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Linn D. Davis
Oregon State Bar
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Re: LDD 2100422 Eric J. Nisley, Leslie Wolf (Brian Aaron, Sarah Carpenter, Matthew Ellis)

Dear Mr. Davis:

I am writing in response to your email of April 13, 2021 in which you requested Mr. Nisley's account of the matters alleged by Brian D. Aaron, Sarah E. Carpenter, Matthew Ellis and Kara K. Davis.

Introduction

The complainants assert that Mr. Nisley committed ethical violations because he failed to disclose to defense lawyers what they claim to be "unequivocally discoverable *Brady* material" (Aaron letter, p. 3), "clearly impeachable evidence," (*Id.*), and "unambiguously *Brady* material." (Ellis letter, p. 4.). However, these overstated assertions are far wrong – the

undisclosed information is not *Brady* material at all, and Mr. Nisley's carefully considered decision not to disclose it was completely appropriate.

The complaints assert 2 separate *Brady* violations: (1) Wasco County District Attorney Nisley failed to disclose to defense lawyers that there was "a romantic intimate relationship" between his Chief Deputy, Leslie Wolf, and City of The Dalles Police Officer Jeff Kienlen. (Aaron, p. 3; also see Ellis p. 1); and, (2) Nisley failed to disclose to defense lawyers a specific document, entitled Notice of Discipline, which City of The Dalles Police Chief Waterbury sent to Kienlen which demoted him for making false statements to fellow officers relating to whether or not he stayed in the same motel room with Ms. Wolf during a conference.

However, the Kienlen material, which is neither admissible evidence nor appropriate impeachment, does not meet the *Brady* test of "evidence [that] is material either to guilt or to punishment." *Brady v. Maryland*, 373 US 83, 87 (1963). Therefore, Mr. Nisley's decisions not to disclose the Kienlen information was correct, and the Bar Complaints should be dismissed.

***Brady v. Maryland* and the other cases cited by the Complainants do not support their claims.**

The central ruling of *Brady v. Maryland*, 373 US 83 (1963), is: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Thus, for *Brady* to be invoked, there must be prosecutorial suppression of admissible material evidence that is favorable to the defendant. The Kienlen information at issue here is not admissible material evidence and is nothing like the *Brady* information involved in the cases cited by complainants.

The complainants correctly state that impeachment information can be favorable material evidence under *Brady*. However, the Kienlen material here, which involves minor misrepresentations to other officers about personal matters, is not appropriate impeachment under well settled Oregon evidence law.

An understanding of the facts of *Brady* and of the other cases cited by complainants is essential for the Bar to determine whether *Brady* applies here. First, in *Brady* itself, Brady and Boblit were charged with capital murder. At trial, Brady admitted to being involved in the murder, but sought to avoid the death penalty by claiming that Boblit did the actual killing. After Brady was convicted and sentenced to death, Brady's counsel learned that the prosecutor had only provided the defense with some of Boblit's statements to the police, and that the prosecutor had specifically withheld Boblit's confession to the killing. 373 US at 84. Boblit's prior inconsistent statements and confession to the killing were clearly favorable, admissible, material evidence. They would have been a central focus of Brady's murder trial.

In *Horton v. Mayle*, 408 F3d 570 (9th Cir 2005) cited at p. 4 of the April 13, 2021 Ellis/Davis letter to the Bar, Donald McLaurin was "the prosecution's principal witness" against Horton in a murder and robbery case. 408 F3d at 574. Horton alleged, and the Ninth Circuit accepted, that the prosecution failed to disclose "a deal between the police and McLaurin, under which McLaurin agreed to testify as the prosecution's star witness in exchange for immunity for anything he did on the weekend of the murder." 408 F3d at 578. *Horton* held:

> 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 US 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 US 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 US 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.

408 F3d at 578–79 (emphasis added). Thus in *Horton*, the rule of *Brady v. Maryland* was violated when the prosecution failed to provide a plea agreement between the prosecution and its star witness. This sweetheart plea deal was admissible material impeachment evidence and would have been a central focus of Horton's trial.

At page 4 of their letter to the Bar, Ellis and Davis miscite *Cash v. Maxwell*, 132 S Ct 611 (2012) as supporting their overbroad assertion that "the United States Supreme Court has ruled that evidence that a witness is a liar is sufficient to overturn an otherwise lawful verdict." 4 Ellis/Davis letter. But the United States Supreme Court has never made such a broad ruling, and the facts in *Cash* were far different than they are in this matter. In *Cash*, the key prosecution witness, Sidney Storch, did not merely tell an unrelated lie about where he spent the night while at a training conference. Instead, as Justice Sotomayor explains:

> Sidney Storch was one of the most notorious jailhouse informants in the history of Los Angeles County. During a 4-year period in the mid-1980's, he testified in at least a half-dozen trials, each time claiming that the defendant had confessed to him in prison. *See Rohrlich & Stewart, Jailhouse Snitches: Trading Lies for Freedom*, L.A. Times, Apr. 16, 1989, p. 30 ("Said inmate Daniel Roach: 'It seems that half the world just confesses to Sidney Storch"').

> Throughout this period, however, evidence mounted that Storch repeatedly was fabricating inmates' confessions for personal gain. As even the State acknowledges, Storch's signature method was to fashion inmates' supposed confessions from publicly available information in newspaper articles. 2 Record 262.

132 S Ct at 611 (Statement of Justice Sotomayor respecting the denial of certiorari.)

Also, there is no opinion for the Court in *Cash v. Maxwell, supra.* Instead, there is only the "Statement of Justice Sotomayor respecting the denial of certiorari," and a dissent by Justices Scalia and Alito.

Thus, there is no support in *Cash v. Maxwell* or in the other cases cited by the complainants for an argument that Kienlen's lies to fellow officers about where he spent the night at a training conference in 2011 "is sufficient to overturn an otherwise lawful verdict," as claimed by Ellis and Davis, *supra.* Also, there is no indication in the Case Register of *State of Oregon v. Gerardo Garcia Gonzalez*, Wasco County Case No. CR090-280, that Wasco County District Attorney Matthew Ellis has sought to overturn the verdict of guilty of Rape in the First Degree against Mr. Gonzalez on the basis that Kienlen lied to fellow officers in 2011 about where he spent the night at a training conference.

Mr. Nisley's decision that the Kienlen information was not discoverable *Brady* material is well supported by a case Nisley cited, *Wood v. Bartholomew*, 516 US 1 (1995), and by OEC 608(2).

***Wood v. Bartholomew*, 516 US 1 (1995)**

None of the complainants tell the Bar that in the "Brady analysis" section of Mr. Nisley's April 21, 2011 Order, where he explained his decision that the Kienlen material should not be disclosed, Mr. Nisley cited an important United States Supreme Court case explaining the *Brady* doctrine: *Wood v. Bartholomew*, 516 US 1 (1995). Mr. Nisley's written

decision, previously submitted by Mr. Ellis, is also attached hereto as Attachment N1. In *Wood v. Bartholomew*, Dwayne Bartholomew was convicted of aggravated first degree murder. After his trial, Bartholomew learned that the prosecution had failed to provide his lawyer with information that one of the key state's witnesses had failed a polygraph test. The United States Supreme Court held that the prosecutor's failure to provide the failed polygraph results did not violate the *Brady* rule.

The *Wood* opinion noted that the Ninth Circuit had reversed the conviction under a mistaken principle that, "although the results would have been inadmissible at trial, the information was material under *Brady*." *Wood v. Bartholomew*, 516 US 1, 116 S Ct 7, 9, 133 L Ed 2d 1 (1995). The Supreme Court explained: "[The Ninth Circuit] reasoned that '[h]ad [respondent's] counsel known of the polygraph results, he would have had a stronger reason to pursue an investigation of [the witnesses's] story.'" But the Supreme Court flatly rejected the Ninth Circuit's opinion, and held the polygraph failure was not discoverable under *Brady* because it was not material evidence: "The information at issue here, then—the results of a polygraph examination of one of the witnesses—is not 'evidence' at all. Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses." *Wood v. Bartholomew*, 516 US 1, 6. Similarly here, disclosure of Kienlen's discipline would not have had a direct outcome on any case because defense counsel could not have used the information during argument or questioning witnesses. *Also see* discussion of *State v. Deloretto*, 221 Or App 309 (2008) and OEC 608, *infra*.

***Wood v. Bartholomew* in Oregon: *State v. Deloretto*, 221 Or App 309 (2008)**

In *State v. Deloretto*, 221 Or App 309 (2008), a sex abuse case, the defense claimed that the prosecutor failed to provide information that would have supported the defense claim that the alleged victim had made

a prior false accusation of sexual assault. In rejecting this defense claim, the Oregon Court of Appeals cited the United States Supreme Court's decision in *Wood, supra*: "Under *Brady*, no due process violation occurs if the evidence withheld by the prosecution would have been inadmissible. *Wood*, 516 US at 8, 116 S Ct 7." 221 Or App at 322 n3. The *Deloretto* opinion ruled that the prior false accusation was inadmissible evidence under OEC 608(2):

> (2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.

221 Or App at 321-26.

Deloretto's interpretation of OEC 608(2) is consistent with other Oregon cases holding that previous false statements about matters unrelated to a witness's testimony, even previous false accusations of crimes, are generally not appropriate impeachment. *See e.g., State v. Hendricks*, 101 Or App 469 (1990) (Evidence that victim who accused defendant of sodomy had previously made false accusations against another would be improper impeachment of the victim under OEC 608(2)). Officer Kienlen's false statements here were also "specific instances of prior conduct" and therefore inadmissible evidence and improper cross-examination under OEC 608(2). Because the Kienlen material was inadmissible evidence and improper impeachment, it was not subject to the *Brady* rule, and Mr. Nisley's decision not to disclose it was correct.

***Fuller v. Dept. of Public Safety Standards*, 299 Or App 403 (2019): A police officer's prior false statements about personal matters are not**

appropriate impeachment under OEC 608(2) and are not covered by the *Brady* doctrine.

In a 2019 opinion, the Oregon Court of Appeals relied on OEC 608(2) to state that an officer's false statements about personal matters, there regarding involvement in an automobile accident after the officer consumed alcohol, did not amount to admissible material impeachment evidence under *Brady*. *Fuller v. Dept. of Public Safety Standards*, 299 Or App 403 (2019). In *Fuller,* which involved the revocation of a police officer's DPSST certification, the Court of Appeals found that the officer was "untruthful" and "dishonest" concerning "an internal investigation regarding his involvement in an automobile accident after attending a fundraiser at a casino where he drank alcohol." 299 Or App at 414.

In *Fuller*, DPSST argued to the Court of Appeals that it had properly found that the petitioner's dishonesty, "impaired petitioner's ability to assist in prosecutions because, due to required *Brady* disclosures, he could be impeached and have his credibility diminished." 299 Or App at 456-67. The Court of Appeals rejected the DPSST's argument, finding that it did not even meet the low standard of a "substantial reason" for the agency's decision: "We agree with petitioner that DPSST's explanation for its conclusion does not comport with substantial reason." 299 Or App at 415. The *Fuller* Court explicitly relied on OEC 608 in its *Brady* impeachment analysis:

> "DPSST argues that petitioner's dishonesty (1) impaired petitioner's ability to assist in prosecutions because, due to required *Brady* disclosures, he could be impeached and have his credibility diminished
>
> * * * * *
>
> "regarding the possibility of petitioner being impeached in future prosecutions, we do not see how that conclusion follows from the

> evidence that petitioner was admittedly dishonest with Hald. That is, had petitioner been *convicted* for dishonest conduct, DPSST's understanding that petitioner's dishonesty had impaired his ability to assist in prosecutions might be correct. However, in this case, petitioner was not convicted of a crime. At least as a matter of state evidence law, any impeachment regarding petitioner's dishonesty would, it seems, be limited by OEC 608, as, under that rule, specific instances of misconduct typically are not admissible to attack a witness's credibility. OEC 608(2). As a result, unlike DPSST, we do not readily perceive how petitioner's admitted act of dishonest conduct would necessarily impact his ability, whole cloth, to assist in future prosecutions, and nothing in DPSST's order provides us with that explanation."

299 Or App at 414-15 (emphasis in original).

Thus, *Fuller* is strong support for Mr. Nisley's analysis that an officer's dishonesty regarding a personal matter is not *Brady* material because it is not relevant for impeachment of the officer. And unlike Fuller, Kienlen was essentially truthful in the internal investigation; Kienlen admitted his prior untruthfulness in his interview with the chief of police.)

Application of the law of *Brady, Deloretto, and Fuller* to the facts alleged by complainants.

The Bar complaints first claim that Nisley and Wolf should have disclosed to defense counsel that Kienlen and Wolf were having a "romantic extramarital affair" (Aaron letter to Bar, 1); and, second, they claim that Nisley and Wolf should have provided defense counsel with the February 17, 2011 Notice of Discipline letter to Kienlen from City of The Dalles Police Chief Waterbury demoting Kienlen for making false statements to his fellow officers concerning where he spent the night while he was attending a training in Eugene in February, 2011.

The claim that Wolf and Kienlen were having a romantic extramarital is simply false. Kienlen denied it in his July 6, 2010 affidavit, attached hereto as Attachment N2, and he denied it again in his February 16, 2011 interview by City of The Dalles Police Chief Waterbury. Attachment N3. I expect Wolf will deny it in her response to the Bar. Since there was no romantic affair, there was no evidence of an affair to disclose under *Brady* and there is no reason to subject Kienlen and Wolf to questioning on this topic in Wasco County Circuit Court or in Oregon State Bar depositions and hearings. Moreover, even if there was an affair, its existence need not have been disclosed to defense counsel. *See, e.g., Thompson v. State*, 2013 Alaska App (2013) 2013 WL 6576729, LEXIS 127 (Agreeing with state's position that even if there had been a sexual relationship between the prosecutor and state trooper, *Brady* did not require the relationship to be disclosed to defense counsel.)

The complainants' second claim, that Nisley did not provide defense counsel with Kienlen's "Notice of Discipline," does not come within the *Brady* rule because it is not material evidence. According to Chief Waterbury's Feb 17, 2011 Notice of Discipline, Attachment N4, before Kienlen attended a training during the week of February 7, 2011 in Eugene, Kienlen told the Chief that he didn't want to stay with Detective Macnab at the training and that he wanted to see his cousin who lived in Eugene. Kienlen initially refused to answer the Chief's questions about where he stayed on Tuesday and Wednesday, February 8-9, 2011, but later admitted that his cousin lives in Hubbard, not Eugene, and that he had stayed with his friend DDA Leslie Wolf who was in Salem at a conference. Attachment N4. Kienlen explained to the Chief why he didn't want to tell him or Macnab about his non-sexual friendship with Leslie Wolf: "I don't expect people to believe me when I say that I haven't had an affair with her. And I'm not having an affair with her. They can believe what they want to believe. It still hurts. But I was afraid that the offer was put out there that I could stay there instead of staying with Eric but not only would it look like what people think is happening is happening." Attachment N3. Chief Waterbury found that Kienlen made two false statements: "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." Attachment N4.

While Chief Waterbury was understandably concerned about Kienlen's misleading statements, this case is far different from any of the *Brady* cases cited by Aaron, Ellis and Davis. Kienlen did not make inconsistent statements about the rape in *State v. Gonzales, see Brady, supra,* he did not make a leniency offer to a state's witness, *see Horton, supra,* he did not lie on the witness stand, and he was not convicted of a crime. Under OEC 608, his false statements to fellow officers about where he spent the night were specific instances of conduct that would not be admissible at trial nor would they be appropriate questions for impeachment. *See* OEC 608(2), *Deloretto* and *Fuller, supra.*

Contrary to the assertions of the complainants, Waterbury's letter of discipline was not discoverable evidence under *Brady.* It was not evidence at all. *Wood, supra.* After carefully considering the law and the facts, Mr. Nisley made the correct decision not to disclose it. Therefore, we ask that this matter be dismissed.

Yours truly,

Lawrence Matasar