

**WHATCOM COUNTY PROSECUTING ATTORNEY  
DAVID S. McEACHRAN**

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Jonathan Richardson  
Melissa Stone  
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Kathy Walker

October 13, 2017

**To: Sheriff Bill Elfo**

**From: David S. McEachran, Prosecuting Attorney**

**RE: Potential Impeachment Disclosure Determination re Whatcom County Sheriff's Deputy Ryan Rathbun**

I have completed my review of the Potential Impeachment Disclosure (PID) matter relating to Deputy Ryan Rathbun. This memo sets forth the information that I have reviewed, the standard applied, and my conclusions.

Information Reviewed:

I reviewed the following:

1. Notes from a defense interview involving Deputy Rathbun conducted on August 31, 2017.
2. A Face Book Image from Deputy Ryan Rathbun's Face Book page. The Facebook page showed the image of a female model wearing a Native American headdress with the following caption, "Victoria's Secret apologizes after use of a Native American headdress in fashion show draws outrage." The notation on the Facebook page indicated the following, "Time to get the small pox blankets out and shut some people up."

Standard Applied

A constitutional Due Process requirement for disclosure is set out in Brady v. Maryland, 373 U.S. 83 (1983). This requirement has been explained and modified by several subsequent cases. The Due

Process requirement applies to all information in the hands of government agencies. Prosecutors have “a duty to learn of any [exculpatory] information known to the others acting on the government’s behalf in the case, including the police.” Kyles v. Whitely, 514 U.S. 419 (1995). Impeachment evidence is especially likely to be ‘material’ under disclosure requirements. Silva v. Brown, 416 F.3d 380 (9<sup>th</sup> Cir. 2005); U.S. v. Olsen, 704 F.3d 1172 (9<sup>th</sup> Cir. 2013). Failure to comply with these requirements can lead to reversal of a conviction.

Independent of the constitutional due process requirement, there are court and practice rules that apply. Prosecutors are required by Criminal Rule 4.7(a)(3) to “disclose any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged.” This obligation is “limited to material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” Criminal Rule 4.7(a)(4). Once information is provided to the Prosecutor’s Office by law enforcement agencies, that material becomes subject to disclosure under Criminal Rule 4.7(a)(3).

A closely concurrent duty to disclose such information is also placed upon prosecutors by Rule of Professional Conduct 3.8(d).

The requirements of Due Process and those of Criminal Rule 4.7 and Rule of Professional Conduct 3.8 apply to evidence that could be used to impeach witnesses. The scope of the requirements addressing potential impeachment evidence is different. Due Process will focus upon evidence that raises issues of credibility or competency, and imposes an affirmative duty on prosecuting attorneys to learn of impeachment evidence for recurring witnesses for the prosecution/investigation team i.e. investigators and forensic scientists. The court and practice rules requirements are limited to information possessed by the prosecuting attorney, but categorically include any prior convictions of a recurring witness for the prosecution/investigation team.

A law enforcement officer’s or forensic expert’s privacy interest does not prevent disclosure of disciplinary records, as such records are considered to be of legitimate concern to the public. See, e.g. Dawson v. Daly, 120 Wn.2d 782, 795-96, 845 P.2d 995 (1993); Cowles Pub’g Co. v. State Patrol, 44 Wn. App. 882, 724 P.2d 379 (1986), rev’d on other grounds, 109 Wn.2d 712, 748 P.2d 597 (1988). Thus, Prosecuting Attorney’s disclosure requirements cumulatively include both an affirmative duty to seek out certain impeachment information and a duty to disclose information that may impact the witnesses credibility.

### Decision

I believe that a reasonable person could conclude that Deputy Rathbun made a disparaging comment related to Native Americans in this comment on Facebook. During the review of this matter I had the opportunity to speak to Deputy Rathbun concerning this entry. He indicated that he did not harbor negative feelings or bias against Native Americans and this remark was merely a parody on something he had seen on SouthPark, a cartoon broadcast show.

My staff and I have spent a great deal of time reviewing this matter and in reaching this decision. Notwithstanding that, many of my staff and I have worked directly with Deputy Rathbun and believe he is a well-qualified, hardworking and good deputy sheriff. We have not seen actions on his part that would reveal bias or prejudice against Native Americans or any other races that he has dealt with in his job as a deputy. Notwithstanding that, I have decided that the notice has to be given under these facts and under the case law and authorities dealing with discovery matters.

### Summary

The forgoing, if heard by a reasonable person (such as a judge or juror), could lead that person to conclude that Deputy Rathbun posted a negative comment concerning Native Americans on his Facebook page. A notice that summarizes this memorandum should be generated whenever Deputy Rathbun’s name appears on a witness list.

Sincerely yours,

David S. McEachran  
Prosecuting Attorney

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**To: Peter Ramey**  
**From: Gavin Van AusDeln**  
**Re: Potential Impeachment Disclosure Determination re Deputy Sheriff Ryan Rathbun**  
**Date: May 5, 2018**  
**Case#: 8Z0048511/Proctor, Austin**

On October 13, 2017, this office made a determination that certain information, if heard by a reasonable person (such as a judge or juror), could lead that person to conclude that Whatcom County Sheriff's Deputy Ryan Rathbun posted a negative comment concerning Native Americans on his Facebook page.

Succinctly, the facts that could lead to this conclusion are as follows: The Facebook page showed the image of a female model wearing a Native American headdress with the following caption, "Victoria's Secret apologizes after use of a Native American headdress in fashion show draws outrage." The notation on the Facebook page indicated the following, "Time to get the small pox blankets out and shut some people up."

This memorandum has been generated to provide the defense notice of this potential impeachment issue.