

IN THE  
SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL : NO. 08-1771

Relator :

vs. :

KIMBERLY JO KELLOGG-MARTIN, ESQ. :

Respondent :

<b>BRIEF OF AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION, IN SUPPORT OF RESPONDENT, KIMBERLY JO KELLOGG-MARTIN, ESQ.</b>
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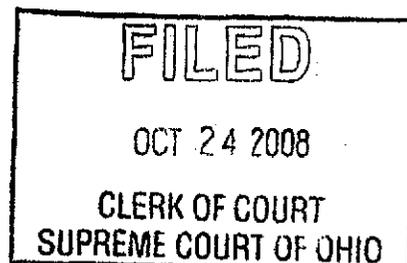
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**INTEREST OF AMICUS CURIAE**

The Ohio Prosecuting Attorneys Association (OPAA) is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: “To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.”

This case involves an alleged discovery violation in a criminal case by an assistant prosecutor.<sup>1</sup>

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<sup>1</sup>Even though the trial court already determined that there was no material violation of *Brady* in this case, it is important to point out that when a criminal defendant pleads guilty, he waives the right to receive from prosecutors exculpatory impeachment material. *United States v. Ruiz* (2002), 536 U.S. 622, 122 S.Ct. 2450; *State v. Harris* (2004), 272 Wis.2d 80, 680 N.W.2d 737. Thus, the position of the OPAA is that there was no discovery violation in this case.

After a hearing, the Board of Commissioners on Grievances and Discipline of this Court recommended that Respondent Kellogg-Martin be suspended from the practice of law for one year with six months stayed. The OPAA submits that the Board was simply not the appropriate forum to address an alleged discovery violation in a criminal case. There are vital public policy reasons why Ohio's attorney grievance system is ill-suited to address any but the most serious criminal discovery violations.

**OHIO'S ADJUDICATIVE SYSTEM IS ALREADY IN PLACE TO DEAL WITH DISCOVERY VIOLATIONS IN CRIMINAL CASES**

There are relatively few cases of disciplinary proceedings of prosecutors for discovery violations. This is because discovery violations in criminal cases are different from other kinds of disciplinary rule violations. Case law and procedural rules have been specifically crafted to redress discovery violations in criminal cases. The management, regulation and supervision of discovery rules is designed to be a function of the trial court - not the Board on Grievance and Discipline.

Discovery issues are raised routinely in every criminal case. As such, trial courts are provided with a mechanism under Crim. R. 16 to make factual findings, and order immediate sanctions against the offending party. These sanctions are immediate, highly visible and potentially quite severe. In the case of prosecutors, a willful discovery violation can result in complete dismissal of the case. And any harm to the public or individual parties is dealt with in the context of the pending case.

Clearly, the trial court is in the best position to handle discovery disputes in the context of the facts of the case in which they arise. This Court should be loathe to interfere with the trial court's discretion in the discovery process and slow to interject regulatory counsel into it.

**APPLICATION OF THE DISCIPLINARY RULES TO DISCOVERY VIOLATIONS IN CRIMINAL CASES RISKS CREATION OF CONFUSION AND CHAOS**

Relator invites this Board to employ a separate standard of review (when sanctioning prosecutors for discovery violations) that eliminates the *Brady* constitutional materiality standard and a mens rea standard of intent. Noting that the words “exculpatory” and “materiality” are not contained in DR 7-103(B), Relator argues that the Rule should be interpreted as broader and more encompassing than the *Brady* standard. The Court should decline this invitation because the Disciplinary Rules should be reserved for only the most serious discovery violations. The Rules are simply ill-suited to the routine discovery disputes that arise every day in criminal court.

Application of the Disciplinary Rules to alleged discovery violations in criminal cases would impose inconsistent obligations upon prosecutors attempting to comply with both procedural rules and rules of professional conduct. And because the reciprocal rules of discovery require defense attorneys to also provide discovery, such application would encourage the very gamesmanship the Criminal Rules of Procedure were designed to eliminate. Every discovery dispute in a criminal case could become a grievance proceeding before the Board with opposing parties wielding the disciplinary rules as procedural weapons. The progress of criminal cases through the system would be obstructed and the purposes of the Disciplinary Rules themselves subverted.

The grievance procedure should be limited to the most serious of cases. This is a case best left to the trial court to resolve in its discretion.

## STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts contained in respondents pre-hearing brief.

### LAW

#### THE BOARD SHOULD INTERPRET THE DISCIPLINARY RULES AS (1) INCLUDING THE MENS REA OF INTENT AND (2) INCORPORATING THE BRADY CONSTITUTIONAL MATERIALITY STANDARD WHEN ANALYZING CLAIMS OF DISCOVERY VIOLATIONS BY PROSECUTORS IN CRIMINAL CASES

In Ohio, the management, regulation, and supervision of discovery is preeminently a trial court function.<sup>2</sup> Criminal Rule 16 governs discovery and inspection in criminal cases. Pursuant to Crim. R. 16, either the state or defense may move the court to order discovery.<sup>3</sup> “Upon motion of the defendant, the court shall order the prosecuting attorney to permit” certain categories of discovery.<sup>4</sup> Similarly, the rules provide for reciprocal discovery of the defendant by the state.<sup>5</sup>

Criminal Rule 16 invests the trial court with the authority to sanction non-compliance with discovery.<sup>6</sup> These sanctions include the court compelling compliance with discovery, the grant of a continuance so that discovery can be completed, and a sanction prohibiting a party from introducing non-disclosed material at trial.<sup>7</sup> In extraordinary circumstances, an indictment can be completely dismissed for a discovery violation.<sup>8</sup> In this case, the guilty plea could have been

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<sup>2</sup> *State v. Larkins*, 8<sup>th</sup> Dist. No. 85877, 2006-Ohio-90, at ¶35, ¶36.

<sup>3</sup> See Crim. R. 16(B)(defense) and 16(C)(prosecution).

<sup>4</sup> Crim. R. 16(B)(1)(a).

<sup>5</sup> Crim. R. 16(C).

<sup>6</sup> *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138.

<sup>7</sup> Crim. R. 16(E)(3).

<sup>8</sup> *State v. Harris* (1998), 127 Ohio App.3d 626, 630-631.

withdrawn.

And in *Brady v. Maryland*<sup>9</sup> the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good or bad faith of the prosecution.”<sup>10</sup> Evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>11</sup>

*Again, as pointed out in footnote one, there has been no discovery violation by respondent Kellogg-Martin in this case. By his plea of guilty, defendant Giles waived his right to receive from respondent exculpatory impeachment material.*

The OPAA believes strongly that even in situations where a prosecutor does commit a discovery violation, sanctions for such violations are best left to the trial courts under Criminal Rule 16, and not to a disciplinary grievance board.

This was the approach taken by the Colorado Supreme Court in *Colorado v. Attorney C*.<sup>12</sup> In this case, Attorney C, an assistant prosecuting attorney, committed two discovery violations. The first involved a domestic violence case. A few days prior to the scheduled preliminary hearing date, Attorney C examined the file and discovered a letter written by the alleged victim wherein the victim recanted her earlier statements to police and provided an account that was more consistent with the defendant’s version of the events. Attorney C realized that the letter was exculpatory evidence but determined that it was not material in the constitutional sense because it would not change the

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<sup>9</sup> (1963), 373 U.S. 83, 83 S.Ct. 1194.

<sup>10</sup> Id. at 87.

<sup>11</sup> *State v. Johnson* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus.

<sup>12</sup> (2002), 47 P.3d 1167

outcome of the preliminary hearing. Attorney C did not disclose the victim's letter to defense counsel. As a result, the defendant waived the preliminary hearing. It was not until after the preliminary hearing that Attorney C disclosed the victim's letter to the defendant's attorney.<sup>13</sup>

The second discovery violation involved a sexual assault case in which the victim's stepbrother was the accused. On the morning of the preliminary hearing, Attorney C interviewed the victim. For the first time, the victim denied that she had oral-genital contact with the stepbrother, and said that the stepbrother touched her genital area with his hand and his penis. Attorney C correctly determined that the victim's story was exculpatory evidence and prepared a memo reflecting the victim's new story but did not inform defendant's counsel of this exculpatory evidence prior to the preliminary hearing, fearing that her office could be disqualified from the case. It was not until the day after the preliminary hearing that Attorney C sent the memo to defendant's counsel.<sup>14</sup>

At Attorney C's disciplinary hearing, two board members concluded that Attorney C violated The Colorado Rules of Professional Conduct, specifically the provision that 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..."<sup>15</sup> A dissenting board member found no violation of the Colorado Disciplinary Rules. The majority imposed a public censure.<sup>16</sup>

On appeal, the Colorado Supreme Court sided with the dissent and reversed. Though the

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<sup>13</sup> *Colorado v. Attorney C*, supra, at p. 1168.

<sup>14</sup> *Colorado v. Attorney C*, supra at pp. 1168-1169.

<sup>15</sup> Colo. RPC 3.8(d)

<sup>16</sup> *Colorado v. Attorney C*, supra at p. 1169.

Court agreed that Attorney C failed to disclose exculpatory evidence in a timely fashion to the defense in both cases, it declined to find a violation of the disciplinary rules.<sup>17</sup>

The Court noted that there are very few cases across the country where prosecutors face discipline for discovery violations. In the Attorney C case, even though Attorney C was negligent in failing to disclose exculpatory evidence in the domestic violence case and knowingly failed to disclose exculpatory evidence in the sexual assault case, the Court said that is not sufficient to invoke disciplinary proceedings against a prosecutor. The Court ruled that a prosecutor must intentionally fail to make a timely disclosure, and that the disciplinary rules should be reserved for only the most serious cases in which “conduct occurs that reflects upon the character of the prosecutor.”<sup>18</sup>

The primary rationale for the court’s decision was that it did “not wish to interfere with the discretion of trial courts to handle discovery disputes in the way dictated by the facts of the case, and because [it] did not wish the possibility of a grievance proceeding to permeate every discovery dispute in criminal cases...”<sup>19</sup>

The Court was particularly concerned about potential abuses under a strict interpretation of the disciplinary rules against a prosecutor for discovery violations:

“As we consider the conduct in this case, we first note that discovery violations in criminal cases are different from other kinds of disciplinary rule violations for a number of reasons. First, discovery issues arise in almost every criminal case. Trial courts routinely make findings of fact and enter orders and sanctions designed to respond to the severity of the violation. As a result, the problems are visible, immediately addressed, and any harm to the public or to the

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<sup>17</sup> *Colorado v. Attorney C*, supra.

<sup>18</sup> *Colorado v. Attorney C*, supra at pp. 1172-1173.

<sup>19</sup> *Colorado v. Attorney C*, supra at p. 1174.

individual parties is dealt with in the context of the pending case. Not only is management, regulation, and supervision of discovery preeminently a trial court function, see *Samms v. Dist. Court*, 908 P.2d 520, 524 (Colo. 1995), but we also have case law and rules of procedure specifically tailored to redress any discovery violations. We neither wish to upset that process nor to interject regulatory counsel into it.”<sup>20</sup>

In sum, the court held that an adjudicative system is in place that deals regularly with discovery issues, and said an attorney grievance system is ill-suited to addressing any but the most serious discovery violations.<sup>21</sup>

This case presents the typical scenario that the well established adjudicative discovery process has evolved to address. This case does not present any disciplinary rule violation requiring sanction by the Board. Respondent testified that she did not intend to mislead or conceal. And the mitigation material demonstrated that she had an exceptional professional reputation above reproach.

In conclusion, the OPAA believes that in cases where there has been a discovery violation, this Court should adopt a mens rea standard of intent and a constitutional *Brady* materiality standard.

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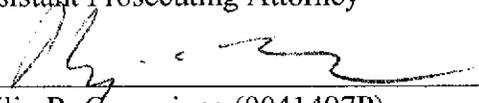
<sup>20</sup> *Colorado v. Attorney C*, supra at pp. 1173-1174.

<sup>21</sup> *Colorado v. Attorney C*, supra at p. 1174.

Respectfully,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Brief of Amicus Curiae, by United States mail, addressed to all interested parties listed on the cover page, this 23 day of October, 2008.

  
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