

From: SEWELL Travis <Travis.SEWELL@mcda.us>

To: 'editor@bradycops.org' <editor@bradycops.org>

Subject: RE: Brady List - Public Record Request

Date: Wed, 10 Dec 2014 14:48:52 -0800 (12/10/2014 05:48:52 PM)

There is no cost for this request. Do you have a name and address we can forward the requested materials to? Thanks, DDA Travis Sewell



ROD UNDERHILL, District Attorney for Multnomah County

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December 12, 2014

BradyCops.Org
18 Village Drive
Ormond Beach, Florida 32174-2648

Re: Brady List-Public Records Request (12/7/2014)


Dear Editor Brady Cops.Org:

Enclosed is our attached policy that is responsive to your request.

Regards,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

By: _____


Travis Sewell
Deputy District Attorney

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Enclosure: ORS 135.81

ORS 135.815 Policy

PURPOSE

In order to maintain the highest possible ethical standards and to adhere to the constitutional principles announced in *Brady v. Maryland* and its progeny including *Giglio v. United States* and *Kyles v. Whitley*, it is necessary for the Multnomah County District Attorney's Office to develop and maintain policy, protocol and a uniform computerized system to ensure compliance with the rules set forth in those cases and the statutory discovery obligations set forth in the Criminal Code of Oregon. All Multnomah County Deputy District Attorneys are required to know and follow the policy, protocols and procedures described herein and the relevant law concerning obligations arising from the decision in *Brady*.

To ensure the fair administration of justice, prosecutors have an affirmative obligation in all cases to disclose potentially exculpatory information to a charged defendant. Compliance with the constitutional mandate set forth in *Brady* is also an ethical requirement for Oregon prosecutors.

ORPC 3.8(b) states:

The prosecutor in a criminal case shall:

(b) 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. This rule is identical to ABA rule 3.8(d).

The rule in *Brady* requiring prosecutors to disclose exculpatory material to the defense including potential impeachment information was codified by the Oregon legislature in 2013: "...the district attorney shall disclose to a represented defendant the following material and information within the possession or control of the district attorney: Any material or information that tends to: exculpate the defendant; negate or mitigate the defendant's guilt or punishment; or impeach a person the district attorney intends to call as a witness at the trial." ORS 135.815(1)(g) - effective date - January 1, 2014.

Certain information regarding state witnesses which may be discoverable as impeachment evidence will be maintained in the Potential Impeachment Disclosure Index (PID Index). State witnesses in the PID Index may include members of law enforcement, personnel employed by the Oregon State Police Forensic Laboratory, DHS caseworkers and members of the Oregon

State Medical Examiner's Office who are likely to testify in a Multnomah County grand jury or trial.

The PID Index acts as a centralized repository for potentially discoverable impeachment information about state witnesses in possession of the District Attorney's Office. The goal is to allow all prosecutors in all divisions to have access to this material when needed on a case by case or institutional basis while at the same time respecting the privacy and personnel interests of the state witnesses and agencies involved. By utilizing a central computerized database, with automatic notification to case prosecutors, lapses in discovery obligations will be prevented that might otherwise be caused by factors such as the passage of time and reassignment of case prosecutors and investigators.

PID INDEX COMMITTEE

The decision to include or remove a state witness from the Multnomah County District Attorney's Office PID Index is made by committee members selected by the District Attorney based on their experience or expertise with *Brady* related issues. The purpose of the committee is to screen relevant information received from all sources for legitimate *Brady* impeachment material. This committee will meet quarterly to consider any candidates for inclusion or elimination from the PID list or to hear any appeals. The committee may meet more frequently as needed. A unanimous vote is required for any action by the committee. Committee members may consider oral, written, or other relevant evidence in reaching their decisions.

The following procedural protections are followed in each case by the PID Index Committee:

1. State witnesses will receive written notice that they are the subject of a pending review;
2. State witnesses will have the opportunity to provide materials for consideration by the PID Index Committee and to appear before the committee;
3. State witnesses who are placed in the PID Index are informed of the opportunity to submit additional information which may provide a basis for removal from the PID Index.

Findings of misconduct involving dishonesty, criminal convictions, and false sworn testimony are three examples of areas which may lead to inclusion of a state witness on the PID Index.

There is not an exclusive list of conduct that may lead to inclusion of a state witness on the PID Index. Examples of the type of potential impeachment disclosure evidence recognized by the Oregon Evidence Code and case law include:

pending criminal prosecution,

convictions of crimes, (OEC 609)

bias or interest, (OEC 609-1)

problem alcohol and illegal drug use,

character, (OEC 404)

false reports,

contrary conflicting statements,

inaccurate statements or reports,

misconduct involving moral turpitude,

reputation for untruthfulness.

See *United States v. Bagley* 473 US 667, 676 (1985).

Information that is not *Brady* material or potential impeachment disclosure evidence is "rumor" or "speculation." One purpose of creating and maintaining a centralized PID Index is to eliminate rumors and speculation regarding state witnesses and to afford due process to these witnesses and a deliberate committee review and determination of whether potential impeachment disclosure information actually exists.

NOTICE

State witnesses will be notified in advance of review by the PID Index Committee and given the opportunity to provide written or other relevant materials for consideration and the opportunity to appear before the Committee.

APPEALS PROCESS

State witnesses will be given the opportunity to file a notice of appeal within 30 days of the committee's decision. In support of their appeal, witnesses may submit additional or new information to the committee which also will be considered during the committee's regular meeting. Additionally, state witnesses who are included on the PID Index always have the opportunity to submit additional materials at any time if they choose to seek reconsideration. The District Attorney will review all appeals and will accept or reject the Committee's decision on appeal.

THE PID INDEX

When the committee determines that a state witness should be included in the PID Index, the witness will be notified and their name will be flagged in CRIMES - the District Attorney's computerized data base. Each Deputy District Attorney will be required to check CRIMES when adding witnesses to a case to determine whether that witness is listed in the PID Index. Entering

a witness into CRIMES who is listed in the PID Index will cause an automatic notice to be sent to the case prosecutor.

No other information regarding the witness will be available in CRIMES regarding the PID Index in order to protect the privacy interests of the witness and to ensure that potentially sensitive information will only be disseminated when required by law.

When a Deputy District Attorney determines that a state witness is included in the PID Index they are required to meet with the First Assistant or a Chief Deputy who will evaluate whether the Deputy District Attorney has a legitimate interest in gaining access to the PID Index in their particular case. If it appears that the witness is necessary to the case, a decision will be made whether to release the potential impeachment disclosure information as discovery to defense counsel. In some cases, due to the particular facts involved and the witness's anticipated testimony, it may be determined the potential impeachment disclosure material is not discoverable. In other cases, where it is unclear whether the information is discoverable, the Deputy District Attorney will submit the material to the court for an *in camera* inspection for a judicial determination. The court, following an *in camera* inspection, may release all or part of the materials in the PID Index regarding a state witness to the defense upon a finding that the materials are discoverable pursuant to the rule in *Brady* as codified in ORS 135.815(g). In the absence of such finding, the court will seal the materials, marked as an exhibit for purposes of appeal and other review.

Release of PID Index materials to defense counsel is not a stipulation as to the admissibility of such information. In many cases it is likely the information, although required to be disclosed, will be found to be inadmissible at trial.

Inclusion on the PID Index does not mean that a state witness will never be called to testify. It is not a comment on the individual's personal reputation or capacity to serve the public.

SOURCES OF POTENTIAL IMPEACHMENT INFORMATION

The Multnomah County District Attorney's Office requests state witness law enforcement agencies to provide all information that could be considered exculpatory to criminal defendants. For purposes of the PID Index, state witness agencies should provide any information that a reasonable person, knowing all of the relevant circumstances, could view as impairing the credibility of a state witness testifying in a criminal proceeding. This includes information regarding misconduct related to lack of veracity, bias, or other conduct which could be exculpatory to a criminal defendant's case. Because this office is not an investigatory agency, it is dependent on state witness agencies to conduct investigations into allegations of misconduct and to advise this office of the results.

It is axiomatic that the prosecution must be notified by law enforcement when a police officer is arrested and charged with a crime. Law enforcement should also notify the prosecution when an officer is the subject of sustained findings of misconduct based on dishonesty or bias.

Judges who have made findings regarding state witness veracity and attorneys, both prosecutors and defense counsel, who become aware of potential impeachment material are encouraged to notify the PID Index Committee. Submissions of such material should be in the form of an order or memo.