaints against sworn staff, reviewing and/or investigating those complaints, determining whether the allegations are founded or sustained, and taking appropriate disciplinary action, if necessary.

    - Policies should include a requirement that any officer who receives a complaint from a community member about a member of the law enforcement agency report that complaint to an appropriate entity (e.g., internal affairs or a supervisor).

    - Regularly conduct trainings and audits to ensure citizen complaint processes are being correctly applied.

- All policies should be written to encourage transparency and should be publicly available. Any policy that explicitly or implicitly discourages an officer from reporting errors, omissions, or misconduct throughout the investigation process must be eliminated.

- Develop a process to involve members of the public in policy reviews and modifications, including posting proposed modifications for public comments, review and respond to those comments, and hold public meetings for policies of significant public interest.

- Notify district attorneys' offices of every internal affairs or disciplinary investigation, along with its outcome, anticipated completion date, and changes in status.

B. For Prosecutors

- As soon as you become aware of misconduct by a law enforcement witness on whom you have relied or by attorneys working in your own office, contact an independent review team to help guide you through what steps should be taken to remedy the harms caused by the misconduct. If the investigation into the misconduct leads to additional information about other instances of misconduct, including in closed cases, seek to remedy those harms as well.

- Gather all relevant information to identify and evaluate potential *Brady* issues within your office.

    - Remember that disclosure is not dependent upon whether the prosecuting attorney is aware of the existence of the materials or information subject to disclosure; prosecutors have an affirmative obligation to discover and disclose information and material possessed by or known to law enforcement.

    - Audit every active officer's personnel record for disciplinary action based upon dishonesty; lack of candor; animus against a person or group of persons; excessive force; poor job performance; or other work issues. Even incidents that did not result in disciplinary action may be subject to disclosure.

- Adopt standards for evaluating dishonesty, bias, and lack of confidence that do not rely on the subjective belief of the officer or the individual prosecutor concerning potential excuses for deception.

    - Disclosure may be required even when the prosecuting attorney does not believe that misconduct occurred if a reasonable person could draw a different conclusion.

- Other potential impeachment information or material subject to disclosure may include: anything that tends to support the defendant's pretrial constitutional motions or tends to show that defendant's constitutional rights were violated; an officer's known animosity toward the defendant or toward a group of which the defendant is a member or with which the defendant is affiliated; an officer's personal relationship to the victim, defendant, or other witnesses, including other officers; and statements an officer made to a prosecuting attorney "in confidence" that relate to issues that may be used for impeachment, or that may lead to the discovery of such material.

- Disclose impeachment evidence in every case in which an officer *may* be a witness or their statements otherwise relied upon.

  - Remember that the inadmissibility of a given piece of evidence does not, by itself, eliminate the *Brady* obligation to disclose it.

  - Do not limit disclosure based upon an anticipated theory of defense or the privacy interests of the officer.

  - Where discoverable material triggers contravening interests against publication, seek judicial review and a protective order.

  - Adopt processes for disclosure of *Brady* information that is not already contained in a discoverable record, i.e., for memorializing and disclosing information learned orally.

  - Practice open-file discovery—"a concept of prosecutorial transparency wherein the prosecution provides the defense with everything in its file, irrespective of evidentiary materiality."[38]

- Regularly conduct trainings and audits to ensure *Brady* policies are being enforced.

38 *Philadelphia DAO Policies on: (1) Disclosure of Exculpatory, Impeachment, or Mitigating Information, (2) Open-File Discovery*, https://phillyda.org/wp-content/uploads/2021/11/DAO-Brady-Policy.pdf.

- Work with partnering law enforcement agencies and less-resourced prosecuting offices to ensure their policies are in line with the law and best practices. Communicate with department leaders to ensure they are conducting trainings and audits of policy updates.

- Do not rely solely on law enforcement offices to hold their officers accountable. Track patterns of bad behavior exhibited by law enforcement witnesses on whom you rely. If those patterns reveal that a person should not be permitted to investigate your cases and testify in support of your prosecution, report that information to their supervisor and consider placing the officer on a "do not call" list.

C. For Legislators and Other State Leaders

- Repeal Oregon's public records exemption to personnel records for law enforcement as it relates to disciplinary records, ORS 192.345(12), and expand public access to information regarding law enforcement disciplinary records.

- Implement open-file discovery in criminal cases. *See* e.g., N.Y. Crim. Proc. Law § 245.20.

- Action is needed to address the very limited avenues by which wrongful convictions may be remedied in Oregon. There is no explicit legal authority that allows for the dismissal of infirm convictions such as these without a lengthy and resource-inefficient post-conviction process. The affected individuals in this case review were only able to obtain appropriate relief because both the Wasco County District Attorney and the court were cooperative. Similarly situated defendants in other counties are not likely to be so fortunate, however unjust their convictions. OJRC's **FLP is focused on exploring potential solutions to the wide gap in remedies for the wrongly convicted. A report is forthcoming.**

Attachments

1. Kienlen Demotion Letter
2. Nisley, Wolf Bar Complaint
3. Nisley Bar Complaint
4. Carpenter Bar Letter
5. WCRP Bar Letter
6. Case Review List

CITY of THE DALLES
401 COURT STREET
THE DALLES, OR 97058
(541) 296-2613
POLICE DEPARTMENT
FAX (541) 298-2747

February 17, 2011

Sergeant Jeff Kienlen
The Dalles Police Department

Notice of Discipline

Sergeant Kienlen,

On February 16th, 2011, you met with Sergeant Baska and myself. The purpose of the meeting was to discuss an issue where you were in possession of a "Pen Gun" from the MINT office. You had previously received a written letter of reprimand dated December 3, 2010, for this incident. I had received additional information since that date that caused me to question your truthfulness in this incident.

Your recollection of this incident is very close to what you stated when you met with Captain Goodman on November 22, 2010. While you did bring up some new information during the discussion, I find no violations for truthfulness.

We also discussed a training you attended the week of February 7, 2011 in Eugene, Oregon. Prior to attending the training, you requested a separate hotel room because you didn't want to stay with Detective Macnab. I told you, "No." You then requested to take your city car because you wanted to see your cousin who lives in Eugene. I gave the okay for that. I have since

learned that you may not have stayed all nights in Eugene. You told Detective Macnab you were staying with a cousin near Salem.

During our discussion, I asked where you stayed. You said on Monday and Thursday at the Riverview Inn in Eugene. You refused to answer about Tuesday or Wednesday. After further discussion, you finally admitted spending these nights at the Comfort Suites in Salem with Leslie Wolfe. You further admitted your cousin lives in Hubbard and you don't have one in Eugene.

The Dalles Police Department Policy and Procedure
W1.100.040 Truthfulness

The integrity of police service is based on truthfulness. No member shall knowingly or willfully depart from the truth in giving testimony, or in rendering a report, or in giving any statement about any action taken that relates to his/her own or any other member's employment or position. Members will not make any false statement to justify a criminal or traffic charge, or seek to unlawfully influence the outcome of any investigation.

These requirements apply to any report concerning department business, including, but not limited to, written reports, transmissions to the emergency communications center and members via radio, telephone, pager, or e-mail.

Members are obligated under this directive to respond fully and truthfully to questions about any action taken that relates to the member's employment or position regardless of whether such information is requested during a formal investigation or during the daily course of business.

Your statement to me regarding your cousin in Eugene was false. You also told Detective Macnab you were staying with a cousin near Salem, which was false.

I find that you have violated policy W.1.100.040 – Truthfulness. The integrity of police service is based on truthfulness. If you are not truthful, you have no integrity. Without integrity you can't be a good police officer. You are a Sergeant, yet tell your officers falsehoods. Because of things like this, you can't wonder why you have lost respect of the officers. 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.

On December 3, 2010, you received a written letter of reprimand for a rule violation concerning the aforementioned Pen Gun. The final sentence states "any further violations of Policy and Procedures may result in further discipline up to and including termination.

This type of behavior is unacceptable, especially from a supervisor.

You are demoted from Sergeant to Police Officer. Your assignment is swing shift starting February 20, 2011. Until further notice your shift will follow the days off and shift on the current schedule of Sgt. Nelson.

Any further violations of Policy and Procedures may result in further discipline up to and including termination.

Sincerely,

Jay B. Waterbury
Chief of Police

cc: Nolan Young, City Manager

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

April 13, 2021

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 9th 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 9th 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 (9th 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 us 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[1]. 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.[2] 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.

[1] 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.

[2] 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

Jennifer Mount

From: cao@osbar.org
Sent: Sunday, April 04, 2021 7:29 PM
To: sallyc@co.wasco.or.us
Cc: OSB Client Assistance Office
Subject: CAO Attorney Complaint
Attachments: OPB article.pdf

Oregon State Bar

4/4/2021 7:28:42 PM To: Sarah E. Carpenter

Following is a record of your complaint filed with the Oregon State Bar.
Please retain this for your records.

Name and Address of COMPLAINANT

Ms Sarah E. Carpenter
511 Washington Street, Suite 304
The Dalles, OR 97058
Primary Phone: 5415062680
Secondary Phone:
Email: sallyc@co.wasco.or.us

Name and Address of ATTORNEY

Mr Eric J. Nisley
129 SW E St Ste 102
Madras, OR 97741
Primary Phone: 541 475-4452 x4103
Secondary Phone:

COMPLAINT

4-4-21 Oregon Public Broadcasting published a story on its website on 1-21-21 about a letter discovered in the desk of former Wasco County District Attorney Eric J. Nisley, OSB 951049. A copy of that story is attached to this message. Based on the matter outlined in the attached story, attorney Eric Nisley either has neglected a legal matter, in violation of RPC 1.3, has engaged in conduct that is prejudicial to the administration of justice, in violation of RPC 8.4, or has engaged in conduct that involves dishonesty that reflects adversely upon his

fitness to practice law, in violation of RPC 8.4. Sincerely, Sarah E. Carpenter
OSB 00227

ATTACHMENTS

OPB article.pdf

Matthew Ellis, District Attorney
Kara Davis, Chief Deputy District Attorney
Sarah E. Carpenter, Senior Deputy District Attorney
Michelle Thomas, 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

July 23, 2021

Linn Davis
Assistant General Counsel and CAO Attorney
Oregon State Bar
PO Box 231935
Tigard, OR 97281-1935
Sent via email: cao@osbar.org

Re: LDD 2100422— Eric J. Nisley, OSB 951049

Dear Mr. Davis,

I am writing to you pursuant to my obligation under RPC 8.3. My original complaint to your office on April 4, 2021, omitted a significant Rule of Professional Conduct that applies to this matter: RPC 3.8(b).

In his response to your office dated June 30, 2021, Mr. Nisley failed to address the core ethical and professional problems with his conduct. He instead distracted his audience with his interpretation of *Brady v. Maryland*, which, while an important case, nevertheless presents a separate standard for a prosecutor's obligations from the standard set by RPC 3.8(b). For example, in *Lane v. Marion County DA's Office,* 310 Or App 296, 305 (2021), the court noted:

> A district attorney's "power is not wholly ministerial, but instead requires the exercise of discretion in 'how and who[m] to prosecute or sue in the name of the state.' " *State v. Goacher,* 303 Ore. App. 783, 786, 466 P3d 1047 (2020) (quoting *Watts v. Gerking et al.*, 111 Ore. 641, 657, 228 P 135 (1924)). In making such determinations, it is "as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged." *State v. Osborne*, 54 Ore. 289, 296, 103 P 62 (1909).
>
> Concomitant with their duty to see that a person on trial is not deprived of any constitutional or statutory rights, prosecutors have myriad disclosure obligations which are imposed not only by the United States Constitution under *Brady* and its progeny, but also imposed by, *inter alia*, statute, *e.g.*, ORS 135.815(1) (requiring the district attorney disclose to "a represented defendant" any "material or information within the possession or control of the district attorney" that tends to "[e]xculpate the defendant," "[n]egate or mitigate the defendant's guilt or punishment," or "[i]mpeach a person the district attorney intends to call as a witness at the trial"), and applicable Rules of Professional Conduct

(RPC), *e.g.*, RPC 3.8 (the "prosecutor in a criminal case shall * * * make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

When Mr. Nisley buried Jeff Kienlen's demotion letter – a letter in which the police chief told Kienlen, "Because of things like this, you can't wonder why you have lost respect of the officers" – Mr. Nisley buried reputation evidence of Kienlen's character for untruthfulness. This evidence not only could negate the guilt of many suspects whom Kienlen investigated but could also mitigate many offenses which Kienlen investigated.

Mr. Nisley kept this information from me, his deputy. Mr. Nisley kept this information from our colleagues in the defense community. Mr. Nisley kept this information from our judges. The consequences to our community are incalculable.

Sincerely,

Sarah E. Carpenter, OSB 002277

Oregon Innocence Project

August 27, 2021

Via email

Linn Davis
Assistant General Counsel and CAO Manager
Oregon State Bar
PO Box 231935
Tigard, OR 97281
ldavis@osbar.org

Re: LDD 2100422 Eric J. Nisley, Leslie Wolf

Dear Mr. Davis,

Oregon Innocence Project (OIP)[1] writes in relation to District Attorney Matt Ellis and Chief Deputy District Attorney Kara Davis' complaint that Eric J. Nisley and Leslie Wolf committed Oregon Rules of Professional Conduct violations by failing to disclose to defense attorneys and/or defendants exculpatory evidence related to former City of the Dalles Police officer Jeffrey Kienlen.

In this letter, OIP explains (I) the importance of this issue to practitioners in the criminal system and wrongful conviction work and (II) the Constitutional, statutory, and ethical violations at issue, the flaws in Mr. Nisley and Ms. Wolf's analyses presented to the bar, and that the facts, as we understand them, form a well-founded complaint.

I. *Brady* violations left unchecked lead to wrongful convictions.

Mr. Ellis' and Ms. Davis' complaint asserts that Mr. Nisley and Ms. Wolf violated the Oregon Rules of Professional Conduct in a number of ways. Relevant to this response, the complaint asserts that Mr. Nisley and Ms. Wolf: (1) failed to disclose information that was required to be disclosed under ORPC 3.3 and 3.8; (2) failed to comply with the discovery requirements of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) failed to disclose information that was required to be disclosed under ORS 135.815.

"*Brady* was decided at a time when pre-trial discovery in criminal cases in the United States was in its infancy. It quickly became—and has remained—the central point of reference for discussions of the government's duty to disclose exculpatory information to criminal defendants. Failure to do so is routinely described as a "Brady violation" and the information at stake is often

[1] OIP is a program of the Oregon Justice Resource Center (OJRC). The OJRC's mission is centered on the principle that fairness, accountability, and evidence-based practices should always be the foundation of our criminal legal system. OIP works to exonerate the wrongfully convicted, train law students, and promote legal reforms aimed at preventing wrongful convictions. In 2020, OIP established a Wrongful Conviction Program that is available to review cases that involve systemic failings in the criminal legal system. At the request of the Wasco County District Attorney's Office, OIP's Wrongful Conviction Review Program has agreed to undertake an independent review of Jeffrey Kienlen's cases.

described as 'Brady material.'" Samuel R. Gross, et al., Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement (2020), at 76, https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

Brady violations are pervasive and one of the widely documented causes of wrongful convictions. OIP's experience and the experience of innocence programs around the world has taught that exculpatory evidence withheld by the prosecution has caused far too many wrongful convictions. On September 1, 2020, the National Registry of Exonerations reported that 45 percent of exonerations involved law enforcement officials concealing exculpatory evidence. *Id.* at 2. "Prosecutors were responsible for most of the concealing[.]" *Id.* at iv.

> In 30% of exonerations, law enforcement officials concealed substantive evidence that would have supported the defendants' claims of innocence (709/2,400). The hidden evidence included alibi evidence for the defendant, evidence about alternative suspects (some of whom were later proven to be the real criminals), forensic evidence that showed that the defendant was not the source of semen or blood or fingerprints left at the scene of the crime, and so forth. *Id.* at 32.
>
> In an overlapping third of the cases, police and prosecutors concealed evidence that would have undercut witnesses who testified to the defendants' guilt (805/2,400). They hid statements in which prosecution witnesses said the opposite of what they testified to in court, attempts by those witnesses to retract their accusations or testify that the defendants were innocent, known histories of deception and crime by prosecution witnesses, money or favors received by the witnesses or deals that saved them years in prison in return for nailing the defendants, and so on.

Id. It is also important for the Bar to be particularly sensitive to claims that a prosecutor violated discovery obligations because "[p]rosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory[.] [W]hile they are required to provide exculpatory evidence to the defense . . . it is very difficult for the defense to find out whether the prosecution is complying with this obligation." Hon. Alex Kozinski, *Preface, Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc, at xxii (2015). Because these violations are difficult to detect and court remedies are limited and hard to obtain, the professional organizations that review claims of prosecutorial violation of their ethical duties have a high responsibility.

Roughly 90 to 97 percent of cases are resolved via plea negotiation. Vera Institute of Justice, In the Shadows: A Review of the Research on Plea Bargaining (2020), at 1, https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining-fact-sheet.pdf. In these cases, prosecutors wield extreme power over defendants with virtually no oversight. *Brady* violations thrive under these conditions, and when the defense is not given the opportunity "to subject the prosecution's case to meaningful adversarial testing," it renders "the adversary process itself

presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659 (1984). To leave *Brady* violations unchecked is to abdicate the Bar's duty to regulate attorneys and ensure public trust in the legal profession.

II. The *Brady* rule required disclosure of the material that Mr. Nisley and Ms. Wolf withheld.

As we understand the complaint and Mr. Nisley and Ms. Wolf's responses, the fact that material was withheld from defendants and the court is not in dispute. Rather, Mr. Nisley argues that Kienlen's Notice of Discipline is not *Brady* material because it is not independently admissible and could not be used for impeachment purposes. Mr. Nisley claims "[i]t was not evidence at all." Nisley Response at 11. Mr. Nisley is wrong in both his analysis and conclusions.

A. The Ninth Circuit has emphatically stated that disciplinary reports are *Brady* material "of the most egregious kind."

In *Milke v. Ryan*, 711 F.3d 998 at 1007 (9th Cir. 2013), the prosecution suppressed evidence of an officer's "five-day suspension for accepting sexual favors from a female motorist and then lying about it." A report, written by a supervisor and signed by the city manager and chief of police, stated: "[Y]our image of honesty, competency, and overall reliability must be questioned." *Id.* at 1012. In evaluating the report, the court wrote that "[t]he facts of [the officer's] misconduct, his lies to the investigators and this assessment by his supervisor would certainly have been useful to a jury trying to decide" whether the officer was telling the truth. *Id.* "Not only does the report show that [the officer] has no compunction about lying during the course of his official duties, it discloses a misogynistic attitude toward female civilians and a willingness to abuse his authority to get what he wants." *Id.* The fact that the officer "was disciplined for lying on the job obviously bears on his credibility and qualifies as Giglio evidence." *Id.* The court therefore concluded that "[t]he report *unquestionably* constituted Brady and Giglio evidence of the *most egregious kind*," and "[t]he prosecution had an 'inescapable' **constitutional** obligation under *Brady* and *Giglio* to produce the evidence." *Id.* at 1007 (emphasis added) (quoting *Kyles v. Whitley*, 514 U.S. 419 (1995)); *see also United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984) ("We have long held that the government has a *Brady* obligation "to produce any favorable evidence in the personnel records" of an officer."); *United States v. Kiszewski*, 877 F.2d 210 (2d Cir. 1989) (personnel files subject to *in camera* inspection for *Brady* materials).

Like in *Milke*, not only did Kienlen lie to his Chief, but the Chief also made the following statement:

> The integrity of police service is based on truthfulness. If you are not truthful, you have no integrity. Without integrity you can't be a good police officer. You are a Sergeant, yet tell your officers falsehoods. Because of things like this, you can't wonder why you have lost respect of the officers. 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.

Notice of Discipline at 3. Moreover, Kienlen was demoted, not just disciplined.

Contrary to Mr. Nisley's position, this Notice is not limited to issues of a personal nature. Kienlen was disciplined for actions directly tied to his use of an official vehicle on an official trip, and his willingness to lie to his colleagues and to withhold information from his supervisor during an official investigation. These actions, and this letter, speak to the core police obligation of truthfulness. The demotion of an officer who is found by his supervisor to be untruthful in the law enforcement community, and who is sworn to uphold the law and who takes the witness stand with the assumed credibility that his position confers, is highly relevant to determinations of reliability. By violating the "inescapable" Constitutional obligation to disclose the Notice of Discipline, Mr. Nisley and Ms. Wolf deliberately distorted the fact-finding processes in a host of cases.

B. Mr. Nisley deliberately distorted the fact-finding process by withholding the Notice of Discipline from the court.

The facts as described by the complaint reveal that Mr. Nisley did not just withhold the Notice of Discipline from the defense; he also withheld it from the court. The Ninth Circuit has "spelled out the proper procedure to follow where the government is confronted with a *Brady* question: … If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an *in camera* inspection and evaluation." *United States v. Cadet*, 727 F.2d 1453, 1467-86 (9th Cir. 1984) (citation omitted). While Mr. Nisley chose to use this process in at least one criminal case, he did not submit the Notice of Discipline for *in camera* review. Like in *Milke*, Mr. Nisley "forc[ed] the state judge to make her finding based on an unconstitutionally incomplete record" and "rendered the fact-finding process employed by the state court . . . defective." *Milke* at 1007. In doing so, Mr. Nisley violated both the procedures set up under *Brady* and his duty of candor to the tribunal under the ORPCs.

C. Information in the Notice of Discipline is admissible for impeachment and would have led directly to the discovery of admissible evidence.

Mr. Nisley argues that the Notice of Discipline is not independently admissible or admissible for impeachment and is therefore not material for *Brady* purposes. That argument fails to address the fact that evidence is material for *Brady* purposes in three ways: if (1) it is admissible, (2) it can be used to impeach a witness (even if not itself independently admissible), or (3) it could lead to the discovery of admissible evidence. *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989).

First, Mr. Nisley conducts an improperly narrow legal analysis of the Notice of Discipline's admissibility. Mr. Nisley argues that it is not admissible under OEC 608(2). He fails, however, to address admissibility under OEC 608(1) (or any other provision of the Oregon Evidence Code). Indeed, he ignores the fact that it would have led directly to the discovery of admissible evidence altogether. For example, Mr. Nisley's citation to *Wood v. Bartholomew* is incomplete. In that case, while the Supreme Court concluded that polygraph results were not admissible under state law, it also discussed an alternative theory for materiality:

> [T]he Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led respondent's counsel to

> conduct additional discovery that might have led to some additional evidence that could have been utilized. *See* 34 F. 3d, at 875. Other than expressing a belief that in a deposition Rodney might have confessed to his involvement in the initial stages of the crime--a confession that itself would have been in no way inconsistent with respondent's guilt--the Court of Appeals did not specify what particular evidence it had in mind. Its judgment is based on mere speculation, in violation of the standards we have established.

Wood v. Bartholomew, 516 U.S. 1, 6 (1995). In other words, while the Court rejected the Ninth Circuit's conclusion as highly speculative, the Court did not reject its position that inadmissible evidence can be material under *Brady* if it leads to the discovery of admissible evidence. Here, the discovery of additional evidence based on the Notice of Discipline is concrete, not speculative; at a minimum, the defense could have used the Notice to call the Chief of Police for his opinion on Kienlen's reputation for untruthfulness under OEC 608(1).

Similarly, Mr. Nisley relies on the Oregon Court of Appeals' analysis of prior false statement evidence under 608(2) in *State v. Deloretto*, 221 Or App 309 (2008). In *Deloretto*, the court determined that the prosecution was not required to produce evidence related to a false prior allegation of rape by the victim in a sex abuse case. The court found that this evidence was not admissible under the *LeClair* exception to OEC 608(2) and that the trial court did not "abuse its discretion in rejecting defendant's argument that examining three character witnesses would, to a reasonable probability, have changed the outcome of the trial[.]" *Id.* at 326.

This conclusion does not support Mr. Nisley's position. First, the court did *not* hold that the character evidence at issue was inadmissible under 608(1). To the contrary, the court concluded that "the defense could have used the evidence in calculating whether to adduce evidence from other witnesses as to [the victim's] general reputation for truthfulness." *Id.* The court found, however, that in this particular circumstance—where the witnesses were three former high school classmates who would have testified that they believed the victim was not a truthful person, but could not testify to any particular instance of dishonesty— the trial court did not *abuse its discretion* in determining that defendant failed to create a reasonable possibility that the *result* of the trial would have been different. *Id.* Here, not only did Mr. Nisley deprive the courts of the opportunity to exercise discretion in the first place, but the effect of that testimony would have been significantly more impactful. Here, the Chief of Police would opine that his own employee—a police officer, sworn to uphold the law and testifying with the assumed credibility that the position confers—had a reputation for dishonesty. It is not speculative to conclude that such testimony would have impacted the outcome of the case.

Mr. Nisley's citation to *Fuller v. Dept. of Public Safety Standards*, 299 Or App 403 (2019), does not change the calculus. *Fuller* discussed OEC 608(2). It did not consider admissibility under OEC 608(1) or any other rule of evidence. Instead, the court stated only that, under state evidence law, OEC 608(2) typically limits the admission of specific instances of misconduct and that, in this specific case, DPSST provided no alternative explanation (for example, OEC 608(1)) for its speculative position regarding an officer's testimony in future prosecutions. *Id.* at 415. Moreover, *Fuller* was not

a criminal case in which the court was asked to review the prosecution's decision to withhold evidence from both the defense and a court equipped to decide materiality.

Information in the Notice of Discipline would be admissible for impeachment purposes and would have led directly to the discovery of admissible evidence. Under OEC 608(1), the Notice of Discipline clearly provides a basis for questioning. As noted above, the defense could have called Chief Waterbury, the author of the Notice, to testify about Kienlen's character for untruthfulness. Given Waterbury's position as Chief of Police, his testimony would have a significant impact on Kienlen's credibility.

Second, Kienlen could have been questioned about the fact of his demotion. This inquiry is unquestionably within the scope of cross-examination. As Ms. Wolf states "nothing would prohibit a defense lawyer from asking 'why did you get demoted.' A trial court would then have to decide the possible relevance of the demotion to a substantive issue properly provable in the case." Wolf Response at 7 n.9. No competent attorney would ask the question without knowing the answer.

Third, like in *Milke*, the letter of discipline would have buttressed any claims of access to Kienlen's personnel file, "where more impeachment evidence could be expected to reside." *Milke*, 711 F.3d 998 at 1008.

Finally, Kienlen could have been questioned about bias related to his relationship with Ms. Wolf. Evidence of bias is always admissible. *State v. Hubbard*, 297 Or. 789 (1984); *Davis v. Alaska*, 415 U.S. 308 (1974) (state rule of procedure yielded to the "vital [] constitutional right [of] effective cross-examination for bias of an adverse witness."). While Kienlen and Ms. Wolf deny that the relationship was sexual in nature, that denial alone is not dispositive. The fact that Kienlen risked his job by lying about driving to another town, over an hour away from his conference, in order to spend the night alone in Ms. Wolf's hotel room is evidence of a close personal relationship sufficient to show bias. Indeed, as the complaint noted, Judge Kelly ruled that information regarding the nature of Ms. Wolf and Officer Kienlen's friendship relationship was, in fact, admissible as impeachment evidence for bias.

The importance of the Notice of Discipline to a Constitutional fact-finding process is highlighted by the language Police Chief Waterbury used in the Notice: "The integrity of police service is based on truthfulness. If you are not truthful, you have no integrity. Without integrity you can't be a good police officer."

D. The Bar's consideration under the ORPCs is broader than a court's under *Brady*.

While OIP has explained why the prosecutors' actions addressed in the pending complaints violated defendants' Constitutional rights under *Brady*, the issue before the Bar does not require a determination that the result in any particular case was likely affected by the non-disclosures. The Notice of Discipline sat in the elected District Attorney's desk drawer for a decade. As we understand the facts, neither Mr. Nisley nor Ms. Wolf disclosed the information in any of the hundreds of cases in which Kienlan was involved.

As the Supreme Court stated in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the ABA Standards for Criminal Justice and the Model Rules of Professional Conduct require more of the prosecution than *Brady*. Indeed, ORPC 3.8 imposes special obligations on prosecutors by specifically addressing their disclosure obligations. This is consistent with the statements by the nation's highest court dating back at least to 1935—that prosecutors have a responsibility to do justice that imposes obligations on them that no other attorneys have. *See Strickler v. Greene*, 527 U.S. 263, 271 (1999) (citing *Berger v. United States*, 295 U.S. 78,88 (1935)).

The complaints against Mr. Nisley and Ms. Wolf raise substantial issues involving hundreds of cases. Failure to address prosecutors' violations of their discovery obligations under the Constitution, state statute, and ORPCs would undermine both the integrity of the proceedings at issue and public confidence in the criminal legal system.

Sincerely,

Steven T. Wax
Legal Director

Brittney Plesser
Senior Staff Attorney

Claire Powers
WCRP Staff Attorney

LAST NAME	CASE NUMBER
Abrams	19CR48129
Adams	1200010DG
Adams	19CR71502
Adams	20CR29061
Adams	19CR25051
Adkison	18CR57831
Aichele-Hoag	20CR11253
Aleck	1400153CR
Aljaouni	100071CR
Alvarez	0600092CR
Bailey	1200103M
Barker	20CR13026
Bartsma	19CR35266
Bartsma	18CR39400
Bartsma	18CR44175
Bartsma	18CR48808
Bartsma	19CR58241
Beeks	16CR36741
Benson	19CN00420
Berezin	18CR36126
Berish	1100040M
Berkovich	18CR55923
Berry	1400047CR
Betancourt	20CR20305
Black	1400221CR
Bosse	18CR12561
Breaux	17CR71226
Brennan	17CR17357
Bromley	15CR52035
Buckles	1300044M
Burris	20CR36908
Campbell	16CR31528
Carrell	1500216CR
Castillo Daniell	20CR21446
Cavagnaro	18CR82358
Cervantes Castro	18CR41764
Cervantes Castro	19CN03991
Ching	1300012M
Chinn	15CR41524
Christophersen	1200052CR
Clingings	1100186M
Cobos	1300291CR
Coggins	16CR76806
Cole	19CR17499
Collins	16CR59878
Collins	1100246CR
Collins	1200321CR

LAST NAME	CASE NUMBER
Colvin	20CR13124
Comini	1100366M
Cortez	1300022M
Cruz	1200354M
Cunningham	17CR73407
Curry	1200069CR
Cushman	20CR20305
Daniel	1300185CR
Davidson	18CN01931
Davidson	19CR59970
Davis	15CR43346
Dean	1500094CR
Dehart-Santiago	21CR03361
Diaz Casteneda	17CR63576
Dillon	1400138CR
Dombarusky	21CR00731
Drake	1400196CR
Duenas	CR120241
Duncan	18CR82356
Dunsmore	19CR36704
Eddy	1200078M
Ellis	18CR59818
Ellis	1400091M
Finch	20CR34647
Flock	18CR82070
Flowers	1500003CR
Floyd	20CR15466
Forrest	1300329CR
Forsman	1500278CR
Fowler	1400261M
Freeman	20CR25819
Frizzell	1100262M
Funderburgh	18CR14114
Fus	18CR63261
Garcia	1300235M
Gladish	1500010CR
Glenn	16CR33248
Glenn	17CR81682
Golysheyskiy	1200278CR
Goodman	20CR10157
Graves	19CR31874
Graves	17CR22407
Green	20CR20300
Hamilton	19CR75932
Hamilton	20CR20750
Hanna	19CR48135
Harris	1100171M
Heemsah	20CR21537

LAST NAME	CASE NUMBER
Heemsah	20CR31710
Heka	18CR07773
Hendon	1100191CR
Henry	1200070CR
Henson	1300284CR
Hester	18CR44989
Hester	19CR07884
Horrell	1100046CR
I'aulualo	1000155CR
Igo	18CR54789
Ike	1500165CR
Jackson	1300193M
Johnson	20CR06644
Jones	1400446CR
Jorgensen	1100189CR
Jorgensen-Walters	1400355CR
Kalista	18CN00480
Kalista	19CR51926
Kemp	1100073M
Kifer	120036CR
Kimball	20CR42063
Kimball	20CR51376
Kimball	20CR44039
Kinder	19CR55279
Klaviter	1300336CR
Kokhanevych	1200279CR
Lane	1400231M
Lane	1300232M
Lauritsen	17CR73391
Leon	15CR49687
Lewis	19CR61598
Lewis	19CR75036
Lewis	1200032CR
Little	17CN00707
Lopez	20CR55407
Lopez	20CR06043
Lowe	19CR69600
Lynn	19CR48127
Lynn	19CR34640
Maldonado	18CR63255
Martens	1400147M
Martens	16CR50786
Martinez	20CR16891
Matney	1300288M
Matney	18CR82617
Matney	19CR65362
Matney	19CR12441
Matney	19CR45681

LAST NAME	CASE NUMBER
Mayfield	16CR67047
McCall	18CR19149
McCormack	20CR56036
McCroskey	18CR57865
McDaniel	19CR66987
McKinney	1500279CR
McNally	16CR63583
Miles	1200301CR
Miller	20VI135694
Miller	18CR19155
Miller	20CR26893
Moreno Aviles	20CR15412
Mosqueda	1300241M
Mulvaney	19VI132416
Mulvaney	19CR56426
Munoz-Pedraza	15CR45470
Munoz-Pedraza	1300266CR
Neet	15CR44655
Newton	1000157CR
Nichols	19CR50130
Niedzienski	20CR66167
Nyberg	15CR58598
Ochoa	19CR02118
Ohms	16CR25759
Olivia	1200320CR
Pantano	16EX00223
Park	20CR48648
Parks	1200172CR
Parnell	18CR14126
Parsons	1200006DG
Parsons	1100157CR
Perales	19CR02128
Perez Hammond	1200061CR
Poole	17CN04175
Porter	1400441CR
Porter	18CR51327
Pugh	19CR48946
Raygoza	1300192M
Ross	16CR55848
Ross	1200300CR
Rowan	1300320CR
Sampson	18CR02435
Sampson	12001117M
Sarabia	18CR19124
Saunders	18CR64132
Scherer	19VI132410
Scott	1200270CR
Sexton	1200216CR

LAST NAME	CASE NUMBER
Sexton	1300156CR
Shebley	1500260CR
Shockey	19CR66414
Shockey	1400385CR
Shockey	1400257CR
Shockey	1500162CR
Shockey	1500177CR
Smith	15CR45678
Smith	18CR23505
Smith	1300031CR
Smith	19CR15316
Smith	21CR30647
Smith	19CR15316
Solberg	20JU02921
Soto Sandoval	19CR43752
Spino	1300110M
Sprague	17CR28291
Spratt	19CR29944
Steers	1200094M
Steers	1200115M
Steers	1200069M
Steynen	20CR48356
Strasburg	18CR82039
Symonchuk	1500163CR
Tappendorf	1300358M
Taylor	19CR22537
Taylor	19CR66711
Thomas	1300140M
Ticknor	20CR20499
Trent	18CR02359
Tui	1000156CR
Uiliata	1200305CR
Urieta	19CR76199
Vanalstyne	1200161M
Wallace	1300068CR
Wampler	1200046M
Weir	1200160M
West	1200030CR
West	1400298CR
Wickerham	1500249CR
Wickerham	1400122CR
Wickerham	1100170CR
Widner	19CR27865
Wilcox	1500137CR
Wilde	16CR55190
Wilkerson	15CR46500
Williams	19CR66132
Wilson	1300124CR

LAST NAME	CASE NUMBER
Withrow-Bullock	20VI135692
Wood	20CR62269
Woolsey	16CN02867
Worley	19CR25059
Yates	18CR54309
York	1500164CR
Zaragoza	18CR19142
Zaragoza-Medina	1200325M
Zavala Soria	19CR52358