JUDGMENT OF PROBATED SUSPENSION AFFIRMED

Opinion and Judgment Signed and Delivered December 17, 2015.

BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

No. 55649

WILLIAM ALLEN SCHULTZ, APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLEE

On Appeal from the Evidentiary Panel 14-3 (Denton) for the
State Bar of Texas District 14 Grievance Committee

SBOT Case No. D0121247202

Opinion and Judgment on Appeal

COUNSEL:

R. Ritch Roberts, Robert R. Smith, Fitzpatrick Hagood Smith & Uhl, LLP, Dallas, Texas, for Appellant William Allen Schultz.

Linda A. Acevedo, Chief Disciplinary Counsel, Laura Bayouth Popps, Deputy Counsel for Administration, Cynthia Canfield Hamilton, Senior Appellate Counsel, Office of the Chief Disciplinary Counsel of the State Bar of Texas, Austin, Texas, for Appellee Commission for Lawyer Discipline of the State Bar of Texas.

OPINION

In this attorney discipline case of first impression, we must determine whether the Texas Disciplinary Rules of Professional Conduct Rule 3.09(d) codifies the constitutional duty to disclose exculpatory evidence imposed under *Brady v. Maryland*, 373 U.S. 83 (1963).[1] No Texas appellate court has yet determined whether the ethical duty of a prosecutor to disclose to the defense information that "tends to negate the guilt of the accused" pursuant to Rule 3.09(d) is limited to the scope of "materiality" in *Brady*. Based on the plain language of Rule 3.09(d) and significant differences between the purpose and application of the duty under the disciplinary rule and the constitutional duty under *Brady*, we hold that Rule 3.09(d) is broader than *Brady*.

The evidentiary panel found that William Allen Schultz violated Rules 3.09(d) and 3.04(a), Tex. Disciplinary Rules Prof'l Conduct, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) ("Rule(s)"), and imposed a six-month fully probated suspension.[2] Rule 3.09(d) requires a prosecutor in a criminal case to:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 3.04(a) requires that:

> a lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

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[1] The United States Supreme Court has issued numerous opinions modifying or clarifying the original holding in *Brady v. Maryland*. This opinion will refer to those cases collectively simply as "*Brady*," mindful that the prosecutor's ethical duty to disclose impeachment evidence is specifically discussed in *Giglio v. United States*, 405 U.S. 150 (1972).

[2] Schultz completed the six-month probation prior to submission of this appeal. He does not challenge the disciplinary sanction imposed but only the findings of misconduct.

Schultz, Assistant District Attorney for Denton County, admitted during the underlying criminal proceedings and during the disciplinary hearing that he did not disclose to the defense the limited ability of the state's key witness to identify her attacker because he did not think it was either exculpatory or material. He relied on his interpretation of what was required under *Brady* in his own defense that disclosure of this information was not legally required.

Schultz later conceded at the disciplinary hearing that the information should have been disclosed. Further, the District Attorney's office stipulated during the criminal proceeding that the information should have been disclosed. The trial judge in the criminal case found that Schultz's failure to disclose the information violated *Brady* and granted a mistrial to which double jeopardy attached.

Schultz argues that he did not violate Rule 3.09(d) because the evidence in question was not material or exculpatory; therefore, his ethical duty under Rule 3.09(d) cannot exceed the legal obligations of *Brady*. He further asserts that any failure to disclose information would violate Rule 3.09(d) only if there were a reasonable probability that the information or evidence withheld would be admissible and make a difference in the outcome of the trial. Schultz also argues that he lacked actual knowledge of some of the information in question. Moreover, as to Rule 3.04(a) he argues that the rule prohibits only intentional destruction of evidence and he did not intend to conceal evidence. Finally, for the first time on appeal, Schultz challenges the term "unlawfully" in Rule 3.04(a) as unconstitutionally vague.

The Commission for Lawyer Discipline[3] ("Commission") argues that the disciplinary judgment should be affirmed based on the evidence in the record that Schultz knew and failed to

[3] The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas that exercises all rights characteristically reposed in a client in lawyer disciplinary and disability proceedings. Tex. Rules Disciplinary P. R. 1.06D and 4.06A, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (West 2013). The Chief Disciplinary Counsel of the State Bar of Texas represents the Commission in disciplinary proceedings.

disclose to the defense that the state's key witness had only assumed her assailant to be her husband, i.e. the identification was based on indirect factors as opposed to actually seeing his face. The Commission also argues that limiting Rule 3.09(d) to the constitutional duty to disclose exculpatory, impeaching, and mitigation evidence under *Brady* is not supported by the plain language or purpose of the rule. The Commission further contends that Schultz argues for an intent element not found in Rule 3.04(a). Finally, the Commission urges that we should affirm the judgment because there is substantial evidence in this record that Schultz violated *Brady*.

We hold that the materiality standard under *Brady* does not apply to Rule 3.09(d). We further hold that failure to disclose information otherwise required by law to be disclosed, regardless of intent, constitutes unlawfully obstructing another party's access to evidence in violation of Rule 3.04(a). Finally, there is substantial evidence in this record to support the findings that Schultz failed to make timely disclosure of all evidence known to him that tended to negate the accused's guilt and, in so doing, unlawfully obstructed another party's access to evidence. Therefore, we affirm.

I. Background

A. Underlying criminal prosecution

This disciplinary case arises out of the Denton County District Attorney's prosecution of Silvano Uriostegui for aggravated assault with a deadly weapon of his estranged wife, Maria Uriostegui. She was attacked and stabbed in the bedroom of her apartment at night. The only light in the apartment was from a TV in another room. When interviewed, Maria told the police that Silvano had attacked her. She later testified in a hearing on a protective order that Silvano had attacked her. Maria's primary language is Spanish. During the various interviews and hearings made a part of this

record, most of the questions to her were translated into Spanish, and her statements and testimony were translated into English.

Appellant Schultz was assigned to prosecute the Uriostegui case in 2011 when he became the head of the family violence section of the Denton County District Attorney's office. He was the second assistant district attorney assigned as the lead prosecutor. Schultz was licensed to practice law in Texas in 1995 and had been a state and federal prosecutor for over 16 years.

Victor Amador was appointed to defend Silvano in March 2011. He was Silvano's third defense attorney. Amador requested and received the initial production of discovery from Mike Shovlin, the original prosecutor. In June, 2011 Amador requested additional discovery, including broad requests for all evidence favorable to the defendant. He met with Schultz several times to discuss discovery.

In January 2012, one month before the case was set for trial, Schultz and several other people from his office met with Maria. During the interview, Maria disclosed that she thought the person who attacked her was Silvano Uriostegui based on his smell, the sole of his boot, and his stature as seen in his shadow. Maria, through a translator, said "I couldn't see his face." Schultz did not believe that any of this information was exculpatory. Schultz did not disclose Maria's statements to the defense.

B. Sentencing hearing and mistrial

On February 13, 2012 Silvano entered a plea of guilty to the indictment, but exercised his right to have a jury determine his sentence. On February 14, 2012, after a jury was selected, the State began its case-in-chief at sentencing. Schultz called Maria as a witness. Maria testified that she did not see her attacker's face and that she did not know whether her attacker was Silvano. Maria also testified that she had told the prosecutor earlier that she did not see who had attacked her. She

explained that she had testified at the protective order hearing that Silvano was her attacker because she had assumed it was him from his smell and boot.

Schultz told the trial court that Maria had told him that she had identified Silvano by his smell, boot, and stature, but that he did not think that the information was exculpatory. Schultz believed her statement that she did not see her attacker's face was at most a prior inconsistent statement. Counsel for Schultz makes a similar argument on appeal. Both the evidentiary panel and this Board reject this argument based on Schultz's own actions: during his investigation, Schultz had enough concern that Maria's attacker might be Alvero Malagon, a man who had previously assaulted her that he investigated and confirmed that Malagon was incarcerated on the date of the attack. The defense attorney was unaware of any of this until the testimony during the sentencing trial. Based on Maria's testimony, defense counsel moved for a mistrial. The court found that the undisclosed information was exculpatory and granted the mistrial.

C. Habeas corpus hearing

Defense counsel filed an application for writ of habeas corpus seeking to have double jeopardy attach to Silvano's mistrial (thereby preventing a retrial)[4] because the evidence was exculpatory, violated *Brady*, and was intentionally suppressed. The district judge who had presided at the criminal trial heard the habeas application. Two assistant district attorneys representing the state at the habeas hearing stipulated that the manner in which the victim had identified her assailant could have been useful to the defendant and should have been disclosed.[5]

Schultz was called as a witness at the hearing on the writ of habeas corpus. Schultz testified

[4] Double jeopardy may attach where a defendant's mistrial was "necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence." *Ex parte Masonheimer*, 220 S.W.3d 494, 507-08 (Tex. Crim. App. 2007).

[5] The state also stipulated that neither Shovlin nor Schultz had disclosed the lack of direct identifying information to either of Silvano's former attorneys.

that he did not directly ask Maria during the January interview whether she actually saw her attacker's face. He knew before trial that Maria had not seen her attacker's face but did not disclose it to the defendant because "I had no doubts that she was telling me that he [Silvano] is the attacker." It never occurred to Schultz that this could be *Brady* material. In hindsight, though, Schultz said that he should have told the defense how Maria arrived at the conclusion that Silvano was her attacker.

Forest Beadle was Schultz's co-counsel in the Uriostegui case. He testified at the hearing that he first learned that Maria had not seen her attacker's face during the January interview when he heard the statement from the translator. He knew he had information favorable to the defense before the plea but told no one. In retrospect, he agreed that the information should have been disclosed.[6]

The court granted the habeas relief and allowed Silvano to withdraw his guilty plea. The court further held that double jeopardy attached because the state had purposefully withheld exculpatory information and intentionally goaded the defense into pleading and seeking a mistrial.

Thereafter, the Denton District Attorney reported Schultz's conduct to the State Bar of Texas but excused it as unintentional. Amador obtained a copy of the letter sent to the State Bar by the District Attorney after receiving an opinion from the Texas Attorney General that the letter should be released. Amador then filed a grievance against Schultz with the State Bar that is the basis of this disciplinary proceeding.

II. Standard of review

This case requires BODA to review both legal issues interpreting the substantive rules of professional conduct and the evidentiary panel's fact findings of misconduct. BODA reviews the legal conclusions of the evidentiary panel *de novo*. *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994)

[6] According to the record on appeal, a disciplinary case against co-counsel was opened but ultimately dismissed.

(questions of law are always subject to *de novo* review); *Comm'n for Lawyer Discipline v. A Texas Attorney*, 2015 WL 5130876 *2 (Texas Bd. Disp. App. 55619, August 27, 2015; no appeal); *Weir v. Comm'n for Lawyer Discipline*, 2005 WL 6283558 at *2 (Texas Bd. Disp. App. 32082, June 30, 2005; no appeal).

BODA reviews the evidence supporting the findings of fact leading to the conclusion that an attorney committed professional misconduct under a substantial evidence standard. Tex. Gov't Code Ann. § 81.072(b)(7) (West Supp. 2014); Tex. Rules Disciplinary P. R. 2.24; *Wilson v. Comm'n for Lawyer Discipline*, 2011 WL 683809 *2 (Tex. Bd. Disp. App. 46432, January 30, 2011; aff'd March 3, 2012). BODA is not subject to the Texas Administrative Procedure Act, Tex. Gov't Code Ann. §§ 2001.001—2001.092, but cases construing substantial evidence under the Act are instructive. *In re Humphreys*, 880 S.W.2d at 404. "At its core, the substantial evidence rule is a reasonableness test or a rational basis test." *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). BODA must affirm a judgment "if it may be upheld on any basis that has support in the evidence under any theory of law applicable to the case." *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Under the substantial evidence standard, the reviewing court focuses on whether there is a reasonable basis in the record for the decision below rather than on the correctness of the decision. *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d at 185. "The findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise." *Id.* Showing the record lacks substantial evidence is a difficult burden for the appellant to meet:

> Although substantial evidence is more than a mere scintilla, *Alamo Express, Inc. v. Union City Transfer*, 158 Tex. 234, 309 S.W.2d 815, 823 (1958), the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence. *Lewis v. Metropolitan Savings and*

> *Loan Association*, 550 S.W.2d 11, 13 (Tex. 1977). . . . A reviewing court is not bound by the reasons given by an agency in its order, provided there is a valid basis for the action taken by the agency. *Railroad Commission v. City of Austin*, 524 S.W.2d 262, 279 (Tex. 1975). Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *Suburban Utility Corp. v. Public Utility Commission*, 652 S.W.2d 358, 364 (Tex. 1983).

Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452-53 (Tex. 1984).

III. Duty to disclose under Texas Disciplinary Rules of Professional Conduct Rule 3.09(d)

Schultz asks BODA to limit the scope of the ethical duty to disclose information under Rule 3.09(d) to the due process requirement to disclose exculpatory evidence under *Brady*. Schultz's main justification for limiting the duty to disclose information under Rule 3.09(d) to material evidence under *Brady* is to avoid multiple confusing standards for prosecutors that could result in an unfair sanction when no constitutional violation of the right to a fair trial has occurred. He argues that expanding Rule 3.09(d) beyond the materiality standard of *Brady* would result in strict liability for prosecutors.

We do not find this argument persuasive, particularly because of the recent amendment to Texas criminal procedure that now mandates the same standard for disclosure as Rule 3.09(d):

> Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

Tex. Code Crim. Proc. Ann. art. 39.14(h) (West Supp. 2014) (effective January 1, 2014). Although art. 39.14 is not dispositive in this case, its promulgation refutes Schultz's position that imposing a broader duty on prosecutors to disclose information to the defense than *Brady* creates an unworkable burden. That "unworkable burden," if there is one, already exists.

A. Rule 3.09(d) is unambiguous

The disciplinary rules are treated like statutes, *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988). A fundamental rule of statutory construction is to ascertain and give effect to the drafter's intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Rule 3.09(d) is identical to the American Bar Association Model Rule 3.8(d). Model Rules of Prof'l Conduct 3.8(d) (2015). The goal of Rule 3.09(d) is to impose on a prosecutor a professional obligation to "see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor." Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) cmt. 1. Unlike *Brady*, the rule imposes this obligation on the prosecutor without regard for the anticipated impact of the information on the outcome of a trial. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

Ethically, under Rule 3.09(d) the prosecution must turn over any information that "tends to negate the guilt" or mitigate the offense. There is no materiality requirement. No analysis is necessary to determine whether disclosure would probably have led to a different outcome of the trial. The information need not be admissible at trial, and the information must be disclosed "timely," that is, "as soon as reasonably practicable so that the defense can make meaningful use of it." ABA Formal Op. 09-454. In addition, unlike *Brady*, Rule 3.09(d) limits the information to that actually known by the prosecutor. Under the disciplinary rules, actual knowledge may be inferred from circumstances. Tex. Disciplinary Rules Prof'l Conduct Terminology; *Cohn v. Comm'n for Lawyer Discipline*, 979 S.W.2d 694, 699 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The ethics rules acknowledge that a prosecutor shall not make a determination of materiality in his ethical obligation to disclose information to the defense. In an adversarial system,

it is the role of both parties to develop arguments why certain evidence is irrelevant, immaterial, and inadmissible. It is the prosecutor's role to disclose impeachment information, the defense lawyer's role to present the impeaching information as evidence, and the trial court's role to determine whether the information is admissible evidence. Rule 3.09(d) is specifically intended to advise—and prevent—a prosecutor from making an incorrect judgment call, such as that Maria's "inconsistent statements" did not rise to the level of *Brady*-mandated disclosure. The clarity of Rule 3.09(d) is a safeguard for prosecutors and citizens alike: if there is any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure.

B. Distinct and independent duty from *Brady*

The goal of *Brady* and its progeny, on the other hand, is to ensure that a criminal conviction is not tainted by the failure of the justice system to provide constitutional due process. Rather than demanding individual accountability, as does Rule 3.09(d), *Brady* holds that "suppression by the prosecution of evidence favorable to an accused upon request 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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Whether the prosecutor deliberately withheld evidence or negligently failed to disclose it is irrelevant: "inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999).

The state is not required under *Brady* to turn over evidence that is only "generally useful" to the defense. *Iness v. State*, 606 S.W.2d 306, 311 (Tex. Crim. App. 1980). For nondisclosure to result in a due process violation, the evidence in question must be "material." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Hampton v. State*,

86 S.W.3d 603, 612 (Tex. Crim. App. 2002). A "reasonable probability" is probability sufficient to undermine confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985). Materiality applies to suppressed evidence "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. at 436. The question is not whether the defendant would have received a different verdict with the disclosed evidence, but "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434.

A *Brady* violation is established by showing "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435. "Harmless error analysis does not apply." *Id.* "*Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant." *Graves v. Dretke*, 442 F.3d 334, 339 (5th Cir. 2006) (citing *Giglio v. United States*, 405 U.S. 150 (1972)).

Thus, *Brady* seeks to protect the integrity of the outcome of a trial without regard for any individual prosecutor's culpability. The ethics rule and disciplinary proceedings serve an entirely different purpose: protection of the public. The ethics rule protects the public, in part, because prosecutors have absolute immunity from suit, regardless of malicious or dishonest action, under 42 U.S.C. § 1983, *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), or under state law. *Charleston v. Allen*, 420 S.W.3d 134, 137-38 (Tex. App.—Texarkana 2012, no pet.).

The ethical standard's independent purpose of protecting the public is further apparent in this case where the withheld information came to light during the proceeding. Determining the materiality of undisclosed evidence by applying a *Brady* test in the context of an aborted prosecution is speculative. Therefore, limiting the ethical duty, as opposed to the constitutional duty, to disclose information would limit prosecutors' accountability to the public because the failure to disclose would only arise if a conviction had occurred.

Courts and commentators have recognized that the ethical obligation to disclose is more extensive than the constitutional duty. The United States Supreme Court has acknowledged that the ethical duty to turn over information to the defense is broader than the *Brady* requirements: "[t]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.…" *Kyles v. Whitley*, 514 U.S. at 437 (also citing ABA Model Rule 3.8(d)). "[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." *Cone v. Bell*, 556 U.S. 449, 470 n. 15 (2009) (citing ABA Model Rule 3.8(d)).

The ABA has explained in detail that the Model Rule does not codify *Brady*: "Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence… without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution." ABA Formal Op. 09-454. The drafters of Model Rule 3.8(d) deliberately made no attempt to codify the evolving constitutional law. *Id.* "A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions." *Id.* The opinion also notes that the requirement that the prosecutor have actual knowledge of the evidence or information "limits what might otherwise appear to be an obligation substantially more onerous than [the] prosecutor's legal obligations under other law." *Id.*

The ABA opinion further explains that the ethical obligation's usefulness to the defense in plea bargaining is a key difference from the duty under *Brady*. "Among the most significant purposes for which disclosure must be made under [the rule] is to enable defense counsel to advise the defendant regarding whether to plead guilty." Thus, timely disclosure requires a prosecutor to disclose

information under the rule prior to a guilty plea proceeding. *Id.* "[T]he ethical duty of disclosure … also requires disclosure of favorable information [t]hough possibly inadmissible itself … [that] may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations." *Id.*

The ABA opinion also emphasizes that evaluating the usefulness of the information is up to the defense. "Nothing suggests a *de minimus* exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable." *Id.* "The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use." *Id.*

In a disciplinary proceeding against a prosecutor arising from a criminal case similar to the one here, the D.C. Court of Appeals held that the "retrospective materiality analysis" of *Brady* does not apply to Rule 3.08(e).[7] *In re Kline*, 113 A.3d 202, 208 (D.C. Cir. 2015). The reliability of the state's eyewitness was the principal issue at trial. The victim had originally told police that he did not know who shot him. The police made Kline aware of this statement but Kline told the defense only that he did not have any truly exculpatory evidence. Kline defended his disciplinary case by testifying that he did not believe that the evidence was *Brady* material and that the "gist" of the undisclosed evidence was in the police reports turned over to the defense.

The trial court challenged Kline that his assumptions prevented him from recognizing exculpatory evidence: "Because you are sure you have the 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

[7] District of Columbia Rules of Professional Conduct Rule 3.8(e) prohibits a prosecutor in a criminal case from intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused. *In re Kline*, 113 A.3d 202, 204 (D.C. Cir. 2015).

always sure you have got the right guy or you wouldn't be prosecuting." *Id.* at 205. The court affirmed the disciplinary judgment, holding that where the prosecutor consciously decided that information was not exculpatory and therefore did not have to be produced, he had acted deliberately and therefore intentionally. *Id.* at 214.

The North Dakota Supreme Court emphasized the plain wording of the disciplinary rule and the fundamentally different purposes of the underlying criminal action and the disciplinary proceeding in holding that its rule 3.8(d)[8] did not require a materiality element. *In re Disciplinary Action Against Feland*, 2012 ND 174, ¶ 14, 820 N.W.2d 672 (2012). The court was not persuaded by that respondent's argument that interpreting North Dakota's Rule 3.8(d) in a "wholly separate way from the well-established discovery doctrine" of *Brady* would result in an "unworkable system." *Id.* at ¶ 12. The court also stated that potential prejudice to the defendant might affect the sanction imposed but should not affect the initial determination whether a violation had occurred. *Id.* at ¶ 13. The court further held that Rule 3.8(d) could be violated negligently, noting that the plain language of the rule does not create an exception for unintentional violations. *Id.* at ¶¶ 18-19.

Schultz has attempted to minimize during this appeal whether his conduct violated *Brady*, despite the trial judge's determination that there was a *Brady* violation and the relief granted as a result of the *Brady* violation. The judge, who was in the best position to determine whether the information was material and whether nondisclosure was intentional, found the prosecutors so "evasive" and "disingenuous" that he banned Schultz and his co-counsel from appearing in his court.[9]

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[8] North Dakota Rule of Professional Conduct 3.8(d) provides that a prosecutor in a criminal case shall "disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . ." *In re Disciplinary Action Against Feland*, 2012 ND 174, ¶ 11, 820 N.W.2d 672 (2012).

[9] At the conclusion of the habeas hearing the judge remarked:

> I can't fathom how they do not understand this is a Brady violation only in retrospect. My jaw dropped to the ground when Mrs. Uriostegui testified the way that she did. I was shocked. And for the state to actually know this and not disclose it…, the only good thing I can say from this miserable

A *Brady* violation—which requires a finding of materiality—is a higher evidentiary standard and carries with it significant legal relief. On the contrary, a prosecutor's Rule 3.09(d) violation alone provides no legal relief for a criminal defendant and would not have prevented Silvano from being re-tried absent a *Brady* violation.

IV. Texas Disciplinary Rules of Professional Conduct Rule 3.04(a)

Tex. Disciplinary Rules Prof'l Conduct R. 3.04(a) requires that a "lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act." Schultz argues that (1) he did not violate Rule 3.04(a) because he did not intentionally commit an affirmative act to obstruct a party's access to evidence, (2) at most he acted negligently, and (3) Rule 3.04(a) is unconstitutionally vague on its face. We hold that the evidentiary panel correctly construed the rule to apply to the situation where a prosecutor failed to disclose information tending to negate the guilt of the accused as required by Rule 3.09(d) or other law, regardless of intent. We also hold that the plain language of Rule 3.04(a) is not vague. Therefore, we overrule Schultz's challenges to whether he violated Rule 3.04(a).

> hearing is at least Forrest Beadle told the truth and was not evasive and was straightforward. I don't particularly like his answers, but he at least was honest.
>
> I can't fathom how somebody who's been to law school, let alone practiced law for this period of time, doesn't understand Brady, doesn't understand the law. And based upon their answers, the way they were answered – the questions were answered, the original conduct in trial, I can only find that they intentionally goaded the defense into having to make a motion for mistrial, that they purposefully withheld Brady material.
>
> And how disingenuous it is to get up here and testify that you don't think that it's Brady that the victim can't identify by face or by anything other than smell and a boot who the attacker is, to indicate, as I hear indicated in the original trial that the state even had some doubt as to who the attacker was because she – because the victim could not identify the face, because she had previously been assaulted, but that individual was in prison at the time that this assault occurred.
>
> I don't know what's going on. And on the basis of my ruling, I'm going to have to ban both Mr. Beadle and Mr. Schultz from my courtroom. They're not allowed to appear in this courtroom until I rule otherwise.

A. Justiciability

At no prior point during the disciplinary process has Schultz argued that Rule 3.04(a) is vague, let alone that the Rule should be declared unconstitutional and stricken altogether. Schultz did not challenge the rule either on its face or as applied to him during the evidentiary hearing, and he has not cited to any authority that would permit him to raise the issue for the first time on appeal.

The Court of Criminal Appeals has spoken clearly that a facial challenge to a statute or rule cannot be raised for the first time on appeal. *In re Karenev,* 281 S.W.3d 428 (Tex. Crim. App. 2009); *Sony v. State*, 307 S.W.3d 348, 353 (Tex. App.—San Antonio, 2009, no pet.). Statutes are presumed to be constitutional until it is determined otherwise. *Flores v. State*, 245 S.W.3d 432, 438 (Tex.Crim.App.2008); *Doe v. State*, 112 S.W.3d 532, 539 (Tex. Crim. App. 2003). Similarly, the Texas Supreme Court requires that a constitutional claim be raised in the trial court before it may be considered on appeal. *Wood v. Wood*, 159 Tex. 350, 357, 320 S.W.2d 807, 812 (1959); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993).

We hold that the analysis in *Karenev* and *Wood* similarly applies in a facial challenge to the Texas Disciplinary Rules of Professional Conduct. This standard has been consistently applied throughout the courts of appeals. *See, e.g., State Bar v. Leighton,* 956 S.W.2d 667, 671 (Tex. App.—San Antonio 1997), (constitutional due process claim can be waived if not presented to trial court), *pet. denied per curiam*, 964 S.W.2d 944 (1998); *Hernandez v. State Bar of Texas*, 812 S.W.2d 75, 78 (Tex. App.—Corpus Christi 1991, no writ) (failure to assert constitutionality arguments to the trial court); *compare Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675 (Tex. App.—San Antonio 1998) (court went to some length to find that the constitutional issue was raised and preserved for appeal.[10]) Having failed to raise his vagueness challenge to Rule 3.04(a) to the evidentiary panel,

[10] The appellate court in *Brown* decided that reference in Brown's closing argument to "most of those [provisions], when challenged, as applied to specific facts, have been held to be unconstitutionally vague and

Schultz may not now do so for the first time on appeal.

B. "Unlawfully" is not unconstitutionally vague

But even if Schultz had raised his challenge the constitutionality of the term "unlawfully" in Rule 3.04(a) before the evidentiary panel, we find that the Rule is not unconstitutionally vague. "To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (discussing, *inter alia*, whether Tex. Disciplinary Rules Prof'l Conduct R. 3.06(d) prohibiting certain contact with jurors post-trial was unconstitutionally vague). "[I]n scrutinizing a disciplinary rule directed solely at lawyers we ask whether the ordinary lawyer, with 'the benefit of guidance provided by case law, court rules and the lore of the profession,' could understand and comply with it." *Id.* "Disciplinary rules need not satisfy the higher degree of specificity required of criminal statutes." *Id.* at 438.[11]

A facial challenge is difficult to sustain because the individual advancing the challenge must establish that no set of circumstances exists under which the statute is valid. *Brown v. State*, 468 S.W.3d 158, 173-74 (Tex. App.—Houston [14th Dist.] 2015, pet. filed July 30, 2015); *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d 133, 138 (Tex. App.—Amarillo 2014, no pet.); *Shaffer v. State*, 184 S.W.3d 353, 364 (Tex. App.–Fort Worth 2006, pet. ref'd). A complainant who engages in some conduct that is clearly proscribed "cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982*); Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d at 138. "A court should therefore examine the complainant's conduct before analyzing the other hypothetical applications of the law." *Hoffman*

unenforceable under both Texas law and federal law" was sufficient to preserve the point for appeal. *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.3d at 681.

[11] See discussion under Intent below that "unlawfully" can readily be defined as failure to disclose or concealment contrary to a legal obligation to disclose, whether under law, a court order, or applicable rules of practice or procedure.

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 495; *Pak-a-Sak, Inc. v. City of Perryton*, 451 S.W.3d at 138. Schultz has conceded that a violation of the duty to disclose material evidence under *Brady* would violate Rule 3.04(a). Therefore, he has not met his burden of showing that there are no circumstances under which the rule can be valid.

C. Intent not required

Finally Schultz argues for an interpretation of Rule 3.04(a) to require an intentional affirmative act of concealment or destruction of evidence. Again, we start with the plain and unambiguous language of the rule. The rule contains no intent *mens rea* but requires only that the attorney "unlawfully obstruct a party's access to evidence." Schultz's interpretation of "unlawful" as "illegal" or "criminally punishable" is too narrow. "Unlawfully" in this context means to conceal or fail to disclose contrary to a legal obligation to disclose, whether under law, a court order, or applicable rules of practice or procedure. 48A Robert P. Schuwerk and Lillian B. Hardwick, *Texas Practice Series: Handbook of Lawyer and Judicial Ethics* § 8:4 (2015 ed.) (The predecessor to Rule 3.04(a), Texas Code of Professional Responsibility DR-7-102(A)(3), provided that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."). We have already determined that Schultz had a duty to disclose the information under both Rule 3.09(d) and *Brady*. Because he failed to do so, he violated Rule 3.04(a).

At least two jurisdictions with counterparts identical to Rule 3.04(a) have held that the rule carries no culpable mental state. *People v. Head*, 332 P.3d 117, 131 (O.P.D.J. Colo. 2013); *State of Oklahoma ex rel. Okla. Bar Assn v. Miller*, 2013 OK 49, 309 P.3d 108, 121 (Okla. 2013) (prosecutor violated 3.4(a) by failing to disclose to the defense attempts to assist one of the state's witnesses with his own criminal proceedings). Professor Robert P. Schuwerk, one of the drafters of the Texas rules, concurs: "a lawyer need only be negligent to violate this Rule. A lawyer need not have known of the

evidentiary value of the materials or even recklessly disregarded the possibility that they might have such value, if a competent lawyer would have recognized that fact. Thus, under this rule, a lawyer cannot 'escape liability … by closing his eyes to what he saw and could readily understand.' " 48A Robert P. Schuwerk and Lillian B. Hardwick at § 8:4.

We note that although Rule 3.04(a) does not require intent, the record here contains substantial evidence that Schultz acted intentionally as it pertains to Schultz's "as-applied" challenge.[12] First, Schultz evaluated the information that Maria could identify her attacker only indirectly and decided that it was not exculpatory. This is at least some evidence that his decision not to reveal the information to the defense was deliberate. Second, Schultz understood the significance of the deficiencies of Maria's identification because he took the further step of investigating and confirming that Alvero Malagon, another possible suspect, was incarcerated on the date of the attack. Third, and most importantly, there is substantial evidence that Schultz then affirmatively represented to the defense that he had disclosed all exculpatory evidence when he had not. By misrepresenting that he had provided full discovery, Schultz perpetuated the defense's mistaken belief that it had received all exculpatory evidence. *See, State v. Doyle*, 2010 UT App. 351, 245 P.3d 206, 211, *cert. denied*, 251 P.3d 245 (Utah 2011) (prosecutor's failure to disclose key witness's plea deal in response to defense counsel's request for all exculpatory evidence was "serious misconduct" and violated Utah counterpart to Rule 3.04(a)).[13]

[12] While intent is not required to violate Rule 3.04(a), intent could be considered in assessing the appropriate sanction. *See*, Tex. Rules Disciplinary P. R. 2.18; 48A Robert P. Schuwerk and Lillian B. Hardwick at § 8:4, fn. 17.

[13] *State v. Doyle* illustrates how a prosecutor's failure to disclose information to the defense can be professional misconduct absent a *Brady* violation.

V. Conclusion

Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) imposes a duty to disclose any information that tends to negate the guilt of the accused without regard to whether the information is material under the standard imposed by *Brady v. Maryland* and subsequent cases. This result is consistent with the language and purpose of the disciplinary rule to protect the public and is now codified by Texas Code Crim. Proc. Ann. art. 39.14. Accordingly, we find that there is substantial evidence in the record that (1) Schultz had actual knowledge that the state's key witness could not identify her attacker directly and that he failed to disclose it to the defense and (2) that Schultz's failure to disclose the limited nature of the witness's ability to identify her attacker constituted material evidence under *Brady*. We affirm the finding that Schultz violated Rule 3.09(d).

Tex. Disciplinary Rules Prof'l Conduct R. 3.04(a) encompasses failure to disclose evidence contrary to a duty under other law to do so and does not require intent to conceal or destroy evidence. Accordingly, Schultz's failure to disclose evidence to the defense required by Rule 3.09(d) constitutes a violation of Rule 3.04(a). We affirm the finding that Schultz violated Rule 3.04(a).

The Judgment of Partially Probated Suspension is AFFIRMED in all respects.

IT IS SO ORDERED.

David N. Kitner, Chair

Ramon Luis Echevarria II, Vice Chair

George A. Taylor

Jeanne C. "Cezy" Collins

Roland K. Johnson

Katherine A. Kinser

David M. González

Wendy Adele Humphrey

Mike Mills

Board Members Robert A. Black, John J. McKetta III, and Deborah Pullum not sitting.