DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	:	
ANDREW J. KLINE, ESQUIRE,	:	
Respondent	:	**Bar Docket No. 2009-D522**
Member of the Bar of the District of Columbia Court of Appeals.	:	
Bar Number: 441845	:	
Date of Admission: May 2, 1994	:	

BAR COUNSEL'S CORRECTED BRIEF IN SUPPORT OF THE REPORT OF THE HEARING COMMITTEE AND IN OPPOSTION TO RESPONDENT'S OBJECTIONS THERETO

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Bar Counsel respectfully submits this brief in support of the Report and Recommendation of the Hearing Committee and in opposition to Respondent's objections, and the brief of Amicus Curiae supporting objections to the Hearing Committee's findings, conclusions of law and recommended sanction of public censure.

I. INTRODUCTION

Respondent challenges the Hearing Committee's fact-findings, particularly its determination that he intended to withhold evidence he should have known was exculpatory. He focuses on the Hearing Committee's credibility determinations and inference-drawing, without acknowledging they lie squarely within the Committee's purview. He counters with misleading characterizations and tortuous logic, navigating around the central facts that proved the violation of Rule 3.8(e). Respondent relies on sleights of citation that the Board should examine with care. For example, to dismantle the Hearing Committee's finding of intent, Respondent quotes and claims to "unpack" a passage that describes events at Shelton's second trial. (Resp. brf. at

23, citing FF 43-44). In fact, the Hearing Committee did not rely on that passage at all in its four-page section (HCR 17-20 (FF 50-60)) finding Respondent made a "deliberate, if not tactical" decision to withhold exculpatory evidence. HCR 19 (FF 57).[1] The Committee rejected Respondent's elaborate explanations to the contrary.

Respondent also claims that his notes about Boyd (the victim/witness) telling police he did not know who shot him were not "material" to deciding whether Shelton did the shooting; thus Respondent "would not have recognized" that he was required to disclose them. Resp. brf. at 43. He imports a materiality requirement into Rule 3.8(e) from *Brady v. Maryland*, and faults the Hearing Committee for looking to the plain language of the Rule, requiring -- without reference to materiality -- that the prosecutor timely disclose "evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." HCR 28.

Respondent pins his hopes on Comment [1] to Rule 3.8(e), exhaustively recounting the Justice Department's largely fruitless efforts to insert restrictive language during the rule-making. Resp. brf. at 37-39 and appended exhibits. However, the Hearing Committee pointed out that the Comment simply means what it says, namely that Rule 3.8(e) does not affect the prosecutor's obligations imposed by other sources of law in the District of Columbia. HCR 28. Despite Respondent's dire warnings about the novelty of this conclusion, the Hearing Committee noted that reading a "materiality" constraint into Comment [1] "would be inconsistent with relevant decisions of the Court of Appeals." HCR 29. As the Committee explained, "[t]he Court

[1] Respondent criticizes the Committee for relying in that passage on the statements and testimony of the successor prosecutor, Ms. Dixon, concerning Respondent's reasons for withholding the statements. The Committee did conclude her evidence showed that Respondent knew about the Boyd Hospital Statement and decided not to disclose it. HCR 44. But the Committee did not even mention Ms. Dixon's statements or testimony as underpinning its ultimate finding in the section it titled "Respondent intentionally failed to disclose evidence that he reasonably should have known tended to negate the guilty of Arnell Shelton." HCR 17-1 (FF 50-60).

has distinguished the expansive duty to disclose before trial from the narrower class of non-disclosures that "lead to a reversal of a criminal conviction." *Id.*

Finally, Respondent complains about the Hearing Committee's finding that the Boyd Statement in fact *was* material under the *Brady* standard. Resp. brf. at 58-67; HCR 37-42. Respondent made his decision to withhold the evidence before trying his case to Shelton's *first* jury, which could not reach a verdict. Nevertheless he now claims the Committee should have looked to the outcome of the *second* trial, conducted after the belated disclosure, in which the jury convicted Shelton. Resp. brf. at 61-62. The Committee correctly concluded that timely disclosure of the Boyd Statement for effective use by the defense was "before the first trial, not after a trial, hung jury and mistrial declaration, and after Respondent had left the U.S. Attorney's Office." HCR 38 n. 16 (noting that Respondent "ultimately concede[d]" that the determination depended on confidence in the verdict of the first trial). While Respondent trudges through elaborate deconstructions of the evidence in attempts to show the Committee relied on "inaccurate" understandings, they largely concern trivial or irrelevant details.

Bar Counsel does not take an exception to the Committee's findings of fact, all of which are supported by substantial record evidence, and incorporates them by reference.[2] The Committee's findings establish that when Respondent was an Assistant United States Attorney, he intentionally failed to disclose to the defense information that he was required to disclose and he should have known that disclosure of such information was required. Respondent thereby violated Rule 3.8(e). Respondent's exceptions to the Hearing Committee's factual findings fail to recognize that the Committee made findings based upon credibility determinations of the witnesses who testified at the hearing, legitimate inferences from the record and common sense.

[2] There are a few minor factual findings that Bar Counsel does not adopt but which have little relevance to the issues.

Such findings should not be disturbed by the Board. *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992).

Amicus Curiae focuses on the Hearing Committee's legal analysis as to the meaning of Comment [1] to Rule 3.8(e) and argues that the scope of a prosecutor's obligations under Rule 3.8(e) extends no further than the type of materiality that would require a reversal of a conviction under *Brady*. While Bar Counsel disagrees with Amicus' argument, neither the Board nor the Court has to reach this determination in view of the Committee's well-reasoned analysis and conclusion that Respondent's disclosure obligation would have been required under *Brady* and the Constitution and that the non-disclosed information was material and exculpatory.

II. RESPONDENT'S ATTACK ON HEARING COMMITTEE'S FACTUAL FINDINGS

A. Hearing Committee Factual Background

In 2001 and 2002, Respondent was an Assistant United States Attorney in Washington, D.C., assigned to prosecute violent crimes. HCR 3 (FF 1).[3] Respondent handled *United States v. Arnell Shelton*, a criminal prosecution arising out of the January 14, 2001 "drive-by" shooting of Christopher Boyd. *Id*. The principal issue in the criminal case was the reliability of the government's identification witnesses. According to an Assistant United States Attorney later assigned to the case, the "question was who did it." HCR 3 (FF 3).

Prior to the March 2002 *Shelton* trial, Officer Edward Woodward told Respondent that he had interviewed the victim, Mr. Boyd, in the hospital shortly after the shooting and that Mr. Boyd had stated that he could not identify his assailant. HCR 4 (FF 5, 6, 7, 12). Further, when Officer Woodward specifically brought Mr. Shelton's name into the hospital conversation, Mr.

[3] "HCR" refers to the Hearing Committee's Report. "Tr." refers to the transcript of the hearing on July 18 and 19, 2011. "BX" refers to Bar Counsel's exhibits. "Bate Stamp" refers to the pagination of Bar Counsel's exhibits. "RX" refers to Respondent's exhibits. "FF" refers to the Hearing Committee's Findings of Fact.

Boyd still did not identify Mr. Shelton as the shooter, although he admitted that he had a "beef" with Mr. Shelton. HCR 13-14 (FF 36). This statement to Officer Woodward was significant because Mr. Boyd later claimed that he had seen the shooter and also that he had known Mr. Shelton for several years before the shooting.

Respondent took contemporaneous notes of what Officer Woodward told him of the conversation and he understood that Mr. Boyd told Officer Woodward that he did not know who shot him. HCR 4-5 (FF 7, 10, 12, 44, 51). Respondent never disclosed Mr. Boyd's Hospital Statement to defense counsel. HCR 8-11 (FF 22-31).

At trial, Respondent called Mr. Boyd to the stand and asked him to identify his assailant. Mr. Boyd pointed out the defendant, Mr. Shelton. HCR 3 (FF 4). Respondent also presented the testimony of two other identification witnesses but significant questions were raised about the credibility of all of the government's identification witnesses, especially in view of the circumstances of the crime. HCR 12-13 (FF 32-36). That is, the crime was a drive-by shooting that took place shortly before midnight, well after dark. The shooting happened quickly, with the shooter's car traveling at a high rate of speed. The shooter's car was variously described as a silver Honda, a baby-powder blue Toyota or a dark colored Toyota Camry. HCR 12 (FF 34). The jury was unable to reach a verdict and, on March 12, 2002, the trial judge declared a mistrial. HCR 14 (FF 37). Four of the twelve jurors stated in post-trial interviews that they felt there "wasn't a case." HCR 14 (FF 37).

Respondent left the U.S. Attorney's Office after Mr. Shelton's trial and a second prosecutor was assigned to handle the retrial. HCR 14 (FF 38, 39). The second prosecutor assigned to the case for retrial "evidently recognized that the Boyd Hospital Statement should have been disclosed to the defense, and drafted a letter to that effect." HCR 14 (FF 39). This prosecutor never sent the letter and left the case because of a family emergency. A third

prosecutor, Wanda Dixon, was assigned to the case shortly before the retrial. Ms. Dixon was told by her supervisors when they assigned her the case that there was information that "was probably not given to the defense attorneys before the first trial and directed her to disclose the Boyd Hospital Statement. Ms. Dixon agreed that she should do so." HCR 14 (FF 40). Ms. Dixon disclosed the information the night before the start of the criminal trial.

The next day, Mr. Shelton's defense attorney moved for a dismissal, citing the government's failure to timely provide *Brady* information.[4] The trial court recognized the *Brady* issue and demanded an explanation as to "what Mr. Kline knew, when he knew it, [and] why it was disclosed so late." HCR 14 (FF 40-42). A day after that, Ms. Dixon reported to the court that Respondent had withheld the statement because "it was [Respondent's] position that the information was not exculpatory." HCR 15 (FF 43). The trial court rejected that rationale stating:

> . . . I don't see how any prosecutor could take that position. . . I don't see how any prosecutor anywhere in any state in the country, could say I don't have to turn that over because I think I know why he said that.

HCR 15 (FF 45).

As a result, the trial court offered the defense a continuance as a "remedy for a *Brady* violation." The defense chose to proceed with the trial, given that Mr. Shelton was incarcerated. HCR 16 (FF 46). At the retrial, the jury found Mr. Shelton guilty of shooting Mr. Boyd. HCR 16 (FF 48)

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[4] *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," and that prosecutors therefore have a duty to disclose such information. 373 U.S. at 87.

B. Respondent's Statement Of Facts Is Misleading

Respondent objects to numerous Hearing Committee's factual findings and outlines his own "Statement of Facts." This "Statement of Facts" fails to cite to a single fact as found by the Hearing Committee. Instead, Respondent selectively picks and highlights information from the criminal trial record and disciplinary hearing in an attempt to distort the record and sanitize his testimony before the Committee.[5] That is, Respondent's "Statement of Facts" is his own "rose colored" view without any acknowledgment that the Committee assessed his self-serving testimony as unworthy of belief. To demonstrate the spin that Respondent puts in his "Statement of Facts," we point out a few of the half- truths or inaccuracies in the "Statement:"

1. Respondent states that the U.S. Attorney's office practice was to provide broad discovery but that "[u]ntil 2002, [the United States Attorney's Office] prudence policy was not explicit." (Resp. brf. at 10 n. 2). Respondent cites to the testimony of Roy McLeese for this inaccurate proposition. While Mr. McLeese did testify that the U. S. Attorney's Manual added a policy in 2006 that advised prosecutors to provide broad disclosure of exculpatory material, Mr. McLeese also testified that this "prudent policy" was in effect and was explicitly taught to prosecutors in Respondent's office before 2002, when Respondent failed to disclose the Boyd Hospital Statement. HCR 19-20 (FF 57, 58); Tr. 273 ("internally imposed policy" McLeese).

2. Respondent states as a "fact" that "Mr. Kline's own practice was to disclose any evidence that was favorable to the defense, even if he did not believe it to be material." Resp. brf. at 10. Respondent cites to his own testimony in support. However, there is no Committee finding that support's Respondent's favorable description of his practice. The testimony he cites shows that he was much more tentative and vague than his brief suggests. Tr. 416 ("Question: If

[5] This is consistent with the Committee's view of Respondent's brief to the Committee. See HCR 10 n. 7 (Respondent "wrenches the Rodrigues testimony out of context .").

you had to do it all over again, would you handle a disclosure . . . differently? Answer: Probably, yes. . . ."); Tr. 491 ("My general policy was consistent with the office's general policy, and that was to be fairly liberal with discovery.").

While Respondent wishes the Board to believe that his general practice was to provide liberal discovery, his "Statement of Facts" merely shows that he disclosed what he was required to disclose by court rule and law. Further, Respondent disclosed in response to defense discovery demands and after the court admonished him to be mindful of his disclosure obligations. Such disclosures do not show liberal discovery or inadvertence in failing to disclose the Boyd Hospital Statement.

3. Respondent discusses Shelton's motion to suppress identification at length, as if it were a frivolous claim. Resp.brf. at 11 (citing a section of the trial transcript not in evidence, 3/4/02, Tr. 15-16). The court did deny Shelton's motion, but Respondent fails to put this decision and discussion in context. In context, the motion and ensuing discussion on the day of the first trial revealed another nondisclosure of a different police officer's notes. Furthermore, Respondent initially gave the court misleading information about the import of those notes. On the day of trial (*i.e.* very "shortly before," in Respondent's terms, Resp. brf. at 11), Respondent disclosed the notes of Detective James Francis, which revealed references to an "Arnell Johnson," with a different birthday, address, and mother's name from Arnell Shelton. Defense counsel asked for time to investigate whether there was another "Arnell" who might have committed the crime. In opposition, Respondent told the court he *believed* "Arnell Johnson" was an alias used by the defendant. BX 3 (Bate Stamp 68-72).

It was only when the court inquired further, admonished Respondent about his *Brady* obligations and required Respondent to specifically ask the detective, that it became clear that "Arnell Johnson" was not an alias but an entirely different person whom the detective had

considered as a possible suspect. Thus, Respondent's first proffer to the court in opposition to Shelton's motion was based upon inaccurate information. Had the court merely accepted Respondent's proffer, neither Shelton nor the court would have found out that there was another "Arnell" initially suspected of involvement in the crime. Thus, Shelton's concerns were not frivolous and Respondent's disclosure of the detective's notes, on the trial date, did not support his claim that he had a broad disclosure policy.

4. Respondent's "Statement of Facts" relates Ms. Dixon's representations to the court in a manner that is misleading. Resp. brf. at 18. First, in response to a direct question from the court, after the court had ordered Ms. Dixon to find out why Respondent had not turned over the Boyd Statement, Ms. Dixon stated, "Your honor, it was Mr. Kline's position that the information was not exculpatory." BX 3 (Bate Stamp 109). That was Ms. Dixon's full and unequivocal response to the court's question as to why the defense did not receive the Boyd Statement prior to the first trial. She did not add her thoughts on why Respondent took this position until the court questioned her further. Before the court, Ms. Dixon distanced herself as much as she could from what Respondent had done and why he had done it. BX 3 (Bate Stamp 110) ("I'm not saying that that's my position at all."); BX 3 (Bate Stamp 111 ("I don't want the Court to think that I'm trying to adopt that position at all.").

The Committee found that Ms. Dixon's representation to the court as to Respondent's "position" was "consistent with Respondent's own testimony." HCR 15 (FF 44). It is correct that Respondent's position is that the Statement was not exculpatory and the Committee found that Respondent used this position to justify his failure to disclose the Statement. HCR 17 (FF 50, 51).

5. In his "Statement of Facts," Respondent asserts that the jurors split "8-4" after the first trial, according to defense counsel. Resp. brf. at 12. This is inaccurate. Defense counsel

testified that four jurors stated that there "wasn't a case." HCR 14 (FF 37). It may be that all of the jurors felt that way. All we know is that four disclosed their belief in the weakness of the government's case and there is no evidence as to how the other jurors felt about the case.

These are but a few of Respondent's attempts to retell the "facts" as he wishes rather than as found by the Committee.

C. Respondent's Exceptions to the Hearing Committee's Findings of Fact are Without Merit

1. To the Extent that the Hearing Committee's Factual Findings are Based Upon Credibility Findings, the Board Should Adopt them

Respondent takes exceptions to the Committee's findings but he fails to acknowledge that the Hearing Committee can reject or accept testimony based upon its determination of the witness' credibility. *In re Lee*, Board Docket No. 09-BD-016 at 14 (May 11, 2012) (citing *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992)); *In re Temple*, 629 A.2d 1203, 1208-09 (D.C. 1993). The Committee here, as in *Lee*, "made express credibility findings, supported by a clear explanation of their basis," which in *Lee* also convinced the Board to accept those findings. *Id*. However, Respondent urges the Board to reject the Committee's major findings claiming that the Committee misunderstood Respondent's testimony and his written submissions, misunderstood the testimony of other witnesses and failed to properly consider record evidence. Resp. brf. at 23-32. To the contrary, the Committee understood the testimony and the record, evaluated it and gave it the weight that it found appropriate.

a. The Committee Found that Respondent Intentionally Failed to Disclose

Respondent stridently argues that his failure to disclose was not intentional and that "the Committee misapprehends the single piece of evidence it relies on – the successor prosecutor's statements to the court - to reach the opposite conclusion." Resp. brf. at 2, 35. Respondent fleshes out this accusation, quoting a passage about Ms. Dixon's testimony as the Hearing

Committee's support [for] its conclusion that Mr. Kline consciously chose not to disclose the Boyd hospital statement. . . ." Resp. brf. at 23. However, Ms. Dixon's testimony was neither the "single piece of evidence," nor did the Committee principally rely on it. HCR 17-21. The Committee relied on the testimony of Respondent, Officer Woodward, and Roy McLeese, as well as noting the trial court's record astonishment at Respondent's failure to disclose the Statement and "the uniform view of career prosecutors that the Boyd Hospital Statement should have been disclosed." HCR 21 (FF 60).

Although Respondent did not concede intentionality, the Committee evaluated his testimony in the context of all the other evidence and found that "Respondent assessed the circumstances under which the statement was made, and affirmatively decided not to disclose it to the defense." HCR 17 (FF 51). In making this finding, the Committee *sub silencio* rejected Ms. Dixons's speculation that Respondent's failure to disclose was inadvertent. Tr. 199.

b. <u>The Committee Did Not Find Respondent's Testimony Credible</u>

When the Hearing Committee made its findings, it did so by rejecting some of Respondent's testimony because he was not credible and his justifications and explanations, at times, lacked "any meaningful factual underpinning." HCR 19 (FF 56). For instance, the Committee outright rejected Respondent's testimony that he "might" have disclosed the Boyd Hospital Statement to Mr. Shelton's first defense attorney. HCR 7 (FF 18). This testimony was completely unsupported by any corroborative evidence and contrary to Respondent's own practice. *Id*. Similarly, Respondent's ineffectual and disingenuous attempt to distance himself from his own written record was rejected by the Committee, which recognized that Respondent's contemporaneous notes of his conversation with Officer Woodward were a "reliable recorded recollection." HCR 4 (FF 9). That is, even though Respondent testified that he was a "terrible note taker," the Committee rejected that testimony and did not find it credible. HCR 4 (FF 8).

The Committee also found that Respondent "*understood* that Mr. Boyd had had 'told officer [Woodward] at hospital that he did not know who shot him,'" HCR 5 (FF12) (footnote and cite omitted; emphasis in the original), even though Respondent denied "any implication that he knew the words that were exchanged among Mr. Boyd and the officer." HCR 4 (FF 8). Such credibility determinations and resolution of contrary evidence are completely within the province of a fact finder. *In re Lee, infra, (*citing *In re Micheel, infra*; *In re Temple, infra*.)

The Committee found that "Respondent, who knew of the Boyd Hospital Statement, intentionally decided not to disclose it to the defense." HCR 5, 15 (FF 11-12, 43- 44) (footnote omitted). The Committee further noted why it did not need to make a finding as to whether Respondent actually knew the information was *Brady:*

> Bar Counsel did not claim that Respondent failed to disclose information that he
>
> "actually, subjectively *knew* to be *Brady* material. Tr. 514. Rather Bar Counsel contends Respondent intentionally failed to disclose to the defense evidence or information he *reasonably should have known* tended to negate the guilt of Mr. Boyd."

HCR 17-18 (FF 53).[6]

c. The Committee Assessed the Testimony of the Other Hearing Witnesses

The Committee also made findings based upon credibility determinations of the other witnesses who appeared at the hearing. For instance, even though Wanda Dixon, a subsequent prosecutor in the *Shelton* case, testified that she did not believe that the Boyd Hospital Statement tended to negate the guilt of Mr. Shelton, Tr. 202, she also testified that "she knew that [defense counsel] needed to be aware of this information;" "this is part of the *res gestae* of the case;" and "[t]his was part of the case. It was obviously important." Tr. 188. Taking her entire testimony

[6] Respondent suggests this passage implies a finding that Respondent did *not* knowingly or intentionally violate the disciplinary rules when in fact the Committee merely noted what it need not decide, in light of Bar Counsel's charge.

into consideration, as well as her actions when she became aware of the Statement, the Committee reasonably concluded that Ms. Dixon, as well as her supervisors, the prior prosecutor Mr. Kastor, and the trial court all understood what Respondent fails to understand -- that the Boyd Hospital Statement should have been disclosed to the defense because the defense had a right to know it and because it tended to negate the guilt of the accused. HCR 14, 20, 22 (FF 39, 40, 42, 59, 64).

The Committee found Officer Woodward's testimony credible and consistent with his criminal trial testimony. HCR 5 (FF 10). Officer Woodward testified that "shortly after he was shot, Mr. Boyd told police that he did not know who shot him." HCR 5 (FF 11). This is an accurate summary of Officer Woodward's testimony that Mr. Boyd told him "words to the effect of 'I don't know who shot me' or 'didn't see who shot me.'" HCR 5 (FF 10).

The Committee also found Ms. Rodriquez's testimony credible. HCR 11 (FF30). The Committee credited Ms. Rodriguez that her defense of Mr. Shelton would have been different if she had known of the Boyd Hospital Statement sufficiently in advance of trial to prepare a different defense. HCR 21-22 (FF 63). Respondent claims that the Committee misstates the record evidence because "Shelton's trial strategy did *not* change." Resp. brf. at 27. Respondent misses the point, not the Committee. But for Respondent's failure to disclose, the defense might have been different. It was not different because Ms. Rodriguez did not know of the Boyd Hospital Statement until the night before the second trial began. The Committee also credited Ms. Rodriguez when she testified that the reason that she did not wish to postpone the second trial was because Mr. Shelton was incarcerated. HCR 16, 21 (FF 46, 63). Ms. Rodrigues requested Shelton's immediate release but, although the trial judge stated that he would consider changing Shelton's release conditions, he did not do so. BX 3 (Bate Stamp 91). Respondent merely speculates that there were other reasons that Ms. Rodriquez did not wish to postpone the

trial. Resp. brf. at 20 n. 3. The Committee rejected such speculation in the face of a credible witness's testimony.

2. <u>The Hearing Committee's Findings are Supported by Sufficient Evidence of Record</u>

Respondent's other objections to the Committee's factual findings relate to findings that are minor or irrelevant, or predicated upon convincing the Board that the testimony or documentary evidence was misinterpreted. The Board should reject these objections as unfounded or immaterial.

The "Statement of Facts" section of Respondent's brief reveals only Respondent's view of (1) the government's evidence in the *Shelton* case, (2) the presentation of that evidence at two separate trials and (3) the Court of Appeals' two decisions in the matter. Resp. brf. at 4-23. These are not factual findings by the Committee but a recitation of the government's evidence derived from the testimony at the two trials. It is clear that the defense, the jury in the first trial, and the Hearing Committee saw some of that evidence in a different light. The Committee fairly summarized the weaknesses in the government case (HCR 12-14 (FF 32-36), HCR 38-39), the defense pointed out the weaknesses in cross examinations and closing argument (BX 6, 3/7/02 transcript), and the jury failed to convict Mr. Shelton despite Respondent's experience and talents as a prosecutor. The Committee's summation of the weaknesses of the government's case is supported by record evidence, which the Committee had before it and obviously digested, *i.e.*, the Committee's summation is supported by substantial evidence of record as a whole. *See* Bd. Rule 13.7.

Respondent criticizes the Committee's view of the weaknesses in the testimonies of Boyd, Boyd's mother and Mr. Durham, without acknowledging that the jury must have agreed

with the Committee because it refused to convict Shelton. Resp. brf. at 25-27.[7] During cross examination and in closing argument, the defense called the jury's attention to the same weaknesses noted by the Committee. BX 6 (trial transcript, 3/7/02 at 429-440). Respondent also must have agreed that these were weaknesses in his case because he addressed them in his closing argument to the jury. Respondent tried to reassure the jury that even though Mr. Durham "comes with some minor baggage" and "he lied to the defense," he testified truthfully. BX 6 (3/7/02 trial transcript at 424, 450). Respondent addressed the issue of the reliability of the witnesses's identifications and assured the jury that each witness had time to see the shooter's face. *Id*. at 448-450. But the jury did not find Respondent's evidence or argument persuasive. Although the Committee correctly points to the evidentiary basis for problems that may have led to the hung jury, Respondent continues to argue the strength of the criminal case as if the jury had never failed to convict. Like the Committee, the jury could reject his evidence and arguments. Respondent's *post hoc* rationalizations and post-hearing interpretations of his own and other testimony and written submissions were rightfully rejected by the Committee.

It is undisputed that Boyd's identification of Shelton, by either name or photo, occurred after Officer Woodward already had suggested Mr. Shelton's name to Boyd in the hospital. HCR 13 (FF 36). Respondent notes that the Committee found that Detective Francis showed Boyd a photograph of Shelton at the hospital, before Boyd identified Shelton by name, although the Committee found that the photo was shown before Boyd identified Shelton by name. Respondent cites to the criminal trial transcript for this proposition. Resp. brf at 25. While Respondent may be accurate as to the timing of the one-photo identification by Boyd, the Committee correctly cited Respondent's own testimony that Boyd identified Shelton as the

[7] Indeed in the second trial, the prosecutor chose not even to call Boyd's mother as a witness.

shooter after Detective Francis showed him a photograph of Shelton. Tr. 402 (". . . Boyd, who a couple of days later, when he was recovering, was interviewed by Detective Francis . . . came in plain clothes and showed him a photograph of Arnell Shelton. . . . "). Respondent later modified this testimony to say that, "I think Christopher Boyd told the detective that Arnell Shelton was the person who shot him, and then Detective Francis showed him the picture." Tr. 403. Whichever version was correct, the Committee had a basis to find that the photo showing came first, and substantively, Officer Woodward indeed had introduced Shelton's name before any identification.

In any event, the exception to this factual finding is irrelevant, as the Committee only numbered this identification procedure as one of several concerns that "raised questions about the reliability of victim Christopher Boyd's trial identification of Mr. Shelton." HCR 13 (FF 36). The Committee did not rely exclusively on the timing of the photograph-showing to conclude that the Boyd's Hospital Statement was material evidence. HCR 36.

III. THE HEARING COMMITTEE CORRECTLY FOUND THAT RESPONDENT VIOLATED RULE 3.8(E)

A. The Boyd Hospital Statement Was Material Information and, Even if it Were not Material, Respondent had a Duty to Disclose it

1. The Boyd Hospital Statement was Material

The Committee correctly concluded that the Boyd Hospital Statement was material where reliability of the eyewitness identification testimony was the issue in this criminal case. HCR 35-36. Amicus argues that Rule 3.8(e) does not require the disclosure of non-material evidence but it does not argue that the evidence in this case was non-material.

The Committee considered the *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) criteria for assessing eyewitness testimony and also considered that there was no forensic evidence linking Shelton to the crime, no confession by Shelton, and that the crime was "a night time,

drive-by shooting that happened quickly. HCR 12.[8] The Committee found that Boyd had little chance to view his assailant, he had been drinking, he had been shot from behind, and he had to look through tinted windows. HCR 38-39. The Committee determined what should be obvious - that because "Boyd knew Shelton before the crime, his trial identification of Shelton took on more credibility and his prior inconsistent statement therefore had enhanced exculpatory potential." HCR 40. The Committee further found that the government's other two eyewitnesses had "important credibility issues of their own." *Id*. The Committee essentially agreed with the trial judge who stated, "It wouldn't have taken me five seconds to figure out that that's something that the defense was entitled to know." HCR 15 (FF 45).

The Committee focused on the obvious significance of the key government eyewitness's statement that he had not seen the shooter or could not see the shooter and only saw a dark colored car, which he later claimed was a light colored car (HCR 12 (FF34)), in the context of Respondent's decision to put this witness on the stand without revealing to anyone this witness's first report to a police officer. As the Committee stated, materiality is determined by a contextual analysis (HCR 35), which Respondent attempts to ignore by asking the Board to focus on the "trees" without seeing the "forest." *See Smith v. Cain*, 132 S.Ct. d627, 630 (2012) (witness' undisclosed statement "plainly material," as it directly contradicted his testimony).

Mr. Boyd testified at the second criminal trial that he did not remember his talk with Officer Woodward. (RX A, Bate Stamp 15). Respondent cites this failure as a reason to believe that his Hospital Statement was unreliable. Resp. brf. at 5, 29 n. 6. Actually, this failure to remember is significant for two other reasons: First, if Respondent had provided the information

[8] *Manson v. Braithwaite* advised that trial courts should consider the following before allowing eyewitness testimony to go to the jury: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Manson* at 114.

to Shelton's attorney soon after he received it from Officer Woodward in early 2001, the defense might have been able to interview Boyd or Officer Woodward before their memories of the Statement had faded a year later[9] and, second, Boyd's failure to remember the Statement might mean that his later identification of Shelton to the detective was a subconscious repetition of the name provided to him by Officer Woodward. That is, the fact that Mr. Boyd did not remember his talk with Officer Woodward, but repeated Mr. Shelton's name to another police officer soon after he awoke from surgery made the information even more material than it otherwise might be. It is commonly known, and medical studies have shown, that a witness's memory can be manipulated by the power of suggestion. *See, e.g.*, *State v. Henderson*, 208 N.J. 208, 218 (N.J. 2011) ("We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications."). Thus, Boyd's failure to remember his first report of the shooting does not undercut the clear materiality of the Statement.

Respondent also disputes the materiality of the Boyd Hospital Statement by claiming that it was not reliable in view of the victim's medical situation at the time he made the Statement and because the *second* jury was told about the Boyd Hospital Statement but found Mr. Shelton guilty. Resp. brf. at 44-45. Neither of these arguments should persuade the Board. First, the government regularly argues the reliability of dying declarations by victims who are in pain, scared, and being treated, as Boyd was at the time he talked to Officer Woodward. *See Kigozi v. United States*, Nos. 03-CF-1181 and 07-CF-684, slip op. at 6-8, 10 (D.C. June 14, 2012) (reversed on other grounds) (dying declaration admitted although victim, who was shot multiple times, in pain, with PCP in his system); *Johnson v. United States*, 17 A.3d 621, 625-26 (D.C.

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[9] *See United States v. Miller*, 14 A.3d 1094, 1108-1109 (D.C. 2011) (purpose of *Brady* disclosure is to allow defense an opportunity to investigate).

2011) (dying declaration admitted although victim, shot multiple times, in pain and in and out of consciousness); *Butler v. United States*, 614 A.2d 875, 885-886 (D.C.1992) (dying declaration admitted, victim shot). But, even more importantly, it is for the defense and the jury to decide the reliability of the Statement, as it clearly was material. If Respondent had any doubts about the Statement's materiality, he should have asked for advice from supervisors in this office, or disclosed it to the trial court *en camera* or simply turned it over to the defense.

> In arguable cases, the prosecutor should provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for *in camera* inspection.

In re Boyd, 908 A.2d 39, 61 (D.C. 2006). Respondent should not have determined unilaterally that the defense and the jury had no right to consider this Statement. *See* HCR 25.

Respondent argues that materiality should be assessed by considering the second Shelton jury's decision to convict. But the Committee correctly looked at the results of the *first* trial,

> [T]he failure to disclose the Boyd Hospital Statement undermines the confidence in the first trial. Had the disclosure been made, that trial may reasonably have resulted in an acquittal, considering that at least four jurors did not think the government's case was adequate.

HCR 42 (citation omitted). *See also* HCR 22 (FF 66) ("Respondent's obligation to disclose the Boyd Hospital Statement crystallized before the first Shelton trial.").

If, *arguendo*, materiality is determined based upon the strength of the government's case, then the Committee correctly looked at the government's case that went before the first jury. Those jurors heard the case presented by Respondent, and only because he and the evidence failed to convince them of Shelton's guilt, did a second trial even take place. The second jury heard a different case, presented by a different prosecutor, with witnesses who had an opportunity to practice their testimony at the first trial. Furthermore, the government, having benefited from their "run through" at the first trial, chose not to present the testimony of Boyd's

mother, Ms. Williams, at the second trial, apparently concluding that her testimony hurt its case more than helped it. *See* BX 6 (transcript 7/17/02, government states who the witnesses will be, omits Ms. Williams' name). By the second trial, the government's witnesses were better prepared and the prosecutor, having talked to both of the two prosecutors assigned to the case before her, had the benefit of knowing the weaknesses of the case. Therefore, as the Committee recognized, the materiality determination must be made in the context of the first trial. HCR 35-38.

It is unknown, and unnecessary to determine, whether Respondent's failure to disclose would have caused the Court to reverse the conviction if Respondent had been able to secure a conviction at the first trial. Even without a reversal, it is clear that Statement was material in the context of the Shelton trial. That is, it is information that a defense attorney would want to know. *Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010).

Both the trial and the appellate courts, in the *Shelton* case, did not hesitate to describe the Boyd Hospital Statement as *Brady* information (see HCR 42). Courts recognize, although Respondent does not, that there is a difference between *Brady* information or *Brady* obligations and a *Brady* violation. *See* Bar Counsel's initial brief to the Hearing Committee at 27-36. The law distinguishes between the prosecutor's constitutionally-based obligation to disclose exculpatory information, and the courts' *post hoc* assessment as to when a failure to meet that obligation requires reversal of a criminal conviction. *See Boyd v. United States*, 908 A.2d at 59-60 (D.C. 2006) (citing *Strickler v. Greene*, 527 U.S. 263 (1999) (duty of disclosure exists even when the items disclosed later prove not to be material)). Respondent and the Amicus deny this distinction and ask the Board to accept the circular reasoning that evidence need only be disclosed if it is material and it is only material if it would cause an appellate court to reverse the

conviction.[10] We ask the Board to reject such reasoning because, even if Rule 3.8(e)'s application is limited to disclosures required under the Constitution, it is not *further* limited to disclosures of such centrality as to require reversal of a conviction. The standard for deciding whether to disclose should not be unnecessarily complex in view of the repeated admonitions of the Supreme Court and our Court to err on the side of disclosure and the ethical Rule requiring disclosure. The Committee's finding of materiality should be adopted by the Board.

2. Even if Not Material, Rule 3.8(e) and the Constitution Required Disclosure

No disciplinary case in this jurisdiction has clarified the meaning of the last sentence in Comment [1] to Rule 3.8(e), but the fact that the victim's Hospital Statement was obviously material in this case makes such a clarification unnecessary. That is, even if Rule 3.8(e) obligations are limited to a prosecutor's obligations under the Constitution and *Brady*, as Respondent and Amicus argue, Respondent had a disclosure obligation in this case which he ignored.

Respondent and Amicus make the same arguments on the law as Respondent made to the Committee, although they have added some information relating to the Department of Justice's 1988 comments to the Court on Rule 3.8. It appears that the DOJ urged the Court not to include Rule 3.8 at all in its adoption of the Rules but, if the Court was inclined to adopt such a Rule, then the DOJ urged the Court to state that a prosecutor should be required to turn over only material exculpatory information. *See* Exhibit 2 at 3-5, attached to Respondent's brief. In response to the DOJ's comments, the Court easily could have inserted the word "material" into

[10] Applying the standard they promote would require a double-layered speculation: the prosecutor would have to imagine what a hypothetical appellate panel would determine when it tried to discern how a jury decided to convict after a trial that has not yet happened. It is difficult enough, in short, for appellate courts to determine the effect of withheld evidence on a jury's closed-door deliberations after the actual trial; adding an additional projection would make no practical sense.

the Rule or the Comment. It did not do so. Instead, at the end of a paragraph reminding prosecutors to be ministers of justice, the Court included in the Comment some clarification. The Court states that

> This rule is intended to be a distillation of some but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes and court rules of procedure.

See Comment [1] to Rule 3.8.

This Comment merely reminds prosecutors that they must follow "the United States Constitution, federal or District of Columbia statutes, and court rules of procedures" as well as Rule 3.8(e)'s requirements. That is, Rule 3.8(e) obligations do not define what a prosecutor must do to comply with the law and rules of the court. Ethical obligations are separate and apart from other legal obligations and may be broader than other legal obligations. *In re Ryan*, 670 A.2d 375, 380 (D.C. 1996) ("ethical responsibilities exist independently of contractual rights and duties").[11]

The difference between a prosecutor's obligations derived from the Constitution and those derived from professional ethics rules has been directly addressed by the courts. In *Kyles v. Whitley*, 514 U.S. 419 (1995), decided seven years before Respondent's conduct in question, the Supreme Court specifically recognized that the discovery obligations of prosecutors found in attorney discipline rules are separate and distinct from constitutional obligations of prosecutors derived from the *Brady* line of cases. It found that the constitutional requirement of *Brady* "requires less of the prosecution than the ABA Standards for Criminal Justice" citing to Model Rules of Professional Conduct. 514 U.S. at 437. Implicit in this finding is the endorsement of

[11] D.C.'s Rule is more expansive, rather than less expansive, than the Model Rule and most jurisdictions, in that it has the provisions "should have known." This shows a broad intent to hold prosecutors accountable.

the notion that attorney disciplinary rules may impose a set of standards different from (and higher than) those imposed by the Constitution. *See id.* The Court did not find that the ethical rules were somehow abrogated or limited by the constitutional jurisprudence. Rather, it merely found that interpretation of the ethical rules did not affect the interpretation of constitutional law under *Brady*. *Id.* Thus, finding a violation of Rule 3.8 would not necessarily lead to a finding of a *Brady* violation, and failing to find a Rule 3.8 violation would not necessarily lead to the finding that there was no *Brady* violation; Rule 3.8 neither restricts nor expands *Brady's* constitutional obligations.

More recently, in *Cone v. Bell*, 556 U.S. 449 (2009), the Court referred to its decision in *Kyles*, stating: "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, *the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations*." 556 U.S. 449, 470 n. 15 (emphasis added). When viewed in this light, Comment [1] does not constrain the interpretation of Rule 3.8(e) in the attorney disciplinary system; it means only that Rule 3.8(e) does not affect the prosecutors other obligations in the criminal justice arena.

The District of Columbia Court of Appeals came to a similar conclusion in *Boyd v. United States*, 908 A. 2d 39 (D.C. 2006). The Court held in *Boyd* that "a duty of disclosure exists even when the items disclosed later prove not to be material." B*oyd* at 60. Thus, the Court in *Boyd* definitively finds that the Constitution and the Supreme Court's interpretation of disclosure obligations derived from the Constitution require disclosure even where the items are not material. In *Miller v. United States*, 14 A.3d 1094, 1109 (D.C. 2011), the Court cited *Boyd* and again emphasized the government's duty to disclose irrespective of materiality. Both *Boyd*

and *Miller* cite to *Strickler v. Greene*, 527 U.S. 263 (1999), a case decided three years before the first Shelton trial.

In *Miller*, the Court cited previous cases where it had advised the government not to use a retrospective, post-trial materiality standard, the same standard for making disclosure determinations, the government and Respondent continue argue is appropriate here. The Court expressed its frustration with the government's history of delayed disclosure or failure to disclose exculpatory information and its refusal to acknowledge that "the duty of disclosure exists even if it later appears that reversal is not required." *Miller, id*. at 1109.

> *It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder.*

Miller, id. at 1110, *citing United States v. Perez*, 968 A.2d 39, 66 (D.C. 2009). *See also Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010) ("Any doubts should be resolved in favor of full disclosure. . . .").

Respondent continues to make the same argument here as the government previously but unsuccessfully made in *Boyd* and *Miller*: that unless reversal of the criminal case occurred, the information was not material and need not have been disclosed under the Constitution. The Board should follow the Court's legal conclusions on this issue and decide that disclosure obligations exist without a finding by a court of materiality or prejudice.

As to Rule 3.8(e), both *Boyd* and *Miller* alluded to the argument that the Rule, on its face, does not require the same materiality analysis as that in *Brady*-type cases. *Boyd*, *Id*. at 59 n. 30; *Miller, Id.* at 1108 n. 16. Neither case needed to resolve the question as to the scope of Rule 3.8(e), as the Court remanded *Boyd* for further hearings on the government's failure to disclose *Brady* information, and reversed and remanded *Miller* for a new trial based upon the government's failure to disclose *Brady* information. The most that can be said is that the Court

in *Boyd*, refused to adopt the Public Defender's expansive view that *any* information, no matter how insignificant, should be disclosed if it is potentially exculpatory. The Court agreed that common sense should be a part of the test in determining disclosure obligations. *Boyd*, at 60. The Court did not, however, go as far as Respondent and Amicus here imply. Resp brf. at 39-40; Amicus brf. at 14. Neither *Boyd* nor *Miller* interpret the scope of Rule 3.8(e), or elucideate the Comment to the Rule, or find that the Rule requires a *Brady*-type materiality.

Respondent's further argues that no pre-2002 decisions "created or recognized a duty 'in arguable cases' to disclose potentially exculpatory evidence that might not be material." Resp. brf. at 40. Respondent ignores the language in the very cases that he and the Committee cite. For instance, in *Edelen*, the Court stated,

> [W]e rightly expect prosecutors to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of prompt disclosure, especially in response to a pointed request--as here--for evidence of the very kind in question.
>
> *Edelen v. U.S.*, 627 A.2d 968, 971 (D.C. 1993)

This language clearly put Respondent on notice that he should interpret his discovery obligations broadly. The other two cases cited by the Committee (HCR 31) but rejected by Respondent clearly provided guidance to prosecutors about their broad discovery obligations before Respondent tried the *Shelton* case. In *Curry v. United States*, 658 A.2d 193 (D.C. 1995), the government *conceded* that it had failed to timely provide discovery and in *Card v. United States*, 776 A.2d 581, 598 n.19 (D.C. 2001), the Court repeated what it had often stated since *Edelen* issued in 1993, about expecting prosecutors to "resolve all reasonable uncertainty about the potential materiality" by prompt disclosure. The concept of broadly interpreting pre-trial discovery obligations should not have been a novel concept to Respondent in 2002.

Amicus makes conflicting claims: that a broad interpretation of Rule 3.8(e) would subject prosecutors to an "improper standard and potentially serious, unwarranted disciplinary sanctions;" and that the Rule already is interpreted broadly by the ABA and the DOJ Manual without the claimed "unwarranted" consequences. Amicus brf. at v; *but see* ABA Comm. On Ethics and Prof'l Responsibility Formal Op. 09-454 (2009); United States Attorney's Manual, § 9-5.001 (U.S. Dep't. of Justice 2010). While Respondent and Amicus rely heavily on one sentence in Comment [1] to Rule 3.8(e) to justify their positions, they reject the guidance provided by ABA Formal Opinion 09-454 which discusses a broad duty of disclosure, separate and distinct from Constitutional obligations but inherent in ABA Model Rule 3.8(d). They point to a footnote in the Formal Opinion where the ABA cites the last sentence in our Comment [1] as indicating that our jurisdiction is one of only two jurisdictions in the country that imposes a materiality component to our Rule. Formal Op. at 4 n. 18. Bar Counsel disputes the accuracy of this interpretation of Comment [1], but also submits that Respondent and Amicus have focused on the "trees" rather than the "forest." The ABA Formal Opinion represents the consensus of the legal community that Rule 3.8(e) obligations may "overlap with a prosecutor's other legal obligations," but prosecutors have a broader disclosure obligation under disciplinary rules. Formal Op. at 1. The ABA rejected the notion that the Rule implicitly requires materiality -- the minimum required by the constitution — and it interpreted the disciplinary rules as being more "demanding." *Id*. In sum, the Formal Opinion states that under Rule 3.8, prosecutors must disclose information to the defense "without regard to the anticipated impact of the evidence or information on a trial's outcome." *Id.* at 4. This advice makes sense in that prosecutors, especially at an early stage of the case, do not necessarily know how strong their case will turn out to be or what the defense case may be like. The disciplinary rules should be interpreted in a way that provides guidance to prosecutors who must make decisions on disclosures pre-trial.

Respondent and Amicus urge an interpretation that would not provide guidance, but instead would only serve to justify non-disclosure after the trial has concluded.

In 2006, the DOJ explicitly articulated in its manual what the United States Attorney's Office here had adopted as an explicit policy since at least 2002: prosecutors should disclose exculpatory information "beyond that which is 'material' to guilt. . . ." DOJ Manual, Chapt. 9-5.001-5.100; HCR FF 57 (U. S. Attorney's Office policy). Moreover, the DOJ manual advised prosecutors to err on the side of disclosure and to disclose in a timely manner. It appears that Respondent and Amicus agree that broad disclosure is required by DOJ and USAO policy but they do not wish to implement this policy by mandating its practice or, at least by holding a prosecutor accountable when his practice deviates from policy.

Amicus claims that "Comment [1] is similar to the analysis applied by the majority of courts that have considered the interplay between rules of professional conduct like Rule 3.8(e) and substantive law." Amicus Brf. 8. In fact, only a very small number of jurisdictions have directly focused on this "interplay." The argument also is misleading because when the courts discussed the scope of the disciplinary rule and specifically, whether the scope of the rule extends beyond that required by the Constitution, the discussion was not outcome-determinative and could be considered dicta. Further, in the four cases from three states and one federal district court cited by Amicus, like most of the jurisdictions where attorneys have been sanctioned for disclosure failures, the non-disclosed information fell within the parameters of *Brady* as well as the disciplinary rules. Amicus brf. at 8-9.

In *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E. 2d 125, 130 (Ohio 2010), cited by Amicus, the Supreme Court of Ohio found that its Code provision DR 7 103 (B) does not require

disclosure beyond that required by *Brady*.[12] However, this Ohio disciplinary case concerned information that was not provided to the defense prior to the defendant's guilty plea and the court noted that the Supreme Court has held that disclosure of material impeachment evidence is not required prior to entering a plea agreement. *Id.* at 130 (citing *United States v. Ruiz*, 536 U.S. 622, 628-629 (2002)).

In Colorado, the federal court in *United States v. Weiss*, No. 05-CR-179-B, 2006 WL 1752373 (D. Colo. June 21, 2006), denied motions requesting exculpatory information under *Brady* and *Giglio* and pursuant to Fed. R. Crim. P. 16(a). [13] The court was unwilling to let the defendants use disciplinary rules as a discovery tool, but also noted that the state court had previously "rejected the proposition that Rule 3.8(d) contains a materiality standard different from that . . . required under *Brady*." *Weiss*, at *9, (citing *In re Attorney C*, 47 P. 3d 1167, 1170-71 (Colo. 2002)). In *In re Attorney C*, the prosecutor was aware of exculpatory information in two separate criminal trials before the preliminary hearings, but did not turn it over until after the hearings. There, Supreme Court of Colorado rejected the prosecutor's argument that the exculpatory information was timely provided. The court agreed that there was a materiality standard in its disciplinary Rule but the holding in the case was based upon a finding that the prosecutor's failures were not intentional. *In re Attorney C*, *id.* at 1171-72, 1174. Such a finding may be understandable in the context of an untimely disclosure rather than a total failure to disclose, as in the instant matter.

Amicus cites one case in Louisiana but it does not stand for the proposition that Louisiana is in the "majority" of jurisdictions that do not broadly view the disclosure obligations

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[12] Ohio uses the Code provision DR 7-103(b), which is similar to the ABA Model Rule 3.8(d), which in turn, is similar to our Rule 3.8(e).

[13] Gigio v. United States, 405 U.S. 150 (1972).

required by Rule 3.8. The court in *In re Jordan*, 913 So. 2d 775 (La. 2005), did not narrow Rule 3.8(e) obligations to those required by *Brady*, as Amicus claims. Amicus brf. at 9. The *Jordan* disciplinary case involved sanctioning a prosecutor who was aware of an exculpatory statement from the victim but did not disclose it, claiming that it was not material and it did not have to be disclosed under *Brady*. *Id*. at 782. However, before the disciplinary case in *Jordan*, the Supreme Court of Louisiana already had reversed the criminal conviction and described the undisclosed victim's statement as "'obviously' exculpatory, material to the issue of guilt, and 'clearly' should have been produced to the defense under *Brady*. . . ." *Id.* at 779. Therefore, when the disciplinary court stated that the "language of Rule 3.8(d) is recognizably similar to the prosecutor's duty set forth in *Brady*," it merely acknowledged that the court did not need to go beyond *Brady* in a case where the undisclosed statement clearly was *Brady* information. *Id*. at 781. To claim that this case limits ethical disclosure requirements would be misreading a case where the court strongly condemned the prosecutor's failure to disclose information and urged prosecutors to "resolve doubtful questions in favor of disclosure." *Id.* at 782, (citing *State v. Cousin*, 710 So. 2d 1065, 1073 n. 8, which cited *Kyles*, 514 U.S. at 439). The *Jordan* court also recognized that holding prosecutors accountable is necessary to ensure "that the integrity of the prosecutorial arm of our criminal justice system is maintained." *Id*. at 783. Specifically, the court stated:

> [A]bsent consequences being imposed by this Court under its authority over disciplinary matters, prosecutors face no realistic consequences for *Brady* violations.

Id.

Ultimately, this is an issue of interpretation that the Court will have to decide but we submit that neither the language of the Comment nor of the Rule supports Respondent and Amicus' attempt to absolve the prosecutor from his obligation to turn over evidence that has

exculpatory potential before trial. Disclosure obligations should not be determined by calculating the odds of reversal. The Court has the authority to require more of prosecutors who practice before it and it has done so having adopted a Rule which unquestionably requires disclosure of exculpatory information without limiting that obligation to exculpatory information that would require reversal of a conviction if it came to light only after the trial.

B. Respondent Intentionally Failed to Provide the Boyd Hospital Statement

The Committee concluded, based upon its credibility determinations and analysis of the evidence, that Respondent intentionally failed to provide the Boyd Hospital Statement to the defense. HCR 11 (FF 31); HCR 17 (FF 51); HCR 20 (FF 60); HCR 23-24 ("Respondent made a conscious decision not to make the disclosure . . . ."). This finding should not be disturbed. Respondent now claims that the failure to disclose was inadvertent. Resp. brf. at 32. Respondent did not testify at the hearing that his nondisclosure was inadvertent nor did his written submissions pre-hearing make such a claim. He testified that he "probably" would disclose the Statement if he had to do it over again (Tr. 415-16); and, that he did not intentionally hide something that he thought he was required to disclose. Tr. 418-19. However, Respondent testified that he did not believe that he was required to disclose the Hospital Statement and he continues to hold to that position. Tr. 420, 425. This is not a claim of inadvertence; this is a claim that he was not legally required to turn the Statement over and that he did not do so.

Respondent argues that there is evidence that proves inadvertency. However, the evidence discussed by Respondent either was not credited by the Committee or did not necessarily prove inadvertence. For instance, Respondent claims that his "standard discovery practice" and the discovery he did provide demonstrate that he "would not have deliberately refuse[d] to explicitly notify the defense of Boyd's preliminary non-identification." Resp. brf. at 33. As to Respondent's purported "standard discovery practice," the only evidence of

Respondent's claimed broad discovery practice was Respondent's own self-serving, unclear and ambiguous testimony. The Committee had a right to disregard this testimony. Furthermore, evidence of obeying statutory, constitutional, office policy and ethical obligations in other cases does not necessarily preclude a finding that in this instance, Respondent did not follow the Rules.[14]

As to Respondent's disclosures in the *Shelton* case, they merely show that, in response to defense demands, and in conformance with his statutory, rule and Constitutional obligations, Respondent provided what he was required to provide. For instance, Respondent disclosed the witness protection program payments to Cassandra Williams, Mr. Durham's criminal record, police reports and grand jury testimony of the witnesses. All of this very likely would have been noticed if not turned over, and might have become a subject of cross examination, or been demanded as Jencks Act material.[15] Thus, if Respondent had not provided the basic, standard discovery required of all prosecutors, it would have come to light and he might have faced sanctions by the court. The Boyd Hospital Statement, on the other hand, was not contained in the standard discovery documents and Respondent did not present Officer Woodward as a witness. Therefore, Officer Woodward was not cross examined and the defense might never have known of the Statement but for the mistrial and the assignment of two other prosecutors

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[14] Unfortunately, there are many attorneys who have never before been charged with any ethical violations but the disciplinary system nevertheless has found serious violations in the case at issue. *In re Howes*, 39 A.3d 1 (D.C. 2012); In re Wood, 29 A.3d 473 (D.C. 2011); *In re Allen*, 27 A. 3d 1178 (D.C. 2011); *In re Bach*, 966 A.2d 350 (D.C. 2009); *In re Sabo*, 828 A.2d 168 (D.C. 2003).

[15] The Jencks Act, 18 U.S. C. § 3500, requires the government to turn over to the defense statements in the government's possession concerning the subject matter of the witness' testimony, after the witness has testified for the government. Respondent repeatedly confuses Jencks Act statements often used for impeachment of government witnesses with *Brady* disclosures, which must be provided pre-trial whether or not a witness testifies. See BX 7 (Bate Stamp 352); Resp. brf. at 31.

who recognized that the Statement should have been disclosed to the defense. It also should be noted that not only did Respondent intentionally fail to disclose this Statement, he did so after he responded to pretrial *Brady* demands by notifying the defense that he had "no truly exculpatory information." HCR 6 (FF15). The defense had a right to rely on this representation. *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

Finally, Respondent asserts that

> [T]he Committee concluded that Mr. Kline acted intentionally based exclusively on Ms. Dixon's July 19, 2002 representation to the trial court that she believed Mr. Kline did not disclose the Boyd hospital statement because he did not think it was exculpatory. Report, ¶¶ 43-44.

Resp. brf. at 35.

This is untrue. Although the Committee found that Ms. Dixon's representations to the Court showed intentionality; it's four-page intentionality findings included assessments of all the supporting evidence. Other such evidence included the fact that Respondent took notes of the Statement, he was an experienced prosecutor, the impact of such a Statement was clear and Respondent was not reasonable or credible when he claimed that he provided the information by turning over Officer Woodward's PD 119 or by telling Shelton's prior defense attorney. The Committee discussed Respondent's assertions in detail and explained why his claims should be rejected. HCR 7-11 (FF 18-31). The Committee's finding of intentionality should be adopted by the Board.

C. Respondent Reasonably Should have Known that the Boyd Hospital Statement Tended to Negate the Guilt of Shelton

As the Committee stated, "A lawyer's scienter is to be inferred from the circumstances." HCR 24, citing *In re Starnes*, 829 A. 2d 488, 500 (D.C. 2003). Looking at the circumstances here, the Committee found that Respondent should have known that the Boyd Hospital Statement tended to negate Shelton's guilt because "the Boyd Hospital Statement had obvious exculpatory

and impeachment potential since it directly contradicted Boyd's later identification of Shelton as his assailant." HCR 24. The Committee rejected Respondent's argument to the contrary and listed four sound reasons for its fact-based conclusion. That is, Respondent had specifically been warned by the trial judge about his *Brady* obligations yet he continued to withhold the Statement and reassured the trial judge that he was "especially careful" when it came to disclosing *Brady* obligations. HCR 25. Respondent's decision to withhold the Statement was directly contrary to the established policy of the United States Attorney's Office. *Id*. The Committee found that "Respondent's rationale for failing to disclose the Boyd Hospital Statement is not supported by the evidence." *Id*. Finally, it found that "[W]hatever his thought process may have been, Respondent had no right to withhold evidence based on his subjective evaluation of the weight a jury would give it." *Id*. Indeed, in the context of another disclosure issue in *Shelton*, the trial judge had warned Respondent not to look at the evidence through the eyes of a prosecutor,

> Respondent: I am not sure how one could conjure up a *Brady* argument in this case.
> The court: Because you are sure you have the right guy, no one could conjure up a *Brady* argument?
> Respondent: I am not sure how . . .
> The court: That is why *Brady* doesn't leave it up to the prosecutor, for that very reason. You are always sure you have got the right guy or you wouldn't be prosecuting.

BX 3 (Bate Stamp 71).

Respondent argues that Mr. McLeese's testimony showed that "a reasonable prosecutor in Mr. Kline's position would not have recognized the Boyd hospital statement as material." Resp. brf. at 43. Mr. McLeese acknowledged that he did not know "what this prosecutor knew about what when. Tr. 264-65, 284. He testified generally that his office's training would not have put Respondent on notice that "*Brady* or the due process clause" would require disclosure of the Boyd Hospital Statement and that he did not view Rule 3.8(e) as requiring disclosure

beyond what the Constitution requires. Tr. 249-50. The Committee, however, found that "this prosecutor" knew at an early stage of the case that his key government witness had stated, soon after he was shot in the back at night by a person in a car driving past him, that he could not identify the person who had shot him and that all he saw was a dark colored car. This information conflicted with his later testimony that the car was light blue. Respondent also knew that there was no confession, no forensic evidence tying the defendant to the crime and that all three of his witnesses had credibility issues. HCR 12-3 (FF 33-14).

In view of all of these circumstances, weighed and considered by the Committee, the Committee found that Respondent reasonably should have known that the Boyd Hospital Statement tended to negate the guilt of Shelton. HCR 24-26. The Committee aptly concluded that, "In arrogating unto himself the right to make credibility determinations, Respondent embraced his adversarial role but abdicated his responsibility to see that justice was done . . . ." HCR 26, (citing *Kyles v. Whitley*, 514 U.S. 419, 440 (1995)). The Committee's finding of "should have known" should be adopted by the Board.

IV. THE RECOMMENDATION OF A PUBLIC CENSURE IS WARRANTED AND CONSISTENT WITH SANCTIONS ORDERED IN OTHER CASES

Respondent argues that no sanction is warranted because he did not violate Rule 3.8(e). Amicus argues that Rule 3.8(e) does not require the disclosure of non-material evidence but it does not argue that the evidence in this case was non-material and, it does not address sanction.

In considering the sanction recommendation, the Committee reviewed the appropriate sanction factors as well as deterrence considerations. HCR 43. In summary, the Committee found that, (1) the misconduct was serious, especially in view of Respondent's "special role" in the criminal justice system; (2) the misconduct was prejudicial to the administration of justice; (3) Respondent has not accepted responsibility for his actions and has not acknowledged

wrongdoing; and (4) Respondent's lengthy experience as a prosecutor is an aggravating factor. HCR 44-45. The Committee also found mitigating circumstances in that the misconduct did not involve dishonesty and Respondent has no prior disciplinary record. HCR 41. We agree with the Committee's analysis of the sanction factors and the recommendation that Respondent be publicly censured.

Prior to Respondent's misconduct, the Supreme Court and the District of Columbia Court of Appeals, as well as the training provided by the United States Attorney's Office, had repeatedly reminded prosecutors to err on the side of disclosure. Respondent failed to heed those warnings. A public censure is the type of discipline that recognizes such a failure, while also making the public and the Bar aware of the necessity of following this ethical requirement. *See In re Hines*, 482 A.2d 378, 386 (D.C. 1984) (use of disciplinary case to notify and warn the Bar); *accord, In re Mance*, 980 A.2d 1196, 1199 (D.C. 2009); *In re Hessler*, 549 A.2d 700, 703 (D.C. 1988). Especially where prosecutors are concerned, it is necessary to fashion a sanction that addresses the seriousness of the misconduct and the aim of deterrence:

> We are further motivated to hold prosecutors accountable in light of their pivotal role in the justice system, the great discretion they are given, and the few tools available to oversee their compliance with the legal standards that govern their conduct.

Howes, 39 A. 3d at 23.

Here, there is a strong need for deterrence because disclosure responsibilities are so difficult to monitor or enforce. Neither the defense nor the trial court knows what has not been disclosed by the government. Both the defense and the court rely on the representations of prosecutors. When a prosecutor, like Respondent, states on the record that he is aware of what the law requires and has met his *Brady* obligations, there usually is little that the defense or the court can do to challenge this representation. But for the mistrial, and other prosecutors more

ethically sensitive than Respondent, it is unlikely that Respondent's failure to disclose the Statement would have come to light. HCR 47. Such difficult-to-detect misconduct deserves an enhanced sanction for deterrent purposes. *In re Howes, Id.* at 23. ("Where misconduct is particularly difficult to discover . . . a *greater penalty* is warranted in the interest of both deterrence and protection of the public.") (citing *In re Cleavor-Bascombe,* 986 A.2d 1191, 199-1200) (emphasis added).

The Committee focused on the need to promote deterrence:

> We conclude that the disciplinary process is an important adjunct of *Brady*, and meaningful, effective enforcement of Rule 3.8(e) is a vital means to accomplish *Brady's* due process goals. The disciplinary system must "apply a sanction that effectively deters prosecutorial misconduct," and takes into account "the interest of both deterrence and protection of the public."

HCR 47 (citing *In re Howes* at Slip op. at 40).

A public censure may provide a needed incentive to disclose even though disclosure may not be in the government's short term interest. That is, the government's ultimate interest should be to make sure that the defendant gets a fair trial. However, some prosecutors get caught up in the desire to win the case and do not remember the larger, more important, goal to make sure that justice occurs. A disciplinary sanction, like a public censure, may help balance out these incentives and oblige a prosecutor to focus in a way that would not happen if individual prosecutors are not held accountable for their actions.

Respondent wants it both ways - he wants credit for being a "public servant" but he does not want the disciplinary system to recognize the responsibility and impact on the criminal justice system that comes with that role. Resp. brf. at 50. The court warned Respondent to be diligent in making *Brady* disclosures yet, he failed to heed that warning and thereby harmed the criminal justice system and the public's view of its fairness. HCR 46 citing *In re Howes*, slip op.

at 38-39. In these circumstances the Committee aptly noted, "Respondent's lengthy experience as a prosecutor is an aggravating factor." HCR 45.

Respondent quibbles with the Committee's characterization of his attitude and failure to acknowledge wrongdoing. Resp. brf. at 31, 50. The Committee got it right. Respondent denies wrongdoing and refuses to accept responsibility for his actions, even in the face of "plainly exculpatory information." HCR 44-45. In his testimony and his written submissions to Bar Counsel, Respondent artfully crafted his language to suggest contrition, but the Committee saw through this pretense. Respondent wrote to Bar Counsel that "if I were to do it over again, I would turn over the information with specificity." BX 7. This promise does not show recognition of the misconduct or even of a "mistake." Resp. brf. at 31. This writing merely shows, at best, a recognition that such misconduct may lead to disciplinary proceedings and, at worst, that Respondent still claims that he disclosed the information but not "with specificity." HCR 8-10 (FF 22-29); HCR 45. Respondent's written submissions to Bar Counsel were motivated by a desire to convince Bar Counsel not to proceed with the disciplinary case. BX 7 (Respondent's letter to Bar Counsel, "I hope that you will seriously consider dismissing this matter."). Similar testimony by Respondent was undercut by the same general motivation. This attitude hardy warrants mitigating the sanction. HCR 45; *See In re Howes*, 39 A.3d 1, 20-21 (failure to accept responsibility an important aggravating factor).

Bar Counsel urges the Board to find the violation and recommend that the Court issue a public censure as the appropriate disciplinary sanction. Such a censure would address the violation and warn prosecutors of the seriousness of the obligation imposed by *Brady* and Rule 3.8(e) and their duty to pursue justice rather than merely to prosecute cases aggressively. Such a censure also would assure the public that the disciplinary system takes seriously the ethical obligations of prosecutors and that no person involved in the administration of justice is "above

the law." No subject should be of such concern to the criminal courts and the attorneys who practice in them as the fundamental fairness of proceedings in those courts.

CONCLUSION

For the reasons stated above, the Board should adopt the findings and legal conclusions of the Hearing Committee and recommend to the Court that Respondent be publicly censured.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of August 2012, I caused the original and four copies of the foregoing Bar Counsel's Corrected Brief In Support Of The Report Of The Hearing Committee And In Oppostion To Respondent's Objections Thereto to be hand-delivered to the Board on Professional Responsibility, 430 E Street, N.W., Room 138, Washington, D.C. 20001, and a copy to be sent by electronic (sarosenthal@venable.com) and first-class mail, postage pre-paid, to:

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