

SHB 1088: Concerning potential impeachment disclosures

We continue to have concerns with one portion of SHB 1088, but otherwise support it.

Our concern is with the provision that specifies that the best practices policy developed by prosecutors and law enforcement will include (quote) “*under what circumstances* an officer’s information or name may be *removed* from any list of potential impeachment disclosures.” That’s in the first section: 1(a)(iii). Nowhere in *Brady v. Maryland* or any of the cases that have extended and interpreted *Brady* is there any mention of removing a person from a Brady list.

The prior misconduct does not just go away with time. The fact of misconduct in the past needs to be disclosed under *Brady*.

This issue was decided in 2015 by now retired Judge Ronald Kessler, who was criminal presiding judge in King County. Judge Kessler wrote the state’s Criminal Caselaw Notebook and is regarded by judges throughout Washington as an expert on criminal law. In that case, the King County prosecutor decided to remove a detective’s name from the *Brady* list after a few years. Judge Kessler sharply rebuked that practice finding that disclosure was always required, and that names should never be removed from any *Brady* list.

We have provided Judge Kessler’s order from that prior case for this panel to consider – *State v. Juan Garcia-Mendez*. Many portions of this court order are not relevant for review by this body, but we want to highlight several key points. Judge Kessler summarized how the detective was once on the King County Prosecutor’s *Brady* list, but was then somehow taken off the list on page one. The Judge clearly found that “the state erred in failing to notify the defense of the 2005 (prior) incident (of misconduct.” Pg. 2, line 7. The court made it clear, as many cases have too, that the Court gets to decide whether an officer’s prior misconduct is admissible in a particular case, but that disclose is always required by the prosecutor. Failure to disclose *Brady* information is government misconduct.

We rely on the caselaw below to assist us in our position about why a person should never be removed from the Brady list:

- ***Brady v. Maryland***, 373 U.S. 83 (1963)
 - “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.”

- ***United States v. Agurs***, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)
 - There is a duty to disclose *Brady* evidence even when there has been no request by the accused.

- ***United States v. Bagley***, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)
 - *Brady* duty encompasses impeachment evidence as well as exculpatory evidence.

- ***Giglio v. United States***, 405 U.S. 150 (1972)
 - The rule stated in *Brady* applies to evidence undermining witness credibility.
 - The prosecution’s “knowledge” for this purpose clearly extends beyond the personal knowledge of the prosecuting attorney representing the State at trial.
 - A prosecutor must resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

- ***Kyles v. Whitley***, 514 U.S. 419 (1995)
 - The scope of the duty to disclose evidence includes the individual prosecutor’s duty “to learn of any favorable evidence known to the others acting on the government’s behalf ... including the police.”
 - Due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state’s witnesses, or to bolster the defense case against prosecutorial attacks.

- ***Coleman v. Calderon***, 150 F.3d 1105, 1117 (9th Cir. 1998)
 - Information requested pursuant to *Brady* need not be admissible.

- ***United States v. Howell***, 231 F.3d 615 (9th Cir. 2000)
 - Prosecutors must turn over all information which might raise opportunities to attack the thoroughness and even good faith of the investigation.

For more information, contact:

Neil Beaver (509) 979-9550 or neil.beaver@gmail.com

– or –

Emily Gause (206) 660-8775 or emily@emilygauselaw.com