DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
ANDREW J. KLINE,	:	
	:	Board Docket No. 11-BD-007
Respondent.	:	Bar Docket No. 522-09
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Membership No. 441845)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This matter is before the Board on Professional Responsibility on the charge that in 2002, Respondent Andrew J. Kline, while an Assistant United States Attorney, violated Rule 3.8(e) of the D.C. Rules of Professional Conduct, when he intentionally failed to disclose information on request of the defense that as a prosecutor he knew or reasonably should have known tended to negate the guilt of the accused.

The Hearing Committee, after weighing the evidence presented at the disciplinary hearing, making determinations of credibility, and considering the burden of proof, found in a thoughtful and comprehensive 48-page report that Bar Counsel proved by clear and convincing evidence that Respondent violated Rule 3.8(e). The Hearing Committee recommended a public censure, the sanction proposed by Bar Counsel.

For the following reasons and those set forth by the Hearing Committee, the Board finds that Respondent violated Rule 3.8(e). The Board has concluded, however, that the gravity of the misconduct warrants a sanction more severe than a public censure and thus recommends that the Court suspend Respondent for 30 days.

II. PROCEDURAL HISTORY

In a Specification of Charges filed on March 9, 2011, Bar Counsel alleged that Respondent violated Rule 3.8(e), which provides that a prosecutor "shall not . . . intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused . . . ." The matter was assigned to Hearing Committee Number Nine.

Prehearing conferences were held on May 6, 2011 and July 8, 2011. The hearing took place on July 18 and 19, 2011. After the Hearing Committee made a preliminary, non-binding finding of a rule violation, the Hearing Committee took testimony from Respondent's character witnesses on the question of sanction. Tr. 535; *see* Board Rule 11.11.[1] Bar Counsel did not present evidence in aggravation of sanction, but argued that Respondent had failed to take responsibility for his misconduct. The hearing concluded, but the record was held open, pending the disposition of Bar Counsel's motion for an order requiring production of documents from the United States Attorney's Office.[2] On August 15, 2011, the Hearing Committee denied the motion, and the record closed as of that date.[3]

The Hearing Committee issued its Report and Recommendation on March 28, 2012, finding that Respondent violated Rule 3.8(e) and recommending a public censure. Respondent

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[1] "Tr.__" refers to the consecutively-paginated transcript of the hearing on July 18 and 19, 2011. "BX__" refers to Bar Counsel's exhibits. "RX__" refers to Respondent's exhibits.

[2] Bar Counsel sought access to documents relied upon by Roy W. McLeese, former Chief of the Appellate Division at the United States Attorney's Office for the District of Columbia, and now a Judge of the D.C. Court of Appeals, who testified on behalf of Respondent. *See* Tr. 237-309.

[3] On March 26, 2012, Respondent filed a Motion for a Post-Hearing Status Hearing to "assist the hearing committee in addressing any outstanding questions or issues." The motion was denied as moot in the Hearing Committee Report, which issued two days later.

filed a notice of exceptions with the Board. Bar Counsel did not file an exception. On June 25, 2012, Respondent filed a brief in support of his exceptions, and on June 7, 2012, the United States Attorney's Office filed a motion for leave to file an Amicus Curiae brief in support of Respondent, with the lodged brief. On June 12, 2012, the Board granted the motion of Amicus and accepted the lodged brief for filing. On July 6, 2012, Bar Counsel filed a brief in support of the Hearing Committee's Report and Recommendation and in opposition to Respondent's objections. Respondent, on July 16, 2012, filed a brief in support of his exceptions, and Bar Counsel filed a corrected version of its initial brief on August 16, 2012. The Board heard oral argument on October 11, 2012.

III. FINDINGS OF FACT

The criminal prosecution at issue in this proceeding, *United States v. Shelton*, F-847-01 (D.C. Super. Ct.), involved the non-fatal "drive-by" shooting of Christopher Boyd. The Hearing Committee found that Respondent violated Rule 3.8(e), when he intentionally failed to disclose to the defense Boyd's statement, when interviewed at the hospital by Officer Edward Woodward shortly after the shooting, that he was unable to identify his assailant ("Boyd Hospital Statement").

Bar Counsel supports the Hearing Committee's findings of fact, with minor exceptions not relevant to the issues before the Board. In contrast, Respondent objects to many of the Hearing Committee's factual findings, arguing that the Hearing Committee "misstated a number of key facts and otherwise omitted others," and in his brief sets forth his own statement of facts. Respondent's Brief at 23.[4]

[4] Reference to Respondent's initial brief to the Board is cited as "Respondent's Brief at _____."

The Board has carefully reviewed the record, Respondent's objections, and the brief of Amicus, and with few exceptions not relevant to the issues here, accepts the Hearing Committee's factual findings as "supported by substantial evidence in the record, viewed in its entirety." *In re Shariati*, 31 A.3d 81, 86 (D.C. 2011) (per curiam) (quoting *In re White*, 11 A.3d 1226, 1228 (D.C. 2011)); *see* D.C. Bar R. XI, § 9(h). The findings of the Hearing Committee set forth below address Respondent's specific objections.

A. Background – *United States v. Shelton*

1. Respondent was admitted to the District of Columbia Bar on May 2, 1994.[5] FF 1 at 3.[6]

2. In 2001 and 2002, Respondent was an Assistant United States Attorney in the District of Columbia assigned to prosecute violent crimes, including the *Shelton* matter, where the defendant was charged with felony assault in the drive-by shooting of Christopher Boyd. FF 2-3 at 3.

3. The principal issue at trial was the reliability of the government's identification witnesses. The question in the case was "who did it?" FF 3 at 3. Prior to trial, Shelton's attorney filed an alibi notice. FF 3 at 3; BX 2 at 53.

4. When Boyd testified at trial and was asked to identify his assailant, he pointed out defendant Arnell Shelton. FF 4 at 3.

[5] Respondent is also a member of the California Bar. The Hearing Committee's mistaken statement that he is a member of the South Carolina and Maryland Bars is based on the membership information of another attorney with the same name. HC Report at 3; *see* Respondent's Brief at 32 (citing BX A).

[6] The Hearing Committee's findings of fact are designated "FF" and are cited to the page of the Hearing Committee Report on which they appear.

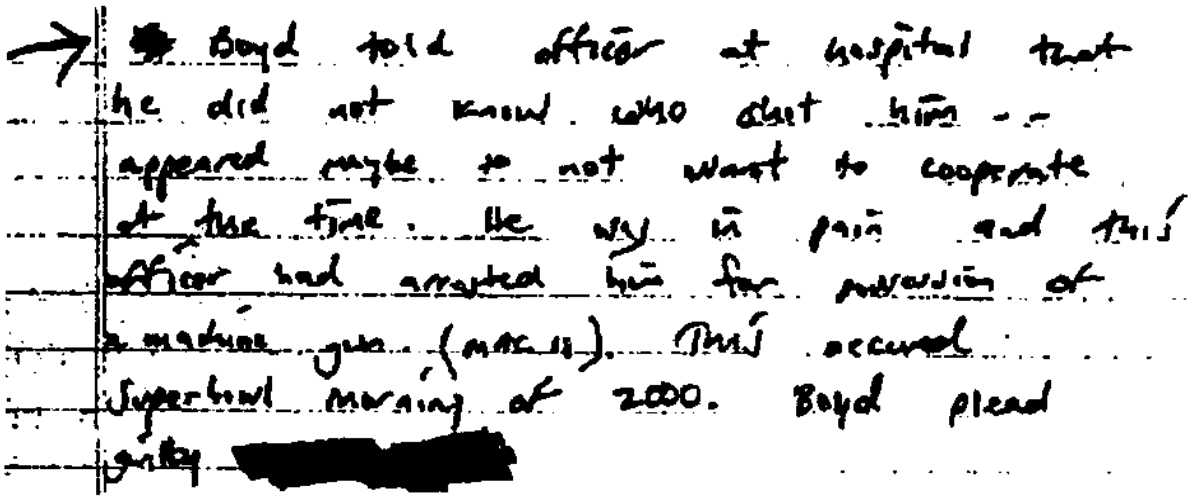
B. Before the *Shelton* Trial, Respondent Understood that Boyd Had Told Police that He Did Not Know Who Shot Him.

5. In the course of preparing the *Shelton* case for trial, Respondent spoke to D.C. Metropolitan Police Department Officer Edward Woodward, the first officer at the crime scene. The Hearing Committee found that Officer Woodward informed Respondent that when he first interviewed Boyd at Greater Southeast Hospital shortly after the shooting, Boyd told him that he did not know who shot him. FF 7 at 4. This finding is based, first, on Respondent's contemporaneous, non-verbatim notes of Respondent's interview with Officer Woodward. *Id.* Respondent's notes state, in pertinent part:

> Boyd told officer at hospital that he did not know who shot him—appeared maybe to not want to cooperate at the time. He was in pain and this officer had arrested him for possession of a machine gun . . . .

FF 7 at 4 (quoting BX 4 at 212; RX I at 209).[7] It is also based on Officer Woodward's testimony at the disciplinary hearing that Boyd said "words to the effect of 'I don't know who shot me' or

[7] Respondent's notes are reproduced below. The Hearing Committee was unable to make a finding whether the arrow is in Respondent's handwriting, since Respondent did not acknowledge the annotation and the Hearing Committee did not have access to the original document. *See* HC Report at 5-6 n.4. The Hearing Committee's finding, that "the arrow confirms that U.S. Attorney's Office personnel believed the Boyd Hospital Statement to be significant," is supported by substantial record evidence.



'didn't see who shot me,'" as well as "alls I saw was a dark-colored car." FF 10 at 5 (quoting Tr. 394-95). The Hearing Committee found this testimony credible. *Id.*

Respondent challenges the Hearing Committee's credibility finding as erroneous, on the grounds that (i) the evidence failed to "establish[] that Boyd specifically told Officer Woodward that he 'did not know' who shot him"; and (ii) the best evidence of what Boyd told Officer Woodward was the Metropolitan Police Department Form 119 ("PD-119") he drafted hours after the shooting, which indicated that Boyd said he was shot from a dark colored car. Respondent's Brief at 30. The Hearing Committee's credibility determination was based on its observation of Officer Woodward, and is consistent with his criminal trial testimony and the documentary record, including Respondent's notes and the PD-119, which shows that the only affirmative evidence of the assault then provided by Boyd was that "a dark colored car pulled up and shot him in the back." RX J at 211. The Board is obliged to accept the Hearing Committee's credibility determination, because it had the opportunity to observe Officer Woodward, and its assessment is "supported by substantial evidence in the record viewed as a whole." *In re Sabo*, 49 A.3d 1219, 1224 (D.C. 2012) (quoting *In re Micheel*, 610 A.2d 231, 234 (D.C. 1992)). The Board thus adopts the Hearing Committee's finding that Boyd told Officer Woodward that he did not know who shot him.

6. Respondent's contemporaneous notes of his conversation with Officer Woodward also establish that at the time Respondent was preparing the *Shelton* case for trial, he "*understood* that Boyd had 'told officer [Woodward] at hospital that he did not know who shot him.'" FF 12 at 5 (emphasis in original) (quoting BX 4 at 212). The Hearing Committee properly discounted Respondent's effort to cast doubt on the accuracy of the notes, finding that they were a "reliable recorded recollection—and indeed the best evidence—of Officer

Woodward's hospital conversation with victim Christopher Boyd as it was reported to Respondent prior to the Shelton trial in March 2002." FF 9 at 4-5.

C. Respondent Failed to Disclose the Boyd Hospital Statement to the Defense.

7. Respondent failed to disclose the Boyd Hospital Statement to the defense, either directly or indirectly. On July 10, 2001, Respondent sent Shelton's Public Defender Service attorney, Carlos Vanegas, an initial discovery letter, but did not disclose the Boyd Hospital Statement. FF 13 at 6 (citing RX A at 35).

8. On August 30, 2001, Vanegas made a written request to Respondent for discovery pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). FF 14 at 6. The request specifically sought "'prior inconsistent [or] non-corroborative' statements by witnesses and 'any other information, which . . . impeaches a witness' testimony.'" *Id.* (quoting BX 5 at 346-48). Respondent received the *Brady* request. *Id.* (citing BX D, ¶ 3; Tr. 461-62). The next day, August 31, 2001, Respondent answered the *Brady* request, and affirmatively denied that the government was "in possession of any truly exculpatory information." FF 15 at 6 (quoting BX 4 at 219). Again, Respondent did not disclose the Boyd Hospital Statement.[8] *Id.*

9. Public Defender Service attorney Anna Rodriques[9] subsequently assumed the representation of Shelton. FF 16 at 6. She testified credibly that Respondent never told her of the Boyd Hospital Statement. FF 20 at 8 (citing Tr. 31, 34-36, 45, 56). Her testimony was corroborated by the documentary evidence, including Respondent's supplemental discovery

[8] The Hearing Committee rejected Respondent's suggestion that he "might" have orally disclosed the Boyd Hospital Statement to Vanegas. This finding is supported by substantial record evidence. FF 18 at 7. No one involved in the case believed there had been such a disclosure, and there are no contemporaneous documents in the record that would corroborate such a disclosure. *Id.*

[9] Bar Counsel's witness list and the Hearing Committee Report misspell Ms. Rodriques' name as "Rodriguez."

letters dated January 11, 2002, January 18, 2002, and February 20, 2002, none of which disclosed the Boyd Hospital Statement. FF 16 at 6 (citing Tr. 27-78; RX A at 39-46).

10. On March 1, 2002, Respondent again wrote to Rodriques and reported that Andrew Durham, a witness to the shooting, had failed to make a photographic identification of Shelton and had earlier provided a description of the assailant to a Public Defender Service investigator that did not match Boyd. FF 17 at 6-7 (citing RX A at 45). Respondent explained that this exculpatory evidence was attributable to Durham's wish to avoid involvement and to get the Public Defender Service "off his back." *Id.* Notwithstanding the disclosure of the Durham exculpatory evidence, Respondent did not reveal the Boyd Hospital Statement in the March 1 letter. *Id.*

11. Before jury selection in Shelton's trial, Rodriques raised a *Brady* issue regarding a possible misidentification. Defendant Shelton's nickname was "White Boy," and Rodriques had learned that there may have been two persons with the same nickname. FF 19 at 7. Respondent denied the claim, asserting that he had "no doubt from day one" that Shelton was the shooter, and he was "not sure how one could conjure up a *Brady* argument in this case." *Id.* (quoting BX 3 at 70-71). The trial court responded:

> Because you are sure [sic] you have the right guy, no one could conjure up a *Brady* argument? . . . 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.

Id. at 7-8 (citing BX 3 at 71). Respondent assured the trial court that he was "especially careful when it came to *Brady* evidence." *Id.* at 8 (quoting BX 3 at 71). Notwithstanding this interchange, Respondent did not disclose the Boyd Hospital Statement. FF 19-20 at 7-8.

12. The police reports Respondent provided to the defense did not disclose, either directly or indirectly, the substance of the Boyd Hospital Statement. FF 29 at 10. The reports,

including the PD-119, do not affirmatively state that Boyd did not identify Shelton, as Respondent contends; they are silent on that point. FF 26 at 9. Instead, they disclose witnesses who did identify Shelton to the police; the documents do not purport to name persons who failed to do so. *Id.* The testimony of defense counsel Rodriques and the Assistant United States Attorneys (and their supervisors) who succeeded Respondent in the *Shelton* prosecution is consistent with the clear meaning of the police reports. They all concluded that Respondent did not disclose the Boyd Hospital Statement to the defense. FF 29-31 at 10-11. The police reports also are consistent with the testimony of Officer Woodward, who agreed that nothing in them suggested whether or not Boyd was able to identify the shooter. FF 30 at 11.

D. The First Trial of *United States v. Shelton*

13. The *Shelton* case was tried between March 5 and 7, 2002. FF 32 at 12. The principal issue in the case was the ability of the three eyewitnesses to the shooting, Andrew Durham, Christopher Boyd, and Boyd's mother, Cassandra Williams, to identify the assailant. FF 32-33 at 12. Shelton's wife testified as an alibi witness, that he was home at the time of the shooting. FF 33 at 12.

14. The circumstances of the crime supported the defense of misidentification. The crime was a drive-by shooting that took place shortly before midnight, happened quickly, and involved a car traveling at a high rate of speed. FF 34 at 12. Consequently, the witnesses each described the car and the position of the shooter differently. *Id.* Eyewitness Durham described a "blur," and witnesses gave different accounts of where the shooter was seated in the car. *Id.* The witnesses also described the car differently, with Durham testifying that it was a silver Honda with tinted windows, *id.* (quoting BX 6 at 213-14, 217, 239), and Boyd describing it as a "baby-powder blue Toyota Corrolla" or a dark colored Toyota Camry. *Id.* (quoting BX 6 at 69; BX 4 at

213). There were also significant questions raised about the witnesses' credibility and Boyd's trial identification of Shelton. FF 35-36 at 13. The jury was unable to reach a verdict, and on March 12, 2002, the court declared a mistrial. FF 37 at 14.

E. The Second Trial of *United States v. Shelton*

15. Respondent left the U.S. Attorney's Office after the *Shelton* trial. FF 38 at 14.

16. The Assistant United States Attorney assigned to prosecute the retrial prepared a letter disclosing the Boyd Hospital Statement to the defense, but he left the office due to a family emergency and never sent it. FF 39 at 14.

17. When the case was reassigned, the supervisors at the U.S. Attorney's Office instructed the new prosecutor, Wanda Dixon, to disclose the Boyd Hospital Statement to the defense, and she agreed that she should do so. FF 40-41 at 14.

18. The retrial was set for July 17, 2002. The evening before, Dixon disclosed the Boyd Hospital Statement to the defense. FF 41 at 14.

19. On July 18, 2002, Rodriques moved for dismissal based on the delayed production of the Boyd Hospital Statement. FF 42 at 14-15. The trial court demanded an explanation as to "what Mr. Kline knew, when he knew it, [and] why it was disclosed so late." *Id.* (quoting BX 3 at 91). Dixon responded that she "kn[ew] that he knew" about the Boyd Hospital Statement before the first trial but did not know why Respondent had not disclosed it. FF 43 at 15 (quoting BX 3 at 91).[10] The trial court continued the case until the next day to permit Dixon to find out "why [the information] wasn't disclosed earlier" and to explain "[i]f it's

[10] Before the Hearing Committee, Dixon testified that her statement to the trial court that she "knew that [Respondent] knew" about the Boyd Hospital Statement was based on information from her supervisors and that Respondent never indicated to her that he had intentionally withheld it from the defense. Tr. 197-99.

not considered exculpatory, why not." FF 42 at 14-15 (quoting BX 3 at 92). The trial court asked Officer Woodward to make himself available to the defense. *Id.*

20. On July 19, 2002, the trial court again asked why the Boyd Hospital Statement had not been turned over sooner. BX 3 at 100, 108. Dixon explained that "it was [Respondent's] position that the information was not exculpatory." FF 43 at 15; BX 3 at 108-09. When the trial court asked why Respondent took this position, Dixon responded that her "understanding" was that Respondent "thought that there was a reason for the witness to respond in that way . . . that the witness was in pain [and] had just been taken to the hospital." FF 43 at 15 (quoting BX 3 at 110).

21. At the retrial, the prosecution called Boyd and Durham, who identified Shelton as the shooter. FF 47 at 16. It did not call Cassandra Williams, Boyd's mother, whose credibility was challenged during the first trial.[11] FF 35 at 13 (internal citations omitted). Officer Woodward testified for the defense that he could not remember Boyd's "exact words," but that Boyd said, "I don't know or I didn't see or all's I saw was a dark colored, someone shoot at me from a dark-colored car." FF 47 at 16 (citing BX 3 at 162). The jury returned a verdict of guilty. FF 48 at 16.

22. On appeal, the Court held that the trial court erred by precluding Shelton from "present[ing] to the jurors the [prior] prosecutor's failure to disclose exculpatory evidence as required by *Brady*," and from "argu[ing] that the jury could and should infer from that failure

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[11] The Hearing Committee characterized the credibility problems with Cassandra Williams as "significant," as described below:

> Ms. Williams was the victim's mother. She was receiving government payments due to her participation in a witness protection program and there was a dispute as to where she was standing when the shooting started. She told police that "White Boy" shot her son, but there may have been more than one "White Boy" in the neighborhood.

FF 35 at 13 (internal citations omitted).

that the government was concerned about the impact of such disclosure on the government's case." *Shelton v. United States*, 983 A.2d 363, 364 (D.C. 2009) ("*Shelton I*"). The Court upheld the conviction, finding the error harmless, and the government petitioned for rehearing, on an issue not relevant to the issues here. On rehearing, the Court stated with respect to the *Brady* violation:

> [E]ven if the court had allowed evidence of the government's *Brady* violation to come in, and defense counsel had argued to the jury that the government withheld the evidence because it thought its case was weak, we can conclude, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error . . . ."

Shelton v. United States, 26 A.3d 216, 222 (D.C. 2011) (per curiam) ("*Shelton II*") (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

IV. CONCLUSIONS OF LAW

A. Respondent Violated Rule 3.8(e).

The Hearing Committee found that Respondent's failure to disclose the Boyd Hospital Statement to the defense before the first *Shelton* trial violated Rule 3.8(e). The Board concurs with that finding.

Rule 3.8(e) states, in pertinent part:

> The prosecutor in a criminal case shall not . . .
>
> (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused . . . .

A violation of Rule 3.8(e) thus requires proof of three elements—that Respondent knew or reasonably should have known that the evidence or information tended to negate the guilt of the accused, that the defense requested the material at a time its use was reasonably feasible, and

that the prosecutor's failure to turn over the evidence or information was intentional. The question whether Bar Counsel satisfied these three elements requires determinations of "ultimate fact," which are really conclusions of law, because they have a clear "legal consequence." *See In re Martin*, No. 11-BG-775, slip op. at 11 (D.C. Mar. 28, 2013) (citing *Micheel*, 610 A.2d at 234-35). Reviewing the Hearing Committee's determinations *de novo*, the Board finds that Bar Counsel satisfied each element of Rule 3.8(e), based on Respondent's "deliberate, if not tactical decision" to withhold the Boyd Hospital Statement from the defense, as explained below. FF 57 at 19.

1. The Defense Timely Requested All Information that Would Tend to Negate Shelton's Guilt.

The defense timely requested all information that would tend to negate Shelton's guilt, well before trial. The defense specifically asked for "prior inconsistent [or] non-corroborative" witness statements, which would have included the Boyd Hospital Statement. FF 14 at 6 (quoting BX 5 at 346-47).

2. Respondent Reasonably Should Have Known that the Boyd Hospital Statement Tended to Negate the Guilt of Arnell Shelton.

Respondent knew of the Boyd Hospital Statement. As an experienced prosecutor, he also reasonably should have known that the Boyd Hospital Statement tended to negate Shelton's guilt, because of its obvious exculpatory and impeachment potential. Boyd knew Shelton before the shooting, but even after Shelton's name was suggested to him by Officer Woodward, Boyd maintained that he did not know who shot him. The statement could have been used by the defense not only to support Shelton's defense that he was not the shooter but to impeach Boyd's later identification of Shelton, which took on extra credibility given their acquaintance. As the Hearing Committee observed, "[t]he circumstances under which the [Boyd Hospital Statement] was made were 'of a kind that would suggest to any prosecutor that the defense would want to

know about it.'" HC Report at 24 (quoting *Leka v. Portuondo*, 257 F.3d 89, 99 (2d Cir. 2001), *quoted with approval in Miller v. United States*, 14 A.3d 1094, 1110 (D.C. 2011)).

3. Respondent's Decision to Withhold the Boyd Hospital Statement Was Intentional.

The Hearing Committee correctly found that Respondent intentionally decided not to disclose information that he reasonably should have known tended to negate Shelton's guilt. The Hearing Committee's finding was not based on a single piece of evidence, as Respondent contends,[12] but on its consideration of the "entire mosaic" of the circumstances surrounding the failure to disclose, including Respondent's explanations for the nondisclosure. *See In re Ukwu*, 926 A.2d 1106, 1117 (D.C. 2007) (In assessing intent, the "entire mosaic" of conduct should be considered.); *In re Starnes*, 829 A.2d 488, 500 (D.C. 2003) (per curiam) (appended Board Report) (A lawyer's *scienter* is to be inferred from the circumstances.). Based on this evaluation, the Hearing Committee concluded that Respondent "assessed the circumstances under which the statement was made, and affirmatively decided not to disclose it to the defense." FF 51 at 17; *see also* HC Report at 23 (Respondent "made a conscious decision not to make the disclosure, based on his subjective determination that the statement was not exculpatory.").

Importantly, the Hearing Committee found that Respondent intentionally failed to disclose information that he *reasonably should have known* tended to negate Boyd's guilt. FF 53 at 17-18. The Hearing Committee did not find that Respondent failed to disclose information that he actually, subjectively knew to be *Brady* material, nor was it necessary to make such a finding to establish a violation of Rule 3.8(e). *Id.* Thus, Respondent's argument to the Hearing Committee that he did not "intentionally hide something that [he] *thought* was required to be

[12] Respondent contends that the finding was based exclusively on the testimony of Assistant United States Attorney Wanda Dixon. Respondent's Brief at 2.

disclosed by the *Brady* decision or by disciplinary rule 3.8," does not address the relevant question: whether he intentionally failed to disclose something that he reasonably should have known he was required to disclose to the defense. HC Report at 17 (emphasis added) (quoting Tr. 418-19).

In finding that the failure to disclose was intentional, the Hearing Committee rejected Respondent's various *post hoc* justifications and explanations, concluding that they were inconsistent with the law, incredible or lacking in evidentiary support. Thus, Respondent testified that he "guessed" that he did not disclose the Boyd Hospital Statement because he did not view it as exculpatory, and because he had disclosed police reports containing "97.7 percent" of its content. FF 50 at 17 (citing Tr. 478-79). But Rule 3.8(e) required Respondent to disclose to the defense evidence or information he *reasonably should have known* tended to negate Shelton's guilt. As explained above, the exculpatory potential of the Boyd Hospital Statement was self-evident. The disclosure of other police reports did not absolve Respondent of his obligation to share this information with the defense.

Respondent also attempted in his testimony to justify the failure to disclose on the grounds that the Boyd Hospital Statement was unreliable and thus would be unpersuasive to a jury. As the Hearing Committee found, Respondent's justification is inconsistent with the fundamental principle that the prosecutor does not have the prerogative to withhold evidence based on a subjective assessment of its utility to the defense. HC Report at 25-26 (citing *Zanders v. United States,* 999 A.2d 149, 163-64 (D.C. 2010)) ("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."). Further, the trial court specifically admonished Respondent that "*Brady* doesn't leave

it up to the prosecutor," yet Respondent continued to withhold the Boyd Hospital Statement, notwithstanding his assurance to the court that he was "especially careful" with respect to his *Brady* obligations. FF 19 at 7-8.

Respondent's testimony that he did not believe that the Boyd Hospital Statement fell within his *Brady* obligations, because he considered Boyd's physical condition so grave as to render it unreliable, was also properly discounted by the Hearing Committee. As the Hearing Committee found, Respondent's repeated testimony that Boyd was "in and out of consciousness" was lacking in "any meaningful factual underpinning" and was in fact refuted by the record, which showed that evidence of Boyd's loss of consciousness was raised for the first time at the second trial.[13] FF 54-56 at 18-19. In addition, the Hearing Committee properly rejected Respondent's testimony that he "might" have disclosed the Boyd Hospital Statement to Shelton's first defense attorney. It correctly held that the statement was unsupported by any corroborative testimony or documentation and inconsistent with the policies of both the Public Defender Service and the U.S. Attorney's Office to memorialize such disclosures. FF 18 at 7.

In addition to considering Respondent's failure to provide a consistent and credible explanation for his failure to disclose the Boyd Hospital Statement, the Hearing Committee considered the testimony of the other witnesses in concluding that the nondisclosure was intentional. Thus, the Hearing Committee found that Officer Woodward's testimony about his conversation with Respondent, as memorialized in Respondent's notes, established that Respondent "understood" that Boyd had told Woodward that he did not know who shot him. FF 12 at 5. The Hearing Committee further considered the testimony of Roy McCleese, that the

[13] The Hearing Committee did not find that Respondent testified dishonestly in this respect or that he intended to mislead the Hearing Committee, but only that his testimony was incredible, likely due to the passage of time and his review of trial transcripts in preparation for his testimony in this matter. HC Report at 18 n.11.

failure to turn over the Boyd Hospital Statement violated the U.S. Attorney's Office disclosure policy in effect at the time, as a basis for concluding that the failure to disclose was "all the more deliberate, if not tactical . . . ." FF 57 at 19. Finally, the Hearing Committee credited the testimony of Assistant U.S. Attorney Wanda Dixon, whose veracity was not challenged by Respondent at the hearing, that she told the trial court that she "knew that [Respondent] knew" about the Boyd Hospital Statement (based on conversations with her supervisors).[14] *See* Board FF 19, *supra* at 10.

Respondent now argues for the first time before the Board that his failure to disclose the Boyd Hospital Statement was inadvertent. *See* Respondent's Brief at 32. Because the Hearing Committee did not have an opportunity to consider the claim of inadvertence, it is waived. *See, e.g.*, *Shariati*, 31 A.3d at 87; *In re Artis*, 883 A.2d 85, 97 (D.C. 2005). Further, the defense of inadvertence is both unsupported by the record and contradicted by Respondent's hearing testimony.[15] HC Report at 52; *see* Tr. 416 ("I can tell you that I did not recognize this as exculpatory."); 434 (Respondent never thought that the statement "was material or that it tended to negate the guilt of the accused."); 478 ("I don't think that I did, nor do I think I would have, viewed this as material or exculpatory or *Brady*."); 490 ("I can tell you that I did not at the time think, hmm, this is material evidence that needs to be disclosed to the defense, nor do I think that as I sit here today."). Respondent's own testimony supports the Hearing Committee's conclusion that he consciously decided not to produce information that he reasonably should

[14] Respondent's contention that the Hearing Committee's reliance on Dixon's testimony was predicated on a false assumption—that Dixon spoke directly with Respondent—is without moment. Even if Dixon's understanding was based on what her supervisors told her, it is consistent with Respondent's own testimony at the hearing.

[15] At oral argument, the Board pressed counsel for Respondent to identify where in the transcript Respondent had testified that his failure to disclose the Boyd Hospital Statement was inadvertent. Counsel conceded that there was no such testimony but argued that the evidence supported such a finding.

have known tended to negate Shelton's guilt. There thus is no basis in law or fact to support Respondent's claim of inadvertence raised for the first time before the Board.

B. Even if Rule 3.8(e) Required Only the Disclosure of Material Evidence, Respondent Violated the Rule Because the Boyd Hospital Statement Was Material.

Respondent's principal legal defense is that Respondent did not have a legal duty to disclose the Boyd Hospital Statement under Rule 3.8(e) because it was not "material" within the meaning of *Brady*. As explained below, even if a prosecutor's ethical obligations under Rule 3.8(e) were construed narrowly to require only the disclosure of "material" evidence under *Brady*, Respondent violated the rule, because the Boyd Hospital Statement was obviously material.

As the Hearing Committee recognized, the materiality determination is based on a contextual analysis. "If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient" to satisfy the materiality standard. HC Report at 35 (quoting *United States v. Agurs,* 427 U.S. 97, 112-13 (1976)). In making the contextual *Brady* assessment, the Hearing Committee considered that Respondent specifically assured defense counsel that he had no "truly exculpatory evidence" and told the trial court that he was "especially careful when it came to *Brady* evidence." FF 15 at 6; FF 19 at 8. Thus, Respondent may have "'misleadingly induced defense counsel to believe' that there was no meaningful impeachment or exculpatory evidence with which to attack Boyd," which may, in turn, have affected the defense strategy. HC Report at 35. Taken in this light, the failure to respond fully to the defense's *Brady* request impaired the adversary process, establishing the materiality of the nondisclosure.

The Hearing Committee further considered the criteria for the reliability of eyewitness testimony set forth in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the lack of a confession or

forensic evidence linking Shelton to the crime, and the suggestive identification procedures used by the police, weighing them against the rest of the government's case. HC Report at 36-37. With respect to the eyewitnesses, the Hearing Committee found that Boyd had little opportunity to see the shooter, since it was a "night time, drive-by shooting that happened quickly," and that "even that limited opportunity was further constrained by the fact that he had been drinking, had been shot from behind and had to look through tinted windows to see his assailant." *Id.* at 38-39. As the Hearing Committee observed, if Boyd had been the sole identification witness, there would have been "no doubt" under these circumstances that the Boyd Hospital Statement was material. *Id.* at 39. As it was, there were two other eyewitnesses, but they were contradicted by Shelton's alibi witnesses, and "had important credibility issues of their own." *Id.* at 40. The Hearing Committee thus found that the Boyd Hospital Statement had clear exculpatory potential, enhanced by the fact that Boyd knew Shelton before the crime, giving his in-trial identification added weight. *Id.*

Respondent disputes the Hearing Committee's materiality finding, on the grounds that Boyd's medical condition rendered his statement unreliable, and because the second jury rendered a verdict of guilty. First, the question of reliability was for the jury to decide; Shelton had the right to the exculpatory evidence and to argue its reliability to the jury. If Respondent had any doubt, it was his responsibility to bring the matter to the attention of his supervisors or to provide the Boyd Hospital Statement to the trial court for an *in camera* inspection. *See Boyd v. United States*, 908 A.2d 39, 61 (D.C. 2006) (In arguable cases, potential exculpatory material should be brought to the attention of the defense, or at the least to the trial court for *in camera* inspection.).

Second, the fact that the second jury returned a verdict of guilty is irrelevant to the materiality analysis. Respondent's obligation of disclosure under *Brady* existed "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case . . . ." HC Report at 38 (quoting *Edelin v. United States*, 627 A.2d 968, 970 (D.C. 1993)). This would have been before the first trial, not following a hung jury and a mistrial. As the Hearing Committee recognized:

> [T]he failure to disclose the Boyd Hospital Statement undermines the confidence in the outcome of 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.

Id. at 42; *see* FF 66 at 22.

Finally, the Boyd Hospital Statement was material, even though the nondisclosure did not result in the reversal of Shelton's conviction. The position of Respondent and Amicus to the contrary—that evidence is material only if it results in reversal—overlooks the distinction between the *Brady* obligation to disclose and the *post hoc* assessment that the failure to disclose requires reversal. *See Boyd*, 908 A.2d at 59-60 (citing *Strickler v. Greene*, 527 U.S. 263 (1999)) (duty of disclosure exists even when the information later proves not to be material). Such a proposed standard is unduly vague and unenforceable, and it would have the prosecutor predict the unpredictable. As United States District Judge Paul L. Friedman explained in *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005):

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins . . . . The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial.[16]

[16] In *Safavian*, Judge Friedman held that *Brady* requires the disclosure of any potentially exculpatory or otherwise favorable evidence without regard to whether the failure to disclose likely would affect the outcome of the upcoming trial. 233 F.R.D. at 16. In *Boyd*, the Court

The materiality standard that Respondent and Amicus propose thus offers little guidance to prosecutors, who cannot be expected to calculate the odds of reversal at the early stage of the case when disclosure is required. Even assuming Rule 3.8(e) requires proof of materiality, application of the rule should not be restricted to disclosures of such centrality that would result in the reversal of a conviction.

The Board thus concurs in the Hearing Committee's assessment that the Boyd Hospital Statement was material evidence within the meaning of *Brady*, a finding that is consistent with the decision of the Court of Appeals in the appeal of the first *Shelton* trial and the finding of the trial court, which characterized the nondisclosure as a *Brady* violation that was so self-evident, "it wouldn't have taken me five seconds to figure out that's something that the defense was entitled to know." FF 45 at 16. Thus, assuming Rule 3.8(e) requires proof of materiality, Bar Counsel established a violation based on Respondent's failure to disclose the Boyd Hospital Statement.

C. Rule 3.8(e) Does Not Require Proof of Materiality.

The Court has not addressed the scope of Rule 3.8(e) in the context of a disciplinary case and whether it requires proof of materiality. It is unnecessary to do so here, since the Boyd Hospital Statement was material. If the Court nonetheless decides to reach the question, the Board recommends that, in contrast to *Brady*, it find that Rule 3.8(e) does not include a materiality requirement, consistent with its plain meaning.

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found Judge Friedman's view "persuasive," but concluded that it could not be reconciled with Supreme Court cases limiting the duty to disclose to "material" evidence. 908 A.2d at 60-61. However, the Court's holding in *Boyd* that disclosure may be required even where the information later proves not to be material, is consistent with the underlying rationale in *Safavian*—that prosecutors do not have the gift of prophecy—and with an interpretation of Rule 3.8(e) consistent with its plain terms, to require a broader disclosure obligation by prosecutors.

As the Hearing Committee found, the text of Rule 3.8(e) is "straightforward and unequivocal." HC Report at 28; *see Boyd*, 908 A.2d at 59 n.30 ("By its terms, Rule 3.8(e) is not conditioned on the materiality of the information.").[17] It requires the disclosure of "any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused . . . ." If the Court had intended to make a lawyer's ethical obligations co-extensive with *Brady*, it could have explicitly incorporated a materiality element into the rule, but it did not. Limiting the disclosure obligation of Rule 3.8(e) to material evidence is inconsistent with the rule's plain meaning.

Respondent and Amicus nonetheless contend that the "common understanding" is that Rule 3.8(e) only requires the disclosure of material evidence. Their interpretation is based on Comment [1] to Rule 3.8(e), which states, in pertinent part:

> The Rule . . . is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statues, and court rules of procedure.

The Hearing Committee disagreed and correctly found that Comment [1] does not alter the plain meaning of Rule 3.8(e). As it recognized, the Comments are not intended to "to add obligations to the Rules," but instead "provide guidance for interpreting the Rules and practicing in compliance with them. . . . The Comments are intended as guides to interpretation, *but the text of each Rule is controlling*." HC Report at 28 (emphasis in original) (quoting Rules Scope [1], [6]). Comment [1], at most, reminds prosecutors of their obligations to follow "the United States Constitution, federal or District of Columbia statutes, and court rules of procedure," as well as their obligations under Rule 3.8(e). HC Report at 28-29. Those obligations are distinct from the

[17] In *Boyd*, the Court implied that Comment [1] to Rule 3.8(e) may be inconsistent with the rule's plain meaning, but it did not decide the question. *See Boyd*, 908 A.2d at 57; *infra* at 22-23.

broader duty to disclose exculpatory evidence under Rule 3.8(e), which is not limited to material evidence.

Even if the meaning of Rule 3.8(e) was not clear, an examination of the legislative history confirms that the rule was intended to impose a broader disclosure obligation than mandated under *Brady*. Thus, the Department of Justice ("DOJ") urged that Rule 3.8(e) be deleted, or if adopted, "redrafted to make clear that the proposed Rule is not intended to impose obligations on the prosecutor beyond those mandated by the Constitution." Brief of Amicus Curiae at Appendix A (Letter from Harold G. Christensen, Deputy Attorney General, to Clerk, District of Columbia Court of Appeals (Nov. 30, 1988) ("DOJ Letter")). Amicus argues that in light of this history, the final sentence of Comment [1] must have been intended to ensure that prosecutors would not be held to standards that differed from those imposed under substantive law. Brief of Amicus Curiae at 7-8. To the contrary, had that been the Court's intent, it could easily have redrafted the rule as the government requested. It did not, but instead maintained the rule's broad disclosure requirement intact.

A prosecutor's broader duty of disclosure under Rule 3.8(e) is also consistent with the distinction drawn in the case law between a prosecutor's obligations under the Constitution and professional ethics rules. Thus, in *Kyles v. Whitley*, 514 U.S. 419 (1995), decided seven years before the *Shelton* matter, the Supreme Court implicitly recognized that the disciplinary rules may impose a different, higher standard than the Constitution, when it noted that *Brady* "requires less of the prosecution than the ABA Standards for Criminal Justice," citing the Model Rules of Professional Conduct.[18] 514 U.S. at 437.

[18] In ABA Formal Opinion 09-454 (2009), the ABA explained that Model Rule of Professional Conduct 3.8(d) includes a broader disclosure obligation than under the Constitution or *Brady*, and that the states' rules of professional conduct are generally consistent, with the exception of

More recently, in *Cone v. Bell*, 556 U.S. 449 (2009), the Supreme Court recognized that "[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. at 465 n.15 (citing *Kyles*, 514 U.S. at 437). Similarly, the Court of Appeals has recognized that a prosecutor's disclosure obligations are not limited to evidence that is material. Thus, in *Boyd,* the Court, relying on *Strickler*, 527 U.S. at 281, concluded:

> [T]he Supreme Court in *Strickler* contemplated the existence of a broad "duty of disclosure," but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. The Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material.

908 A.2d at 59-60 (footnote omitted) (citing Strickler, 527 U.S. at 281). In *Miller*, the Court reiterated the government's duty to disclose, regardless of materiality. The Court wrote:

> [A]s we explained in *Boyd*, . . . there is a duty of disclosure even when the items disclosed subsequently prove not to be material. . . . "A duty of disclosure exists even if it later appears that reversal is not required."

Miller, 14 A.3d at 1109 (quoting *Boyd*, 908 A.2d at 60).

Neither *Boyd* nor *Miller* needed to or in fact interpreted the scope of Rule 3.8(e), since the Court was concerned with the prosecutor's disclosure obligations under *Brady*. Nor did the Court find that the rule requires proof of *Brady*-type materiality, as Amicus mistakenly contends. Rather, the Court simply recognized that Rule 3.8(e), on its face, does not require the same proof

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Colorado and the District of Columbia (relying on Comment [1]). Like the Court in *Boyd*, the ABA did not examine Comment [1] in the context of the purpose of the Comments, the legislative history of Rule 3.8(e), or the case law, which show that Comment [1] was not intended to alter the rule's broader disclosure obligation, which is the norm in the vast majority of jurisdictions.

of materiality as *Brady*, a position wholly consistent with the Hearing Committee's interpretation of Rule 3.8(e) and our own.

Contrary to Respondent's assertion that *Boyd* and *Miller* do not reflect the state of the law in 2002, they are consistent with cases at the time, which placed Respondent on notice of the prosecutor's broad duty to disclose exculpatory evidence that might not be material. Thus, in *Edelin*, 627 A.2d at 971 (internal quotation marks and citations omitted), 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.

Accord Card v. United States, 776 A.2d 581, 598 n.19 (D.C. 2001) (same); *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995) (quoting *Edelin*, 627 A.2d at 971) (finding that it was "well-settled" that the prosecution is required to disclose exculpatory material at a time it might be useful to the defense and that reversal is warranted only "'where there is a reasonably probability that, had the evidence been disclosed, the result of the proceeding would have been different'").

Further, Respondent was on notice of the obligation to interpret his discovery obligations broadly by the established policy of the U.S. Attorney's Office, which is entirely consistent with the express terms of Rule 3.8(e). As the Hearing Committee observed, "none of the prosecutors involved in the *Shelton* prosecution—with the sole exception of Respondent—had any difficulty recognizing that the Boyd Hospital Statement should have been produced to defense counsel. HC Report at 32 (citing *Safavian*, 233 F.R.D. at 12).

The plain meaning of Rule 3.8(e) is thus consistent with the drafting history of the rule and the case law, which recognizes the broader ethical obligation of prosecutors to disclose exculpatory information. The Board thus rejects the interpretation of Respondent and Amicus,

that the obligations of Rule 3.8(e) are co-extensive with *Brady* and instead finds that Respondent had an obligation to disclose the Boyd Hospital Statement, even if it was non-material, because he reasonably should have known that it "tend[ed] to negate the guilt of Arnell Shelton."

V. SANCTION

The Hearing Committee recommended that the Court impose a public censure for Respondent's misconduct, as proposed by Bar Counsel. Respondent argues that no sanction should be imposed, even if the Board concludes that he violated Rule 3.8(e). For the reasons set forth below, the Board recommends that the Court suspend Respondent for 30 days.

The Board rejects Respondent's position that no sanction is necessary. Prosecutors should be held accountable in light of their pivotal role in the justice system. They are given great discretion, and there are few tools available to oversee their compliance with the legal standards that govern their conduct. *In re Howes*, 39 A.3d 1, 23 (D.C. 2012) (citing *Imbler v. Pachtman*, 424 U.S. 409, 423-24 (1976)). As another court observed in wrestling with the sanction to impose for a violation of that jurisdiction's counterpart to Rule 3.8(e):

> [P]rosecutors are in a unique position from other members of the bar as they are immune from civil liability under *Imbler*. . . . Neither are they realistically subject to criminal sanctions. . . . Thus, absent consequences being imposed by this Court under its authority over disciplinary matters, prosecutors face no realistic consequences for *Brady* violations.

In re Jordan, 913 So.2d 775, 783 (La. 2005). In *Imbler*, the Supreme Court noted that "[a] prosecutor stands perhaps unique . . . in his amenability to professional discipline by an association of his peers." 424 U.S. at 429. A disciplinary sanction is thus an effective, if not key means of both protecting the public and deterring future prosecutors from engaging in similarly egregious conduct. Consequently, the Board cannot accept Respondent's suggestion that he should receive no sanction, particularly in light of the intentional and egregious nature of the

violation. Imposing no sanction in such circumstances would not protect the public, deter other prosecutors from similar conduct, or maintain the integrity of the profession.

A. Standard of Review

An appropriate sanction is one that is necessary to protect the public and the courts, maintains the integrity of the profession, and deters other attorneys from engaging in similar misconduct. *See In re Kline*, 11 A.3d 261, 265 (D.C. 2011) (citing *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc)). The sanction imposed must be consistent with cases involving comparable misconduct. *See* D.C. Bar R. XI, § 9(h)(1). In determining the appropriate sanction, the Court considers: (1) the nature and seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) the respondent's attitude toward the underlying misconduct, (4) prior misconduct, (5) mitigating or aggravating circumstances, and (6) prejudice to the client. *See In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

B. The Nature and Seriousness of the Misconduct

In considering the nature and seriousness of Respondent's misconduct, we recognize that a prosecutor has a special obligation to do justice, as described by the Supreme Court in *Berger v. United States*, 295 U.S. 78, 88 (1935) (quoted in *Howes*, 39 A.3d at 18 n.23):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law . . . [W]hile he may strike hard blows, he [may not] strike foul ones.

In *Strickler*, the Supreme Court specifically noted that the prosecutor's "special status" explains "the basis for the prosecutor's broad duty of disclosure . . . ," even though the violation might not establish that the outcome was unjust. *Strickler*, 527 U.S. at 280-81.

In this case, Respondent's failure to disclose violated his constitutional duty under *Brady*. He failed to produce to the defense or provide for *in camera* review the Boyd Hospital Statement, which he knew had been given to Officer Woodward and should have recognized as obviously material. At a minimum, even if the Boyd Hospital Statement is not viewed as material, Respondent's failure to comply with his broader disclosure obligation under Rule 3.8(e) precluded Shelton from using the statement in his defense during the first *Shelton* trial, affecting Shelton's trial strategy. The Hearing Committee correctly noted that under the circumstances, where four jurors voted for acquittal, there was a "reasonable probability that had the Boyd Hospital Statement been presented to the jury at the first *Shelton* trial, the result of that trial would have been different." FF 63 at 21-22. As it was, the government had an opportunity to retry the case following the mistrial, with practiced witnesses, and knowing the weaknesses of its case. Specifically, the prosecution did not call Boyd's mother, Cassandra Williams, who, as the Hearing Committee found, had "significant" credibility problems. In addition, Respondent's misconduct strained judicial resources, becoming a central issue on appeal in *Shelton I* and *Shelton II*. Respondent's violations were thus unquestionably serious and warrant a significant sanction.

C. There Are No Companion Violations, Including Charges of Dishonesty.

Respondent was charged with violating Rule 3.8(e) only. There were no allegations of dishonesty.

D. Respondent's Attitude

The Board shares the Hearing Committee's concern about Respondent's attitude. He has not accepted responsibility for his misconduct, and has continued to deny wrongdoing. The Board considers this as an aggravating factor.

E. Evidence in Mitigation and Aggravation

Respondent's clean disciplinary record should be considered in mitigation of sanction, as well as evidence of his good character. At the same time, we agree with the Hearing Committee that Respondent's status as a prosecutor should be considered in aggravation. As the Hearing Committee noted, Respondent "simply should have known better" and if in doubt, should have consulted colleagues at the U.S. Attorney's Office or tendered the Boyd Hospital Statement to the trial court for its review. HC Report at 45.

F. Deterrence

The question of deterrence is another factor that should be taken into consideration in assessing the appropriate sanction. As the Court noted in *Howes*, decisions to withhold evidence are difficult to detect and thus deterrence takes on particular significance in such cases. 39 A.3d at 22-23 (citing *In re Cleaver-Bascombe*, 986 A.2d 1191, 1195 (D.C. 2010) (per curiam)). Respondent's failure to disclose the Boyd Hospital Statement only came to light because Respondent left the U.S. Attorney's Office, causing the case to be assigned to another prosecutor. That prosecutor learned that the Boyd Hospital Statement had not been disclosed to the defense and brought this to the attention of supervisors. Had Respondent not left the U.S. Attorney's Office, it is unlikely that Respondent's misconduct would ever have been discovered.

G. Comparable Cases

There are only two cases in this jurisdiction involving *Brady* violations to guide the sanction determination. In *In re Stuart*, 942 A.2d 1118, 1121 (D.C. 2008), the Court imposed a three-year suspension with a fitness requirement as reciprocal discipline for the failure to disclose exculpatory evidence and misrepresentation. Because *Stuart* is a reciprocal discipline case, governed by different standards, it is not a useful guide for determining a consistent

sanction in an original proceeding.[19] *Howes* involved a host of far more egregious violations, including dishonesty, and resulted in disbarment. 39 A.3d at 25.

Given the scant authority in this jurisdiction, the Hearing Committee considered cases from other jurisdictions involving *Brady* misconduct. Those cases and the additional authority we have identified support the imposition of a period of suspension for an intentional *Brady* violation and an admonition or reprimand where the conduct is negligent.[20] *Compare Disciplinary Bd. v. Feland*, 820 N.W.2d 672 (N.D. 2012) (per curiam) (admonition for negligent failure to disclose exculpatory evidence), *and Bar Ass'n v. Gerstenslager*, 543 N.E.2d 491, 491 (Ohio 1989) (per curiam) (public reprimand for negligent failure to disclose), *with Jordan*, 913 So. 2d at 783 (three-month deferred suspension for intentional withholding of exculpatory evidence), *and Disciplinary Counsel v. Jones*, 613 N.E.2d 178 (Ohio 1993) (per curiam) (six-month suspension for knowing failure to disclose). *See also In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001) (per curiam) (public reprimand by consent; no stipulation as to level of intent); *State v. Mucklow*, 35 P.3d 527, 540 (Colo. 2000) (public censure for inexperienced prosecutor who delayed disclosure of exculpatory material in reliance on advice from her superiors).

Taking the above authority into account, the nature of the misconduct, and the other sanction factors, the Board has concluded that a 30-day period of suspension is warranted. The Board recognizes the Court's observation that the imposition of a sanction more severe than proposed by Bar Counsel "should be the exception, not the norm." *See In re Cleaver-Bascombe*, 892 A.2d 396 412 n.14 (D.C. 2006). The Board considers this case to be such an exception.

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[19] In reciprocal discipline cases, there is a presumption that discipline identical to the discipline imposed by a sister disciplining court will be imposed in this jurisdiction, unless the respondent can demonstrate that an exception applies under D.C. Bar R. XI, § 11(c).

[20] In all these jurisdictions, intent is not an element of a violation of the equivalent of Rule 3.8(e), consistent with Model Rule 3.8(d).

Respondent's violation of Rule 3.8(e) was blatant. He failed to disclose exculpatory information that was obviously material. That failure likely impacted the result of the first *Shelton* trial and may have influenced the subsequent guilty verdict at the second trial. A suspension will serve as a more effective deterrent than the public censure recommended by Bar Counsel and the Hearing Committee and is an appropriate measure of the seriousness of Respondent's violation.

VI. CONCLUSION

Based on the foregoing, the Board finds that Respondent violated Rule 3.8(e) and recommends that the Court suspend him from the practice of law for a period of 30 days. For reinstatement purposes, the suspension should be deemed to run from the date Respondent files an affidavit in compliance with D.C. Bar R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Robert P. Watkins
Robert P. Watkins

Dated: 31 July 2013

All members of the Board concur in this Report and Recommendation, except Messrs. Bernius and Carter, who are recused, and Ms. Soller, who did not participate.