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May 21, 2013

The Honorable Jeff Barker, Chair
The Honorable Chris Garrett, Vice-Chair
The Honorable Wayne Krieger, Vice-Chair
House Judiciary Committee, Members
Oregon House Committee on Judiciary
900 Court St. NE
Salem, Oregon 97301

**Re: Senate Bill 492-A**

Dear Chair Barker, Vice-Chairs and Members,

I very much appreciated the opportunity to testify on May 16, 2013, in support of SB492, which would codify prosecutors' existing obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. This year, the fiftieth anniversary of that landmark decision, is an opportune moment for Oregon to join the other 30 states that have codified those obligations, so as to ensure that they are carried out faithfully and uniformly throughout the state. I write to address a number of points that were raised at the hearing by the District Attorneys and others who oppose the bill.

My overarching goal in supporting this bill is simply to ensure that prosecutors and other law enforcement officials adhere to their constitutional, statutory, and ethical discovery obligations. We have heard recently of instances—nationally and in Oregon—in which officials have fallen short in that regard. A statute that concisely sets out the applicable standards in a place that is easily accessible to prosecutors, police officers, judges and defense lawyers alike would likely go a long way toward ensuring compliance. And greater compliance is a goal that all of us surely share.

It was with that in mind that I was troubled by many of the positions that were articulated in opposition to SB492. Simply put, those positions are based on a fundamental misunderstanding of the applicable law. Indeed, if Oregon prosecutors are regularly adhering to the legal standards articulated in opposition to SB492, the necessity and urgency of the bill are even more pronounced than we initially believed.

1. ***Brady* applies beyond the situation in which a prosecutor engages in intentional misconduct.**

Focusing on the word "suppression" in *Brady*, the opponents of the bill suggested to the Committee that *Brady* is concerned only with *intentional* wrongdoing by prosecutors who *knowingly* suppress evidence. The witnesses returned to that theme several times during their testimony. But *Brady* and its progeny are clearly *not* aimed at punishing prosecutors for intentional misconduct—rather, the principles articulated in those cases are all aimed simply at ensuring that potentially exculpatory evidence is produced to the defense, without regard to the prosecutor's motives. Indeed, *Brady* itself, *on its face*, makes clear that its standards apply "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The U.S. Supreme Court repeated that point in *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (recognizing that *Brady* applies to evidence "suppressed by the State, *either willfully or inadvertently*" (emphasis added)).

Oregon courts have recognized that bedrock principle for more than forty years:

> *Brady* focuses the deprivation of due process squarely upon the harm to defendant and *not upon the motives of the prosecution*. It thus approves of cases holding 'negligent suppression' to be a violation of due process. In this light it rationally matters not . . . *whether [exculpatory material] was negligently, accidentally or maliciously withheld*.

*Hanson v. Cupp*, 5 Or. App. 312, 320 (1971) (emphasis added).

That same refrain is sounded over and over again in U.S. Supreme Court opinions and opinions from every federal circuit in the country. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is *the fairness of the trial, not the culpability of the prosecutor*" (emphasis added)); *Spicer v. Roxbury Correctional Institute*, 194 F.3d 547, 557 (4th Cir. 1999) ("The prosecutor's actions appear to have been based on a misunderstanding of his disclosure obligation under *Brady*. But this misunderstanding, or even his error in judgment about it, cannot justify releasing the prosecutor from the obligation."); *Gibbs v. Johnson*, 154 F.3d 253, 255–56 (5th Cir. 1998) ("Violation of the duty to disclose does not turn on good or bad faith. Rather, *it is the character of evidence, not the character of the prosecutor that matters*" (emphasis added)); *U.S. v. Lloyd*, 71 F.3d 408, 410 (D.C. Cir. 1995) ("The purpose in *Brady* is not to punish a wrongdoing prosecutor, but rather to assure that the defendant was not convicted without due process of law . . . irrespective of the good faith or bad faith of the prosecution."); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) ("In *Brady* itself, the Court stated that the failure to disclose material

information is a due process violation irrespective of the good faith or bad faith of the prosecution. … Otherwise, the prosecutor can proclaim that his heart is innocent and his failures inadvertent, a claim hard to disprove, while at the same time completely disregarding his duty to disclose.”).

In short, to the extent that there was ever a question as to whether *Brady* applies only in situations in which a prosecutor has engaged in intentional wrongdoing and/or knowingly suppressed evidence, that question was resolved long ago—it is abundantly clear that *Brady* is not so limited. Indeed, as I said during my testimony, I believe that the vast majority of *Brady* violations are attributable to something *other than* intentional misconduct by prosecutors. Rather, in my view, most such violations arise out of some combination of inadvertence and a lack of clear understanding of what one's *Brady* obligations are. I have faith that most prosecutors and law enforcement officers will do the right thing so long as they have clearly articulated standards to guide them. That is what this bill is intended to accomplish. It seems to me that that point should be uncontroversial.

**2. A prosecutor's *Brady* obligations extend beyond information “actually known to the prosecutor.”**

To my knowledge, for the past 18 years (*i.e.*, since the U.S. Supreme Court handed down *Kyles v. Whitley*) every federal circuit and state Supreme Court in the country has recognized the following principle of law that is clearly articulated in *Kyles*: “[T]he individual prosecutor has a *duty to learn* of any favorable evidence known to the others acting on the government's behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (emphasis added). This is no longer a debatable point; I am unaware of *any* current federal or state appellate law—from anywhere—that reads *Kyles* the way the opponents of SB492 apparently read it, *i.e.*, as suggesting that a prosecutor need only disclose information of which he/she is actually aware. The U.S. Supreme Court has been absolutely clear that *Kyles* means what it says. *See, e.g., Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam) (“*Brady* suppression occurs when the government fails to turn over *even evidence that is known only to police investigators and not to the prosecutor*” (emphasis added; internal quotation omitted)).

The U.S. Court of Appeals for the Ninth Circuit has explained the legal and common sense rationale underlying *Kyles*:

> Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.

*U.S. v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995). For that reason, “[t]he prosecutor is charged with knowledge of any *Brady* material of which the prosecutor's office *or the*

*investigating police agency* is aware." *Milke v. Ryan*, 07-99001, 2013 WL 979127 (9th Cir. Mar. 14, 2013) (citing *Youngblood* 547 U.S. at 869–70) (emphasis added); *see also, e.g., U.S. v. Price*, 566 F.3d 900, 908 (9th Cir. 2009) ("As the prevailing Supreme Court precedents make clear, the district court should have considered whether the government failed to disclose the relevant information in the possession of *any* of its agents involved in Price's prosecution, not just what the prosecutor himself personally knew." (emphasis in original)); *Carriger v. Stewart,* 132 F.3d 463, 480 (9th Cir.1997) (en banc) ("Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned.")

The "actually known to the prosecutor" standard simply cannot be squared with those cases. And despite suggestions from the bill's opponents to the contrary, those cases are not outliers, nor are the cited quotes taken out of their proper context. A list of cases from every circuit in the country standing for precisely the same proposition would fill many pages. And I am aware of *no* current authority to the contrary. It is simply impossible to read the existing case law as suggesting that a prosecutor's *Brady* obligations extend only to materials "actually known to the prosecutor"—federal due process standards clearly and adamantly impose on prosecutors a duty to learn of *Brady* information that is in the possession of other government agencies (including the police) who participate in the investigation (*i.e.*, those within the possession or control of the district attorney).

Just last week, Texas became the nineteenth state to codify a prosecutor's obligation to produce exculpatory materials within the prosecutor's possession or control. Specifically, the Texas Legislature—which has never been accused of bending to the will of the criminal defense bar—unanimously passed a bill that, similar to SB492, requires prosecutors to "disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment of the offense charged."

For all of these reasons, the proposed Dash 7 amendment—which would limit a prosecutor's disclosure obligation to information "actually known" to the prosecutor—should be rejected because it would graft a clearly unconstitutional standard onto Oregon's discovery statute. Perhaps of eved more immediate concern is the notion that District Attorneys' Offices may currently be practicing under the erroneous impression that they are constitutionally obligated to produce exculpatory information only if it is "actually known to the prosecutor." If that is the prevailing practice, it only highlights the need and urgency for a statute that accurately reflects prosecutors' duties under the clear standards articulated in *Kyles* and the other authority cited above.[1]

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[1] Opponents of the bill also suggested that the State would likely incur costs of approximately $250,000.00 per year litigating appeals that would stem from the legislation. However, as Bronson James demonstrated in his testimony, that projection is not consistent with the experiences of other states that have enacted similar laws; there is no evidence of any increased appellate activity resulting from such legislation.

**3. SB492 would not impose logistical obligations beyond those that currently exist under ORS 135.815.**

SB492's opponents testified at some length about concerns with the phrase "any material or information" in SB492. If I understood correctly, the concerns were that: (1) this language might be read to impose on prosecutors a requirement to seek out private third parties and otherwise to scour the Earth in search of potentially exculpatory information, thereby rendering the standard impractical; and (2) it is not clear how a prosecutor would even go about obtaining such information (for example, the rhetorical question was asked, "Would I just send a letter to the Portland Police Bureau?").

Again, this is not a novel concept conjured up by the defense bar, nor is its application particularly complicated, confusing or resource intensive. As Representative Hicks pointed out during the hearing, SB492 would apply only to material or information "within the possession or control of the district attorney." That standard *already exists* in ORS 135.815 with regard to other evidence. Specifically, prosecutors *already* have an obligation to produce the following information (among other information) "within [their] possession or control":

- "relevant written or recorded statements or memoranda of any oral statements of [persons whom the district attorney intends to call as witnesses at any stage of the trial]";
- "written or recorded statements or memoranda of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one";
- "reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which the district attorney intends to offer in evidence at the trial"; and
- "books, papers, documents, photographs or tangible objects . . . obtained from or belong[ing] to the defendant."

In the ordinary case, much of that material and information will initially be collected and maintained by the police and other investigating agencies. Some protocol is presumably in place between District Attorneys' Offices and those agencies to facilitate the transmission of that information from the law enforcement agencies to the District Attorneys' Offices. Whether that protocol consists merely of sending letters or something more, it seems that whatever protocol is currently in place to ensure that relevant discovery is provided by the law enforcement agencies to the District Attorneys' Offices would be the logical place to start in ensuring that those agencies also provide *Brady* material to the prosecutor. If District Attorneys' Offices are able to communicate effectively with law enforcement agencies to obtain the information currently required by ORS 135.815, it is difficult to understand the perceived difficulties in communicating with those agencies to obtain *Brady* material.

**4. SB492's "timing" provisions are consistent with existing rules and would not impose an unreasonable burden on the State.**

Finally, SB492's opponents voiced concerns with respect to the timing of disclosures that the bill would require. Specifically, the Committee was directed to lines 1-3 on page 2 of the bill, which provide that disclosure "shall occur without delay immediately after arraignment and prior to the entry of any guilty plea pursuant to an agreement with the state." Focusing on that language, it was suggested that this would impose an unreasonable burden on the State by requiring law enforcement to finish its investigation and obtain all of its *Brady* material prior to charging a defendant. There are two responses to that concern.

First, the concern is addressed (and should be resolved) by the language that immediately follows the portion that was cited to the Committee: "If the existence of the material or information is not known at that time, the disclosure shall be made immediately upon discovery without regard to whether the represented defendant has entered or agreed to enter a guilty plea." Obviously, that language contemplates that investigations will continue even after a defendant is charged, and that additional information will be gathered and produced as the case progresses. It simply requires that the State turn over potentially exculpatory information promptly upon obtaining it, whether that occurs before or after arraignment.

Second, pursuant to ORS 135.845, absent a court order to the contrary, a prosecutor's obligations to disclose other discovery under ORS 135.815 (witness statements, etc.) similarly "shall be performed as soon as practicable following the filing of an indictment or information in the circuit court or the filing of a complaint or information charging a misdemeanor or violation of a city ordinance." That standard has never (to my knowledge) been read to suggest that law enforcement must complete its investigation prior to charging a case. Similarly, there is no basis upon which to believe that the standard proposed for the timing of *Brady* material would ever be read that way, either.

I appreciate the opportunity to provide input in this important matter. I believe firmly that a statute that clearly articulates prosecutors' existing obligations would go a long way toward getting all of the relevant parties—prosecutors, defense lawyers, and judges—on the same page on these issues. I hope that this letter dispels any lingering concerns that SB492 may seek to do more than that. I would be happy to provide any additional information that the Committee might find helpful on these issues.

Sincerely yours,

David H. Angeli