

Verified Correct Copy of Original 5/18/2021

SEVENTH JUDICIAL DISTRICT
CIRCUIT COURTS
PAUL G. CROWLEY
Presiding Judge

HOOD RIVER COUNTY
GILLIAM COUNTY
SHERMAN COUNTY
WASCO COUNTY
WHEELER COUNTY

FILED
WASCO COUNTY
COUNTY COURTHOUSE
309 State Street
Hood River, OR 97031 3
2011 Phone (541) 386-1862
Fax (541) 386-3465
TRIAL COURT ADMIN

December 13, 2011

Mr. Eric Nisley
District Attorney
511 Washington Street
The Dalles, OR 97058

BY *JO*
Mr. John Olson
Attorney at Law
414 Washington Street, No.3
The Dalles, OR 97058

Re: State v. Kevin Dwayne Hester, Wasco County Circuit Court Case No. CR11-0256

Dear Counsel:

The parties agreed with the State submitting certain information to the Court for an *in-camera* review to determine whether the information is subject to discovery pursuant to Brady v. Maryland, 373 US 83 (1963). I have reviewed the information. It is not discoverable.

A copy of this letter and the *State's Motion For An In-Camera Inspection, And Protective Order*, will be placed in the Court's file. Those documents will be available for public inspection.

To create a record in the event of appellate review, the following information will be placed in a sealed envelope that will be placed in the Court's file:

- 1) The *State's Memorandum Addressing In-Camera Inspection and Protective Order*.
- 2) *Exhibits 1 through 5* to that memorandum.
- 3) The Court's opinion letter dated December 13, 2011.

That envelope will be marked as follows:

Confidential discovery issue. Not to be opened without the prior written permission of the Court.

Judge Paul Crowley
December 13, 2011

Sincerely,


Paul Crowley
Circuit Judge

SEVENTH JUDICIAL DISTRICT
CIRCUIT COURTS
PAUL G. CROWLEY
Presiding Judge

HOOD RIVER COUNTY
GILLIAM COUNTY
SHERMAN COUNTY
WASCO COUNTY
WHEELER COUNTY

COUNTY COURTHOUSE
309 State Street
Hood River, Or. 97031
Phone (541) 386-1862
Fax. (541) 386-3465

December 13, 2011

Re: State v. Kevin Dwayne Hester, Wasco County Circuit Court Case No. CR11-0256

The parties agreed with the State submitting certain information to the Court for an *in-camera* review to determine whether the information is subject to discovery. Having reviewed the information, the Court determines that the information is not discoverable. This letter is intended to serve to document the Court's opinion and the basis of the opinion in the event of appellate review.

At issue is whether opinion or reputation evidence about Officer Jeff Kienlen of The Dalles City Police Department (TDCPD) is subject to discovery to the defense pursuant to Brady v. Maryland, 373 US 83 (1963), as potentially exculpatory evidence. The answer is, no. The reason is that it's not admissible evidence. The reason it's not admissible is that the evidence pertains to specific acts of misconduct, not evidence of general opinion or character evidence.

OEC "Rule 608(1) allows evidence of a witnesses' character for untruthfulness as circumstantial evidence that the witness was untruthful or truthful in giving evidence. . . . [t]he character evidence may be proved by reputation evidence or opinion evidence." *Oregon Evidence, Fifth Edition, page 483.*

OEC "Rule 608(2) bars impeachment of the witness by inquiry or extrinsic evidence regarding prior specific instances of conduct not resulting in conviction of a crime. The prohibition applies even where the prior specific instances of conduct are probative of a witness' truthfulness or untruthfulness." *Oregon Evidence, Fifth Edition, page 487.* Moreover, "[e]vidence regarding specific acts should not be allowed under the guise of opinion testimony." *Oregon Evidence, Fifth Edition, page 484.*

The potential evidence in this case comes from two sources: Chief Jay Waterbury of TDCPD and Officer Joshua Jones of that same department.

In a letter dated December 8, 2011, *State's Exhibit 5*, Chief Waterbury writes that he has known Officer Kienlen since 1995 and he "has never has a reason to question his truthfulness in regards to his position with the police department." Chief Waterbury indicates that Officer Keinlen claimed to have a cousin in Eugene, that the statement was later determined to be untrue, and that Chief Waterbury believes that Officer Keinlen "was untruthful . . . to cover up a personal indiscretion." *State's Exhibit 5.*

Re: State v. Hester

Page 2 of 3

The letter addresses a single act of misconduct. It offers no evidence of Officer Kienlen's reputation for truthfulness or that Chief Waterbury has an opinion that Officer Kienlen is not truthful. There is nothing in the letter that is admissible under OEC 608(1) or under OEC 608(2).

There are two sources of information about statements attributed to Officer Jones about Officer Kienlen's truthfulness. The first is a declaration from District Attorney Eric Nisley. *State's Exhibit 1*. All of the statements in the declaration address specific acts of misconduct:

He responded that well, recently Kienlen has said things that were not true. . . . He then said something like: I guess *recently* I think that *he has not been truthful*. . . . he has *not been truthful recently* so I would say yea, I guess in *my opinion he has been untruthful*. . . . [the next day] he then stated he thinks Kienlen is a *truthful person* but that just recently he [Keinlen] has *said some things* that he [Jones] felt *were untrue*.

Exhibit 1 (emphasis supplied.)

During a follow-up interview conducted by Chief Waterbury, Officer Jones made the following pertinent statements or responses to questions.

I believe Jeff [Keinlen] is a *truthful* person that has made mistakes in the past. . . .

Q: Can you explain what you told the District Attorney. . . ?

A: It was *my opinion* based upon what I had heard that he [Keinlen] had been *untruthful about personal indiscretions*.

. . . I don't think he [Keinlen] has ever lied to me or about a police case.

Q: *Do you have an opinion as to whether* Jeff Keinlen has a *reputation* as being a truthful or untruthful person?

A: Yes.

Q: If you do have an opinion, what is that opinion?

A: I believe based on the ongoing investigation by DOJ, negative media coverage, and in addition to rumors, he has a *reputation of having not been truthful about personal indiscretions*.

Exhibit 3. (Emphasis included.)

Officer Jones was asked if he has an opinion as to Officer Keinlen's reputation. There is no basis in the evidence code for the admission of a witness' opinion as a person's

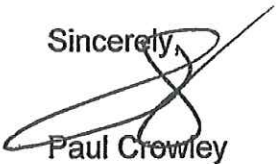
Re: State v. Hester
Page 3 of 3

reputation for truthfulness.

To the extent that Officer Jones addressed Officer Keinlen's reputation for truthfulness, it is clear that the reputation he addressed is based upon a single act of misconduct, *vis-a-vis*, was Officer Keinlen honest when asked about personal indiscretions, whatever they may be.

Single acts of misconduct are not admissible as character evidence. The evidence in question is not admissible. Since it's not admissible, the evidence is not potentially exculpatory. It does not need to be discovered to the defendant.

Sincerely,



Paul Crowley
Circuit Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Verified Correct Copy of Original 5/18/2021.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

STATE OF OREGON,
Plaintiff,
v.
KEVIN HESTER,
Defendant.

Case No. 11-256

STATE'S MEMORANDUM ADDRESSING IN-CAMERA INSPECTION, AND PROTECTIVE ORDER

CONFIDENTIAL MEMORANDUM
NECESSITY OF IN-CAMERA INSPECTION, FOR ORDER TO DISCLOSE OR FOR PROTECTIVE ORDER

The state has an obligation to provide exculpatory information that is in its possession. Brady v. Maryland, 373 US 83 (1963). This evidence must be turned over to the defense, even if not specifically requested. United States v. Agurs, 427 US 97 (1976). Prosecutors are further required to provide evidence that could impeach the credibility of a government witness. Giglio v. United States, 405 US 150 (1972). Prosecutors also have a duty to learn of favorable evidence known to others acting on the government's behalf, such as law enforcement. Kyles v. Whitley, 514 US 419, 437 (1995). However, the prosecution has no obligation to communicate "preliminary, challenged or speculative information." Agurs, supra, 427 US 97 at 109, fn. 16. Moreover, failure to disclose material is not a Brady violation when there is only "mere speculation" as to whether its disclosure would have led to admissible evidence. Wood v. Bartholomew, 516 US 1, 6 (1995) (refusal to discover polygraph results not a Brady violation when results not introduced at trial and therefore not used as "evidence").¹

Cases in which courts have found that *Brady* required disclosure include: promises of immunity (*see, e.g., United States v. Butler*, 567 F.2d 885 (9th Cir 1978)); prior criminal records (*see, e.g., United States v. Auten*, 632 F.2d 478) (5th Cir 1980) and United States v. Owens, 933 F. Supp. 76, 87-88 (D. Mass 1996); prior inconsistent statements of government witnesses (*see,*

¹ A prosecutor's ethical obligation to disclose is found in ORPC 3.8. The ethical obligation should mirror the state's obligation under *Brady*, but there is no guidance from the court's on that issue.

Verified Correct Copy of Original 5/18/2021

e.g., *United States v. Payne*, 63 F 3d 1200, 1210 (2d Cir 1995)); *United States v. Kelly*, 35 F 3d 929 (4th Cir. 1994); *United States v. Herberman*, 583 F 2d 222 (5th Cir 1975); information about mental or physical impairment of government witnesses (see, e.g., *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995); inconsistent or contradictory scientific tests (see, e.g., *United States v. Fairman*, 769 F 2d 386 (7th Cir 1985); pending charges against witnesses (see, e.g., *United States v. Bowie*, 198 F 3d 905, 909 (DC Cir 1999); monetary inducements (see, e.g., *United States v. Mejia*, 82 F. 3d 1032, 1036 (11th Cir 1996); *United States v. Fenech*, 943 F Supp. 480, 486-87 (ED Pa 1996)); bias (see, e.g., *United States v. Schledwitz*, 169 F 3d 1003 (6th Cir 1999)); proffers of witnesses and documents relating to negotiation process with the government (see, e.g., *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1203 (CD Ca1999)); and the government's failure to institute civil proceedings against key witnesses (see, e.g., *United States v. Shaffer*, 789 F.2d 682, 690-91 (9th Cir 1986)).

With respect to false statements by officers, in *United States v. Cuffie*, 80 F 3d 514, 517-19 (DC Cir 1996), the government conceded, and the court agreed, that failure to disclose perjury by a police officer during a motion to seal proceeding was *Brady* material relevant to impeachment. In *Nuckols v. Gibson*, 233 F 3d 1261 (10th Cir 2000), the court held that the prosecution violated *Brady* by failing to disclose the disciplinary record of its primary witness which might have shown that the witness' testimony was based upon his motive ingratiate himself with the sheriff and deflect dissatisfaction with his conduct. Conversely, in *Carvajal v. Dominguez*, 542 F 3d 561 (7th Cir 2008), the court found that, even assuming that the officer lied about the date in which the officer first identified the defendant, the prosecution was not obligated to disclose the lie to the defense. The court held that the prosecution's failure to disclose a "lying witness" was not a *Brady* violation. *Id.* at 567.

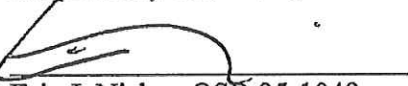
In addition to the Brady issues, the court should examine rule OEC Rule 608 addressing opinion evidence as it relates to truthfulness.

The legal points provided here are not intended as argument, but rather as a guide for the court in reaching the appropriate conclusion. The state is not advocating that the material is or is not subject to disclosure. Instead, the state seeks the court's guidance in making the appropriate determination in a very difficult circumstance.

The facts before the court are presented in detail in exhibits 1-4 and are attached hereto. In summary, there are two issues for the court to review. First, are statements made by one officer about another officer subject to disclosure under Brady. The second issue is whether the discipline of the officer subject to disclosure under Brady.

If the court requires additional information it will be made available as soon as possible.

DATED this 9th day of December, 2011

Respectfully submitted,

Eric J. Nisley, OSB 95-1049

Verified Correct Copy of Original 5/18/2021

EXHIBIT 1

Declaration of Eric Nisley, Wasco County District Attorney.

Sometime in the beginning of November, 2011 I received a call from The Dalles Police Department Officer Joshua Jones that he had been subpoenaed to testify in a matter unrelated to the Hester case. I thanked him and told him I would get back to him later as I was preparing for a hearing in an Aggravated Murder case (State v. Smith, CR09-031) and did not have time to address the matter. Immediately following that hearing, I was out of the office for approximately two weeks a conference and on a short vacation during thanksgiving week.

I returned to the office on Monday, November 28th 2011 and called Josh Jones and spoke to him on the telephone. I cannot recall the specific time but I believe it was in the afternoon. What follows is the substance of the conversation and not specific quotes. During the course of the conversation I asked him if he knew why Brian Aaron had subpoenaed him for this trial. He indicated he did not know why and was not part of the case (i.e., arrest, investigation etc). I then asked him if he thought Brian Aaron was going to ask him about his opinion as to Jeffery Kienlens' truthfulness. I asked this question because I felt I had a duty to inquire under Brady due to Brian Aaron questioning the veracity of Officer Kienlen in a previous case. He said he did not know. I then asked him what he would say if he were asked. Initially, he said he was not sure, asked what I meant by untruthful. I said the rule is clear, if you have an opinion, you will need to state it as to truthfulness or reputation. He responded that well, recently Kienlen has said things that were not true and does that count? I said, not really, it is opinion that matters in this case, not specific instances of conduct. He then said something like: I guess recently I think he has not been truthful. I then asked again if he had an opinion as to whether Kienlen was truthful and he responded that well he has been untruthful recently so I would say yea, I guess in my opinion he has been untruthful. I asked him to come in the next day so I could show him the letter I was going to write for the defense attorney in the case of State v. Hendon which was scheduled for trial in a few days.

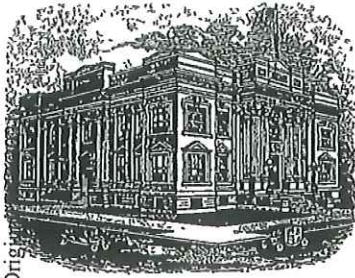
Officer Jones came in on the morning of the next day, Tuesday November 29, 2011 and reviewed the letter and said in a nutshell that is not what I would say under oath, and that is not what I think. I recall him saying something to the effect of "it is not as cut and dried as that." Further that he then stated that he thinks Kienlen is a truthful person but that just recently he has said some things that he felt were untrue. Based on this contradiction of his statements from the previous day, his statement that he would not testify under oath that Kienlen is in his opinion untruthful, and the fact that the defense requested continuance was granted in the Hendon matter, I did not send the letter. I instead sought opinions of other prosecutors and decided to present the matter to the court for this review. A copy of my draft letter to Brian Aaron dated Monday November 28, 2011 is attached as exhibit 2. I left for the Oregon District Attorney's Conference later that day and returned to the office on Monday December 6, 2011.

Verified Correct Copy of Original 5/18/2021.
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Instead of speaking to Officer Jones again, I asked Chief of Police Jay Waterbury to ask him questions that are directly related to the issues addressed in this matter before the court. The questions and answers are incorporated in a letter which is attached as exhibit 3.

Exhibit 5 is a semi-related issue of discipline of Officer Kienlen by Chief Waterbury. As a single incident of specific conduct it does not appear to rise to the level of impeachable or admissible evidence but I provide this to the court to review under Brady.

Verified Correct Copy of Original



WASCO COUNTY

DISTRICT ATTORNEY

SUITE 304
511 WASHINGTON STREET
THE DALLES, OREGON 97058-2237
PHONE (541) 506-2680
FAX (541) 506-2681

ERIC J. NISLEY
DISTRICT ATTORNEY

LESLIE C. WOLF
CHIEF DEPUTY DISTRICT ATTORNEY

SARAH E CARPENTER
DEPUTY DISTRICT ATTORNEY

CHILD SUPPORT ENFORCEMENT
(541) 506-2679

VICTIM ASSISTANCE
(541) 506-2685

November 28, 2011

Brian Aaron
Aaron and Associates, PC
Attorneys at Law
Hood River, OR 97031

DRAFT

RE: Discovery in State v. Hendon, CR11-191

Dear Mr. Aaron:

Pursuant to Brady v. Maryland, 373 U.S. 84 (1963) I am required to disclose the following information to you. I learned several weeks ago that you were calling Josh Jones to testify in the above-referenced matter. I left the office just after learning that information for a conference and vacation the week of Thanksgiving. I returned to the office today and called Josh Jones this morning.

During that phone call he told me that in his opinion, Officer Jeffery Kienlen was not a truthful person. Because such information may have a tendency to exculpate your client, I am required to disclose that to you in advance of trial.

I recognize that this trial is set for November 30, 2011. Because this information is being made available to you in such a short time frame, I believe you are entitled to a continuance should you feel the need to request one. Weatherford v. Bursey, 429 U.S. 545 (1997).

Sincerely Yours

Eric Nisley
Wasco County District Attorney

DRAFT

Exhibit 3

Interview of Officer Josh Jones, 12/08/11, by Chief Jay Waterbury

1. How long have you know Jeff Kienlen?

A—9.5 years

2. Do you feel you know him well professionally and personally?

A—Yes

3. Have you had the opportunity to work with him on regular basis?

A—Yes

4. If he said something to you, would you have a tendency to believe him?

A—Yes

5. If you were in a circumstance as a police officer and you had to rely on him in a life or death situation, would you trust him?

A—Yes

6. If he told you something about a case you and he were working on would you believe him?

A—Yes

7. Do you have an opinion as to whether Jeff Kienlen is a truthful person?

A—Yes

8. If you do have an opinion, what is that opinion?

A—I believe Jeff is a truthful person that has made mistakes in the past based on what I have heard.

9. Do you recall telling the District Attorney that he was not truthful?

A—Yes

10. Can you explain why you told the district Attorney that?

A—It was my opinion based on what I had heard that he had been untruthful about personal indiscretions.

11. If you were called to testify, and asked under oath if you had an opinion as to whether Jeff Kienlen was, in your opinion, a truthful person, what would you say?

A—Same answer as #8 with the addition of I don't think he has ever lied to me or lied about a police case.

12. Do you have an opinion as to whether Jeff Kienlen has a reputation as being a truthful (or untruthful) person?

A—Yes.

13. If you do have an opinion, what is that opinion?

A—I believe based on the ongoing investigation by DOJ, negative media coverage, and in addition to rumors, he has a reputation of having not been truthful about personal indiscretions.

14. If you were asked that opinion under oath, would that be your answer?

A—Yes

15. Are you willing to meet with a Judge in chamber and answer any questions the Judge has about this issue?

A—Yes

Verified Correct Copy of Original 5/18/2021

MORRIS, OLSON, SMITH, STARNES & RASCHIO P.C.

JACK L MORRIS
JOHN A. OLSON†
A V "LONNY" SMITH† †
BRIAN M STARNES
ROBERT S RASCHIO

COURTROOM LAWYERS
414 Washington Street, Suite 3
The Dalles, Oregon 97058
(541) 296-9601
Fax (541) 296-8269

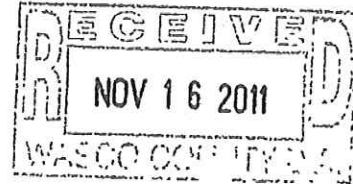
116 Oak Street #8
Hood River, Oregon 97031
(541) 386-1661
Fax (541) 386-2412

T CONOR SULLIVAN
ANDREW J MYERS

† ALSO LICENSED IN IDAHO
†† ALSO LICENSED IN WASHINGTON
AND FLORIDA

November 15, 2011

Eric Nisley
Wasco County District Attorney
Wasco County Courthouse
The Dalles, OR 97058



Re: *State of Oregon v. Kevin Hester*
Wasco County Case #CR11-256
File #11-11-37D

Dear Eric:

Pursuant to ORS 135.805-.825, the defendant requests pre-trial discovery of the following items:

1. The names and addresses of any and all persons who the State intends to call as witnesses at any stage of the proceedings herein, together with the relevant written or recorded statements of such persons.
2. Any books, papers, documents, photographs, or tangible objects which were obtained in the course of the investigation of this case.
3. Any and all written or recorded statements or memoranda of any oral statements made by the defendant, and the circumstances of the acquisition of any such statements.
4. Any reports, or statements of experts made in connection with this case, including physical examinations, medical examinations, scientific tests, experiments, or comparisons which the state intends to offer in evidence.
5. Any record of prior criminal convictions of persons whom the State intends to call as witnesses at the trial. I request that you cause to be made any and all agency checks available to your office to determine if any of the State witnesses do have any prior criminal convictions.
6. Any and all tangible objects which the State intends to offer in evidence; and any and all tangible objects which were obtained from or belong to the defendant, whether or not the State intends to offer them into evidence.
7. Whether or not either a search or seizure occurred.

DISCOVERY PROVIDED

11/18/2011

Page Two

8. Any and all material or information obtained from a search or seizure.
9. Any and all information, evidence, statements and reports which would be exculpatory;
10. All prior convictions of the defendant which the state will or could introduce as "Impeachment by Evidence of Conviction of Crime", pursuant to Oregon Evidence Rule 609, ORS 40.355, at defendant's trial.
11. All prior convictions of the defendant known to the state that would affect the determination of the defendant's criminal history for sentencing under rules of the State Sentencing Guidelines Board;
12. And any and all information which would be beneficial to the defendant in the event of sentencing.

All materials should be disclosed as soon as possible and at a date which allows the defendant adequate time to prepare a defense.

If after disclosure is made, additional material which is requested or otherwise discoverable under statutory or constitutional requirements become available before or during trial or other proceeding, such material should be promptly disclosed.

If the District Attorney is not certain whether the material does or does not comprise requested information or materials, the district attorney should so promptly advise defense counsel and submit to the Court for in camera inspection.

Upon your request, I will be willing to provide the State with the full disclosure required by ORS 135.835.

Thank you for your cooperation.

Sincerely,



John A. Olson, OSB #97118
Attorney at Law



Exhibit 5

CITY of THE DALLES

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

POLICE DEPARTMENT

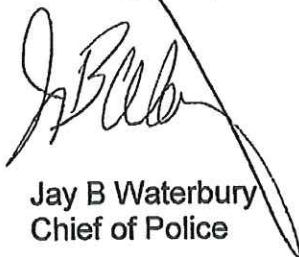
December 8, 2011

I have been acquainted with Officer Jeff Kienlen since he was hired in January of 1995 by The Dalles Police Department. Since that time I have never had a reason to question his truthfulness in regards to his position with the police department. I have never known Officer Kienlen that closely to make a judgment regarding his personal life.

I promoted him to the position of Sergeant in October of 2007. Part of the promotion process is based on truthfulness.

In early February of this year Officer Kienlen was scheduled to attend a class in Eugene, Oregon. He had asked if he could take a department car because he wanted to visit a cousin of his in Eugene. I gave approval for this request. I later discovered that he didn't have a cousin in Eugene and he admitted to that. I felt he was untruthful with me to cover up a personal indiscretion.

On February 17, 2011 I demoted Officer Kienlen from Sergeant to Officer for violating a department policy regarding truthfulness.



Jay B Waterbury
Chief of Police