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DCCA No. 21-BG-024

DISTRICT OF COLUMBIA
COURT OF APPEALS

In the Matters of: MARY CHRIS DOBBIE, ESQUIRE Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 975939) REAGAN TAYLOR, ESQUIRE Respondent. An Attorney Licensed to Practice Law in the State of Tennessee	Board Docket No. 19-BD-018 Bar Docket No. 2014-D208 Board Docket No. 19-BD-018 Bar Docket No. 2014-D209

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND INDIVIDUAL FORMER ASSISTANT UNITED STATES ATTORNEYS

Pursuant to D.C. Court of Appeals Rule 29(a)(3), Movants the National Association of Assistant United States Attorneys (NAAUSA) and Individual Former Assistant United States Attorneys respectfully move for leave to file the attached Brief Amicus Curiae in support of Respondents. Counsel for all parties have consented to the filing of the brief.

INTEREST OF AMICI

The National Association of Assistant United States Attorneys (NAAUSA) is a nonpartisan professional membership association that has since 1993 represented the interests of our nation's 6,300 career federal prosecutors who work as AUSAs for the Department of Justice. Today, NAAUSA has a national membership of over 1,500 AUSAs. NAAUSA's members are professional men and women of integrity, loyal to the Department of Justice, and dedicated to carrying out its mission of serving the cause of justice. NAAUSA has a considerable interest in ensuring that rules of professional responsibility that apply to prosecutors are interpreted in a way that reflects both the importance of maintaining the highest ethical standards for prosecutors and an appropriate understanding of the difficulties prosecutors often face in complying with those standards.

The Individual Movants are former Assistant United States Attorneys: Barry Coburn (former Assistant United States Attorney for the District of Columbia, 1985-1989); Justin Dillon (former Assistant United States Attorney for the District of Columbia, 2008-2014); Aitan Goelman (former Assistant United States Attorney for the Southern District of New York, 1998-2003); Steven Gordon (former Assistant United States Attorney for the District of Columbia, 1975-1986); Andrew Lopez (former Assistant United States Attorney for the District of Columbia, 1999-2009); and Cassidy Pinegar ((former Assistant United States Attorney for the District of

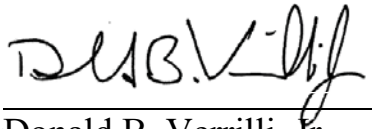
Columbia, 2006-2018). As former Assistant United States Attorneys, the Individual Movants share the interest of NAAUSA in ensuring that rules of professional responsibility applicable to prosecutors are interpreted in a manner that strikes an appropriate balance.

MOVANTS' EXPERIENCE AS PROSECUTORS CARRYING OUT THEIR DISCLOSURE OBLIGATIONS MAY ASSIST THIS COURT IN RESOLVING THE ISSUES ON APPEAL

Movants have considerable experience in making judgments about when and how to disclose potentially exculpatory information to defense counsel in fulfillment of their constitutional, legal and ethical obligations. Their experience as public servants in that role gives them a particularly informed perspective on the issues raised in this appeal. Their perspective may be of assistance to the Court in resolving the questions presented on appeal.

Dated: May 18, 2021

Respectfully submitted,



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I hereby certify that on May 18, 2021, I filed the foregoing with the Court's electronic filing system which electronically served the following:

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DCCA No. 21-BG-024

DISTRICT OF COLUMBIA
COURT OF APPEALS

In the Matters of: MARY CHRIS DOBBIE, ESQUIRE Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 975939) REAGAN TAYLOR, ESQUIRE Respondent. An Attorney Licensed to Practice Law in the State of Tennessee	Board Docket No. 19-BD-018 Bar Docket No. 2014-D208 Board Docket No. 19-BD-018 Bar Docket No. 2014-D209

ON APPEAL FROM REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND INDIVIDUAL FORMER ASSISTANT UNITED STATES ATTORNEYS

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INTEREST OF AMICI

The National Association of Assistant United States Attorneys (NAAUSA) is a nonpartisan professional membership association that has since 1993 represented the interests of our nation's 6,300 career federal prosecutors who work as AUSAs for the Department of Justice. Today, NAAUSA has a national membership of over 1,500 AUSAs. NAAUSA's members are professional men and women of integrity, loyal to the Department of Justice, and dedicated to carrying out its mission of serving the cause of justice.

The Individual Amici are former Assistant United States Attorneys, many of whom served in the District of Columbia.[1] They have considerable experience in making judgments about when and how to disclose potentially exculpatory information to defense counsel in fulfillment of their constitutional, legal and ethical obligations. Their experience as public servants in that role gives them a particularly informed perspective on the issues raised in this appeal. Their perspective may be of assistance to the Court in resolving the questions presented on appeal.

[1] The Individual Amici are: Barry Coburn (former Assistant United States Attorney for the District of Columbia, 1985-1989); Justin Dillon (former Assistant United States Attorney for the District of Columbia, 2008-2014); Aitan Goelman (former Assistant United States Attorney for the Southern District of New York, 1998-2003); Steven Gordon (former Assistant United States Attorney for the District of Columbia, 1975-1986); Andrew Lopez (former Assistant United States Attorney for the District of Columbia, 1999-2009); and Cassidy Pinegar (former Assistant United States Attorney for the District of Columbia, 2006-2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises an issue of pressing importance for the administration of justice in the District of Columbia. D.C. Rule of Professional Conduct 3.8(e) provides that a prosecutor shall not "intentionally fail to disclose to the defense . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." By its plain terms, a violation of Rule 3.8(e) requires proof that a prosecutor acted with the intention to subvert or evade the requirement that the defense be provided with evidence in the prosecution's hands that tends to negate the guilt of the accused. The Board on Professional Responsibility (the "Board") has, however, read the intentionality requirement out of Rule 3.8(e). As the Board would have it, a Rule 3.8(e) violation occurs *every time* a prosecutor chooses not to disclose information that a court or the Board later determines (with the benefit of 20/20 hindsight) reasonably should have been disclosed. That ruling is deeply unfair to prosecutors who are routinely faced with difficult judgments about what their legal and ethical obligations require. It also threatens to bring about unwarranted changes in established prosecutorial practices that could have unpredictable effects on the criminal process, creating risks to

victims, law enforcement officers and other witnesses and impeding the search for truth.[2]

1. Prosecutors are held to particularly high ethical standards. That is as it should be. Prosecutors wield an awesome power. They can direct the full force of the government's criminal process against a citizen—a process that typically imposes enormous emotional stress, reputational harm, and often a loss of liberty. With that power comes correlative responsibility. "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." ABA Criminal Justice Standards, The Prosecution Function 3-1.2(b); see also *id*. ("The prosecutor serves the public interest and should act with integrity and balanced judgment . . ."). Prosecutors are therefore more than just zealous advocates for the public's interest convicting and punishing the guilty. They are also public servants with a responsibility to minimize the risk that the innocent are not wrongly convicted. In recognition of these principles, the District of Columbia, like virtually all jurisdictions (and the American Bar Association) has codified the special ethical obligations for prosecutors in its Rules of Professional Conduct. See generally Rule 3.8.

[2] Amici generally agree with Respondents Dobbie and Taylor on the additional issues raised on appeal. This brief will focus on the meaning of "intentionally fail[s] to disclose" in Rule 3.8(e) because of the systemic importance of that issue for the practice of law and the administration of justice in the District of Columbia.

At the same time, the special ethical requirements applicable to prosecutors must be interpreted and applied in a manner that takes into account the difficult questions prosecutors routinely face when seeking in good faith to comply with their obligations under the Constitution, governing law, and applicable ethical rules. Overly aggressive interpretations of ethical requirements in particular can impose real costs. Such an approach risks systemic unfairness to prosecutors, who routinely confront difficult judgment calls that must be made under pressure and with insufficient time for full consideration or extended reflection. It is one thing to say, with the benefit of 20/20 hindsight, that a prosecutor made the wrong call on a particular matter. It is quite another to say that a misjudgment of this kind should brand the prosecutor as unethical and subject to potentially serious disciplinary consequences. And costs fall not merely on prosecutors themselves but on society as a whole. Overly aggressive interpretation and application of professional responsibility rules can also "result in broad and unwarranted changes in traditional law enforcement and defense practices and procedures." *Grievance Committee for the Southern District of New York* v. *Simels*, 48 F.3d 640, 644 (2d Cir. 1995) (discussing a disciplinary rule relating to contacts with adverse parties). It is therefore vital that ethical rules applicable to the prosecutorial function be interpreted and applied in a balanced way that reflects the full range of relevant considerations.

2. That is especially true for the question presented on this appeal. A prosecutor's obligation to disclose evidence or information that may tend to disprove the guilt of the accused is plainly an important guarantee of the fairness and integrity of criminal proceedings—one with constitutional and statutory, as well as ethical, foundations. At the same time, deciding whether particular information should be disclosed will often involve nuanced judgments. Even prosecutors seeking to err on the side of disclosure—as federal prosecutors, including the respondents in this case, are trained to do in close cases, United States Attorneys' Manual ("USAM") § 9-5.001(B)(1)—are vulnerable to being second-guessed after the fact. Prosecutors should not have to operate in the shadow of a constant threat that they will be sanctioned for good-faith misjudgments when they are doing their best to comply with disclosure obligations under governing law. See *Disciplinary Counsel* v. *Kellogg-Martin*, 923 N.E.2d 125, 130 (Ohio 2010). Indeed, risks of this kind are particularly pronounced for prosecutors in the District of Columbia. Rule 3.8(e) requires disclosure of information that tends to negate guilt even if the failure to disclose would not violate *Brady* v. *Maryland*, 373 U.S. 83 (1963), or other disclosure requirements imposed by law. See *In re Kline*, 113 A.3d 202, 210-213 (D.C. 2015) (Rule 3.8(e) may be violated even if information that a prosecutor fails to disclose is not material to the outcome of the trial). The indeterminancy of that standard, particularly at the margins, exacerbates the unfairness of after-the-fact

assessments that a prosecutor misjudged the scope of her ethical disclosure obligations.

In making judgments about whether and how to disclose information to the defense, prosecutors also must account for the effects disclosure may have on other participants in the criminal process. In particular cases, disclosure can create risks that victims, law enforcement officers, and other witnesses, will face danger, intimidation, embarrassment, or at a minimum create the specter of such consequences. And those risks can in turn create systemic problems for the administration of justice if witnesses become reluctant to come forward, making it more difficult to protect society by convicting the guilty.[3] To mitigate such risks, prosecutors must therefore consider both what information should be disclosed and how that disclosure should occur.

Rule 3.8(e) sensibly responds to these competing pressures by providing that a prosecutor acts unethically only when the prosecutor "intentionally fail[s] to disclose to the defense . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." As its plain text makes clear, Rule 3.8(e) does not apply automatically whenever a prosecutor makes a decision not to disclose evidence or information that a finder of fact later

[3] Such costs can be particularly severe in national security cases, which often can be brought only if confidential human sources are willing to cooperate. Disclosure can put such sources at enormous risk.

determines should have been disclosed. It applies only when a prosecutor acts with a conscious purpose to evade her responsibility to disclose information that tends to negate the guilt of the accused. This intentionality requirement appropriately balances the importance of the underlying disclosure obligation and the systemic risks that would follow from an overly aggressive interpretation of the rule's requirements. It avoids the unfairness to individual prosecutors that would arise from second-guessing their good faith efforts to comply with their ethical and legal obligations. And it reduces the risks to victims, law enforcement officers and other witnesses (not to mention to the administration of justice itself) that would result from a rule that incentivized prosecutors to engage in overly broad and unnecessary disclosures to avoid the stigma or worse that would follow upon a finding that the prosecutor acted unethically.

3. The decision of the Board in this case has upended the careful balance set forth in the text of Rule 3.8(e) by rendering the intentionality requirement of Rule 3.8(e) a dead letter. The Board concluded that a prosecutor acts with the requisite intention to violate the rule whenever a prosecutor intends to do what the prosecutor did, even if the prosecutor in good faith believed that her actions complied with the rule's requirements. Indeed, the Board left no doubt about its interpretation of the pivotal language:

> The intent required is not the intent to violate the Rule; it's the intent to withhold information that a reasonable prosecutor would have understood

> tended to negate the guilt of the accused. If a prosecutor determined that 100 pages of material needed to be disclosed as *Brady* but, due to a copying error, only produced fifty of those pages, that prosecutor would not violate Rule 3.8(e); her failure to disclose was accidental, not intentional. Here, though, Respondents disclosed everything they intended to. They were wrong about what should be disclosed. . . . As a result, they intentionally failed to include facts that a reasonable prosecutor would have known were required to be disclosed.

Report & Recommendation of the Bd. on Pro. Responsibility 17 ("Bd. Rpt.").

That unprecedented interpretation—rendered for the first time in a proceeding 35 years after the Rule was first enacted—cannot be squared with the Rule's text, the history of its adoption, or fairness and sound policy. As the Board has now stated in plain terms, a prosecutor will violate Rule 3.8(e) *in every case* in which the prosecutor makes a choice not to disclose information that a trier of fact later determines reasonably should have been disclosed. The only failures to disclose that count as "unintentional" under the Board's reading are failures that occur because the prosecutor was unaware of the evidence altogether or intended to disclose the information but inadvertently failed to provide it to the defense.

The Board's application of its unprecedented interpretation of Rule 3.8(e) to the facts of this proceeding underscores just how extreme and unreasonable that reading is. As set forth more fully in the briefs filed by Respondents Dobbie and Taylor, the Board's finding of an ethical violation turned on two key facts: (i) the failure to include in a motion *in limine* provided to defense counsel the fact a prosecution witness, Officer Childs, had filed a false disciplinary report alleging that

a prisoner had committed assault; and (ii) the failure to disclose until the first day of trial that Officer Childs had been demoted. But it blinks reality to conclude, as the Board did, that Respondents Dobbie and Taylor acted with the conscious purpose of evading their responsibility to disclose information that they should have disclosed to the defense.

As to the alleged failure to disclose Officer Childs' submission of a false disciplinary report, Respondents *did disclose to the presiding judge* (Judge Morin) an investigatory report of his employer, the Department of Corrections (the "Collins Report"), that addressed the very issue. Respondent Dobbie also summarized the Collins Report in a motion *in limine* provided to both the court and defense counsel, and expressly asked Judge Morin to further disclose to the defense anything else in the Report that the Judge determined would tend to negate the guilt of the accused.[4] To be sure, the key information about Childs' filing of a false disciplinary report ultimately was not disclosed. But that was the direct result of what all agree was an inadvertent error. The copy of the report provided to the court was missing several

[4] On the first day of trial, Respondent Dobbie said the following in court:

> I've made representations to the Court in the motion, and the Court has the final [Collins] report, to be clear. And if the Court finds that there's anything in the final report that should additionally be disclosed to defense counsel, if there's anything that I didn't include [in the motion *in limine*] that would be useful . . . the government is requesting that.

(11/2/09 Tr. 22.)

pages, including the pages that discussed Childs' submission of a false report. Report & Recommendation of the Ad Hoc Hearing Committee, Findings of Fact ("FF") 47. The Board determined (correctly) that this inadvertent miscue violated no ethical rule. But the Board nevertheless found a violation of Rule 3.8(e) even though Respondents believed they had turned over the entire report to Judge Morin and asked him to disclose anything in it that might be exculpatory.

The Board believed that this remarkable conclusion was dictated by its reading of Rule 3.8(e)'s intentionality requirement. According to the Board, Respondents violated Rule 3.8(e) because they intended to say what they said in the motion *in limine*, and that motion failed to disclose directly to the defense that Childs filed a false report. Had the Board instead followed the plain text of the Rule and asked whether Respondents intended to violate their disclosure obligations, it could not possibly have reached the conclusion it did on these facts. By turning the Collins Report over to the court and requesting that the court disclose anything exculpatory in it, Respondents unambiguously demonstrated their good faith intent to comply with their disclosure obligations through a procedure (disclosure to the court) that Judge Morin himself described as widely accepted at the time. FF 35. See also Brief for Respondent Taylor at 9-15 (setting forth legal authority supporting propriety of this approach). Indeed, even accepting the Board's misreading of Section 3.8(e), it is difficult to see how one could conclude that Respondents intended to withhold

anything in the Collins Report from the defense. After all, Respondent Dobbie urged Judge Morin to disclose anything in the Report that should be disclosed.

The Board's conclusion regarding the disclosure of Officer Childs' demotion was equally unreasonable. Respondents *did disclose* the fact of Officer Childs' demotion at the outset of trial, and Judge Morin denied defense counsel's request to sanction the prosecutors for untimely disclosure—finding that the defense suffered no prejudice from not learning this fact earlier. FF 52. And Respondent Dobbie testified that she had not included the fact of the demotion in the motion *in limine* only because she had forgotten it (and the Hearing Committee and the Board both credited that testimony (FF 48; Bd. Rpt. 18-19, 21)). Under no plausible reading of Rule 3.8(e)'s text could Respondents have "intentionally failed to disclose" the fact of Childs' demotion in the motion or otherwise. Nevertheless the Board found a violation. Without ever mentioning that Dobbie *did* disclose Childs' demotion, the Board concluded that Respondents violated their ethical obligations by failing to include the information in the motion *in limine*. Although the Board's reasoning is difficult to follow, it appears to have concluded that Respondents "intentionally failed to disclose" Childs' demotion because they intended to include in the motion *in limine* only what they included. The Board made no effort to square that conclusion with the fact that Respondent Dobbie did not include the fact in the motion because she had forgotten it, or with the fact that Childs' demotion was

disclosed in a manner that Respondents and Judge Morin thought was timely—a fact that would preclude finding a violation on the correct reading of Rule 3.8(e)'s intentionality requirement, or even under the Board's misreading.

As important as it is to reverse the unreasonable and unfair ruling that Respondents acted unethically—and to vacate the onerous sanction of suspension—it is even more important that this Court rectify the Board's misreading of Rule 3.8(e)'s intentionality requirement. If left uncorrected, that ruling will create an unacceptable risk of arbitrary and unfair enforcement. It will also threaten the administration of justice in unacceptable ways.

Argument

I. A Violation of Rule 3.8(e) Requires Proof that a Prosecutor Evaded the Obligation to Disclose Evidence or Information that Tended to Negate the Guilt of the Accused.

The Board's interpretation of Rule 3.8(e) cannot be squared with the Rule's text, its drafting history, apposite precedent from other jurisdictions, or thirty-five years of practice under the rule.

1. The text of Rule 3.8(e) is clear. It states that a prosecutor shall not "intentionally fail to disclose . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." The critical word in that sentence is *intentional*. That word has a well-recognized and generally accepted meaning when used in statutes, regulations and rules—

particularly those that regulate conduct and impose legal consequences for particular actions or failures to act. Intentional means "on purpose" or "deliberate." *Intentional*, Oxford University Press, *available at* https://www.lexico.com/en/definition/intentional. It stresses a conscious awareness of the end to be achieved. When used in the criminal or regulatory context it connotes a high degree—indeed, the highest degree—of culpability. A person commits an intentional murder when the person acts with a conscious plan to kill the victim. A person acts with intentional cruelty when the person desires to inflict gratuitous pain and suffering. Intentional action is, in sum, action undertaken with a conscious purpose or desire to bring about the proscribed result. See *Intentionally*, Black's Law Dictionary (6th ed. 1990) ("[A] [p]erson only acts 'intentionally' if he desires to cause [the] consequences of his act or he believes [the] consequences are substantially certain to result."); Model Penal Code § 2.02 (Am. L. Inst., Proposed Official Draft 1962) ("a person acts purposely [*i.e.* intentionally] with respect to a material element of an offense when . . . it is his *conscious object* to engage in conduct of that nature or to cause such a result" (emphasis added)).

In Rule 3.8(e) the word "intentionally" modifies the term "fail to disclose." A person "fails" to do something when that person does not carry out an expected duty or requirement. *Fail*, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/fail. Rule 3.8(e) thus prescribes an

ethical duty: the duty to disclose evidence or information that tends to negate the guilt of the accused. But a prosecutor acts unethically under the Rule only if the prosecutor "intentionally fail[s]" to fulfill that duty. As a textual matter, therefore, Rule 3.8(e) covers only situations in which a prosecutor acts with the conscious purpose or desire not to fulfill her duty to disclose information that may tend to negate the guilt of the accused. In other words, not every decision that proves to be a misjudgment about what must be disclosed constitutes a violation of Rule 3.8(e). Evasion of the disclosure requirement must be the prosecutor's conscious goal.

2. The drafters of Rule 3.8(e) made a deliberate choice to limit the scope of Rule 3.8(e) to conduct that is intentional in the sense described above. In 1986, the D.C. Bar Model Rules Committee and the Board of Governors of the D.C. Bar recommended to this Court the language that is now in Rule 3.8(e). The drafters began with the ABA Model Rule, which provides that prosecutors shall disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused." Model Rules of Professional Conduct r. 3.8(d) (Am. Bar Ass'n 1983). But they did not recommend adoption of the ABA language. Instead, as explained in the "Jordan Report," they made significant changes.[5] Most relevant here, of

[5] *Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended By the Board of Governors of the District of Columbia Bar* at 171-76 (Nov. 19, 1986).

course, they added an intentionality requirement. The reasoning that led to this recommended change is instructive. As the drafters explained, the proposed Rule drew from both ABA Model Rule 3.8(d) (quoted above) *and* Section 3-3.11(a) of the ABA Standards for Criminal Justice. Jordan Report at 175. Critically, Section 3-3.11(a) of the Model Standards included an intentionality requirement. Standards for Criminal Justice, The Prosecution Function, Standard 3-3.11 (1980) (Am. Bar Ass'n 2d ed. 1980) ("[i]t is unprofessional conduct for a prosecutor *intentionally* to fail to make disclosure to the defense . . . of the existence of evidence which tends to negate the guilt of the accused . . . ." (emphasis added)). And the ABA Standards for Imposing Lawyer Sanctions expressly defined intentional conduct as acting "with the *conscious objective or purpose* to accomplish a particular result."

This history strongly indicates that the drafters sought to limit the application of Rule 3.8(e) to situations in which a prosecutor acts with the conscious objective of evading the duty to disclose information that may tend to negate the guilt of the accused. Had the drafters intended to create the standard that the Board has now adopted, they would have written the rule to say that a prosecutor acts unethically by failing to disclose any information of which the prosecutor is aware that the prosecutor reasonably should know tends to negate the guilt of the accused. But they did not adopt any such expansive language. Instead, they moved decisively in the opposite direction by including an intentionality requirement that—in both this

specific context and more generally—is generally understood to limit violations to conscious wrongdoing.[6]

3. Courts applying analogous rules of professional responsibility with intentionality requirements have interpreted such requirements in precisely this way. For example, in *In re Conduct of Campbell*, 202 P.3d 871, 881 (Or. 2009), the Oregon Supreme Court explained in a disciplinary case, relying on the ABA "mental state" definitions:

> "When a lawyer knowingly takes action, the lawyer obviously intends to accomplish some result; the action taken is a result. So, for instance, in this case, the accused intended to . . . take a position opposite to that of the trustee. However, the accused did not intend to harm the entity that he viewed as his prior client . . . . In prior cases in which the court has found that a lawyer acted intentionally it has required a showing that the result that the accused intended was not the act taken, but the harmful (to others) or beneficial (to the accused) effect of that act."

[6] In reaching a contrary conclusion, the Board placed great weight on the fact that Rule 3.8(e) imposes an obligation to disclose information that a prosecutor "reasonably should know" is exculpatory. That reliance was misplaced. As explained in Respondent Dobbie's brief, the intentionality requirement was included in the Rule to counterbalance the decision to expand the Rule to cover information that the prosecutor should have known was exculpatory. Dobbie Br. at 20-22. Moreover, the Jordan Report suggests that the "reasonably should know" language was included to prevent a prosecutor from evading the Rule's disclosure obligation by deliberately turning a blind eye to exculpatory information that is readily available (such as information in the possession of law enforcement officers). Reading the "reasonably should know" language to cover such conduct is entirely consistent with the Rule's intentionality requirement. But that language does not justify the Board's decision to jettison the intentionality requirement altogether.

Accord *Disciplinary Matter Involving West*, 805 P.2d 351, 354 (Alaska 1991) ("intentionally" requires the "conscious objective or purpose to accomplish a particular result" (citation omitted); *In re Disciplinary Proceeding Against Vanderveen*, 211 P.3d 1008, 1016 (Wash. 2009) ("conscious objective or purpose to accomplish a particular result") (internal citation omitted).

4. Consistent historical practice also sheds light on the correct meaning of Rule 3.8(e). In its decision in this case, the Board did not cite *any* prior ruling in which it interpreted this Rule to find a violation based on nothing more than a prosecutor's choice not to disclose information that a trier of fact subsequently determines should have been disclosed—and there appears to be no reported Board decision interpreting the Rule as the Board did here. That is telling. Over the thirty-five years of the Rule's existence, District of Columbia and federal courts have identified numerous instances in which prosecutors failed to make timely disclosure of exculpatory information. Indeed, the Board's decision in this case makes reference to several such cases. See Board Ruling at 13 n.9. In every one of the cases cited by the Board (and doubtless many more) a prosecutor chose not to disclose the information that the court subsequently held should have been disclosed.[7] Under the Board's current interpretation of Rule 3.8(e), therefore, at

[7] In *Miller* v. *United States*,14 A.3d 1094, 1123 (D.C. 2011), this Court found a *Brady* violation and reversed the conviction. In *Boyd* v. *United States*, 908 A.2d 39, 63 (D.C. 2006), this Court concluded that the prosecution should have turned over

least one prosecutor in each of these cases "intentionally failed to disclose" information that tended to negate the guilt of the accused. But there is no record of the Board initiating disciplinary proceedings (or courts referring prosecutors for investigation of possible ethical violations) in any of these cases. And the Board cited no other case in which it imposed discipline for a violation of Rule 3.8(e). If Rule 3.8(e) meant what the Board now claims it means, then surely there would have been many such proceedings and many decisions finding unethical conduct. The absence of any such proceedings and decisions is a powerful indication that Rule 3.8(e) has never been understood to apply in the manner the Board applied it in this proceeding.[8]

5. As described above (pages 8-11 *supra*), Respondents Dobbie and Taylor did not demonstrate any conscious desire to evade their duty to disclose to the

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exculpatory information under *Brady* and remanded for a determination of prejudice. In *Zanders* v. *United States*, 999 A.2d 149, 164 (D.C. 2010), this Court found that prosecutors chose to withhold information that *Brady* required them to disclose but ultimately found no prejudice. In *Perez* v. *United States*, 968 A.2d 39, 66 (D.C. 2009), this Court found there was "no question" that prosecutors should have turned over information that they were required to disclose but again found no prejudice. On the Board's view, every one of these cases (and presumably many others in which courts found violations of *Brady*, *Giglio*, or The Jenks Act) should have resulted in a disciplinary proceeding finding a violation of Rule 3.8(e). Yet apparently none did.

[8] For the reasons explained by Respondent Dobbie, requiring proof of a conscious purpose to evade applicable disclosure obligations is entirely consistent with *In re Kline*, 113 A.3d 202 (D.C. 2015), which involved the question of what kinds of evidence sufficed to justify an inference of such a conscious purpose.

defense information that might tend to negate the guilt of the accused. Quite the contrary. They recognized that it was at least debatable whether additional information in the Collins Report should be disclosed so they followed the accepted practice of disclosing the report to the presiding judge and asking the judge to determine what in the report should be disclosed to the defense. The only conclusion that can reasonably be drawn from these facts is that Respondents sought to ensure that the defense received everything that they should have received, but ultimately left that determination to the court. That course of action cannot plausibly be described as demonstrating a conscious purpose to avoid compliance with the disclosure obligations of Rule 3.8(e). And the same is true about the disclosure of Officer Childs' demotion. Respondents *did disclose* that information to the defense. The only question is whether they waited too long to do so (the presiding judge thought not). But the reason for any delay was that Respondent Dobbie had forgotten this fact. So the delay in disclosure was inadvertent—not intentional. Under a proper interpretation of Rule 3.8(e), therefore, the Board's finding of a violation must be reversed.

II. The Board's Contrary Reading of Rule 3.8(e)'s Intent Requirement Creates Unfairness and Risks to the Sound Administration of Justice

It makes a great deal of difference to the sound administration of justice whether Rule 3.8(e) is interpreted to require proof of a conscious purpose to evade a prosecutor's disclosure obligations. If that requirement is read out of the Rule,

then every choice a prosecutor makes not to disclose information that a court or ethics tribunal later concludes should reasonably be viewed as exculpatory *automatically* constitutes an ethics violation that can trigger harsh and permanently damaging sanctions including—as in this case—a lengthy suspension from the practice of law. Such a draconian approach is unfair because it is insufficiently sensitive to the difficult judgments prosecutors must make regarding disclosure; it is unnecessary because prosecutors already face powerful incentives to meet their disclosure obligations; and it is unwise because it threatens the sound administration of justice.

1. The Board's interpretation is unfair. In some cases, the prosecutor's obligation to disclose may be clear. But in many others the question whether particular information tends to negate the guilt of the accused will be close and difficult, and will be made under time pressure with less than complete knowledge. Yet, according to the Board, *every* misjudgment risks violating Rule 3.8(e) if a court later determines that information reasonably should have been disclosed. In the context of the underlying disclosure obligations themselves, however, the U.S. Supreme Court has recognized that "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor." *United States* v. *Bagley*, 473 U.S. 667, 675 n.7 (1985). A rule making every misjudgment by a prosecutor a

violation of the rules of professional responsibility places a similarly "impossible burden" on prosecutors. Every such decision will require prosecutors to weigh not only what the Constitution and laws require of them but also the risk to their professional reputations and even their ability to practice law at all. Inevitably, some number of prosecutors will be drawn into lengthy and contentious disciplinary proceedings that take a substantial emotional and financial toll, and distract from their ability to carry out their vitally important public responsibilities. While it is entirely appropriate for prosecutors to bear those burdens when they act with a conscious purpose to avoid or subvert their responsibilities, it is not appropriate to subject prosecutors to such stress on the basis of good-faith misjudgments when they seek to fulfill those responsibilities.

2. The Board's interpretation is unnecessary to achieve the purposes of Rule 3.8(e). Properly read, the Rule requires prosecutors in all cases to make a good-faith effort to comply with their disclosure obligations. Anything less would appropriately subject the prosecutor to disciplinary sanctions. In the vast majority of instances prosecutors meet their disclosure obligations in good faith, and no prosecutor wants the stain of a disciplinary sanction on her record. Equally to the point, the underlying constitutional and statutory disclosure requirements already impose powerful incentives on prosecutors to meet their disclosure obligations.

Failure to do so can—and not infrequently does, see footnote 7 *supra*—result in reversal of a criminal conviction.

3. Most fundamentally, the Board's interpretation will have adverse consequences for the administration of justice. As a matter of inescapable logic, the Board's newly minted view means that in every case in which a prosecutor makes a decision not to disclose information that prosecutor will have violated Rule 3.8(e) if a court or the Board itself concludes after the fact that the decision was unreasonable. Accordingly to the Board, the only failures to disclose that do not trigger disciplinary sanctions are those that arise from inadvertence, *i.e*., when a prosecutor does not know about the exculpatory information or tries to disclose it but accidentally fails to do so. (The Board might also allow a narrow category of exceptions for situations in which the reviewing court *expands* disclosure obligations beyond those that existed at the time of the prosecutor's decision, but did not address that issue here.)

Thus in virtually every case in which the Disciplinary Counsel learns that a court has concluded that a prosecutor has failed to disclose exculpatory information—even those cases in which the court concludes that the failure ultimately did not affect the outcome at trial—Disciplinary Counsel will, in theory, have to do what it did here and open an investigation. Defense counsel in criminal cases will also be able to take advantage of the Rule by referring prosecutors to disciplinary authorities whenever they are dissatisfied with the disclosures they

receive. It is no answer to say that Disciplinary Counsel can exercise its discretion in deciding whether to initiate a disciplinary proceeding in such cases. The Board has now defined nearly every erroneous choice not to disclose as a violation of Rule 3.8(e). While the Hearing Committee or the Board's views about the seriousness of such violations might provide a basis for modest sanctions, they would not provide any principled basis for refusing to find a violation of the Rule itself. If Disciplinary Counsel, the Hearing Committee or the Board respond by selectively pursuing (or finding violations) only those cases that they believe meet some ill-defined threshold of seriousness they will inevitably be applying a standard different from the one they now claim that Rule 3.8(e) imposes. But prosecutors will have no ability to know what that standard is. That is a recipe for arbitrary and unfair enforcement.

Problems extend even further. In some cases, disclosure to the defense will reveal information that exposes the victim, police officers, or other witnesses to increased risk of exposure and retaliation. Such considerations should and do influence the judgments prosecutors make about whether and how information should be disclosed. Indeed, in this very case Respondents were concerned about the risks to officers named in the Collins Report if that Report were ever circulated within the jail. The added risk of professional censure for even good faith misjudgments could well lead prosecutors to err in the direction of unnecessary disclosure that increases these risks. And one lesson prosecutors could easily draw

from the facts of the present case is that even disclosure to the court or similar protective order procedures may not shield them from professional discipline if the Board ultimately concludes that the prosecutor should have disclosed the information directly to the defense. As the U.S. Supreme Court has recognized with respect to the underlying *Brady* obligation itself, an overly expansive "right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.'" See *Bagley*, 473 U.S. at 675, n.7 (quoting *Giles* v. *Maryland*, 386 U.S. 66, 117 (1967). The Board's misinterpretation of Rule 3.8(e) poses comparable risks.

It is for reasons just as these that the Colorado Supreme Court interpreted its rule of professional responsibility to apply only when a prosecutor acts with the conscious purpose of evading disclosure requirements. See *In re Attorney C*, 47 P.3d 1167, 1174 (Colo. 2002). Although Colorado's analogous rule does not contain an express intentionality requirement, the Colorado Supreme Court recognized that the need to limit the application of its rule to appropriately serious violations compelled the conclusion that such a limitation should be inferred from the rule's text. Notably, the Colorado Supreme Court supported its conclusion by reference to the ABA Standards for Criminal Justice—the very same source that the drafters of Rule 3.8(e) drew from, see page 15 *supra*—which provided that a "prosecutor should not *intentionally* fail to make timely disclosure to the defense . . . of all evidence or

information which tends to negate the guilt of the accused." 47 P.3d at 1174 (quoting the Standards for Criminal Justice: Prosecution Function and Defense Function 3–3.11(a) (Am. Bar Ass'n 3d ed. 1993) (emphasis added)). The Colorado Supreme Court went on to note that "[t]he ABA standard anticipated that the rule would address only the most serious of cases in which conduct occurs that reflects upon the character of the prosecutor: conduct that cannot be fully addressed by orders relating to the underlying case." *Id*.

The Colorado Supreme Court struck the appropriate balance. This Court should follow its persuasive reasoning and restore balance to the application of Rule 3.8(e) in the District of Columbia.

CONCLUSION

For the foregoing reasons, the decision of the Board should be reversed.

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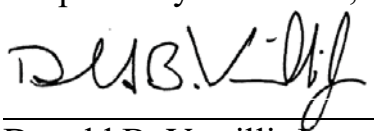
Respectfully submitted,



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