

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

vs.

Kimberly Jo Kellogg-Martin
(Attorney Reg. No. 0022083)
Respondent.

CASE NO: 2008-1771

**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS
TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS**

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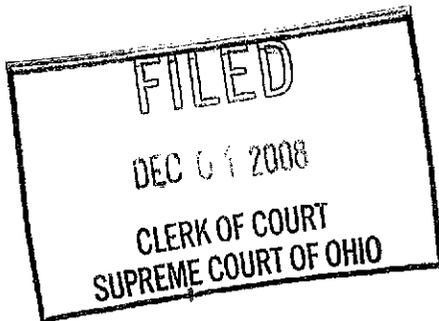


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**IN
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Disciplinary Counsel, :

Relator : **CASE NO. 2008-1771**

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Kimberly Jo Kellogg-Martin :
(Atty. Reg. No. 0022083) :
Respondent :

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**RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS
TO THE BOARD OF COMMISSIONERS’ REPORT AND RECOMMENDATIONS**

INTRODUCTION

Now comes relator, Disciplinary Counsel, and submits this answer to respondent’s, Kimberly Jo Kellogg-Martin’s, objections to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline (the "board"). Relator’s answer will also respond to the arguments of amici curiae Ohio Prosecuting Attorneys Association (OPAA) and Butler County Prosecuting Attorney, Robin N. Piper.

The facts of this matter are as set forth in the board’s Findings of Fact, Conclusions of Law, and Recommendation (“the report”). Based upon the clear and convincing evidence presented at the hearing in this matter, the board determined that respondent violated four Disciplinary Rules of the Code of Professional Responsibility. Report at 13-17, 20. The board determined that respondent violated:

- **DR 1-102(A)(4)**(A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation);
- **DR 1-102(A)(5)**(A lawyer shall not engage in conduct that is prejudicial to the administration of justice);
- **DR 7-102(A)(3)** (In her representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which she is required by law to reveal); and,
- **DR 7-103(B)** (A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment).

Id. The board recommended that respondent be suspended from the practice of law for one year with six months of that suspension stayed. Id. at 20.

The board's report was certified to this court on September 4, 2008. A show cause order was filed on September 16, 2008. After obtaining a stipulated extension of time, respondent's objections were filed October 27, 2008. Oral argument is scheduled for December 16, 2008.

Beginning with the section of her brief labeled "Introduction," respondent offers arguments that are not supported by the facts of this disciplinary case; are contrary to the facts of *State v. Giles*; and, are contrary to well-established law. For example, respondent claims that this Court's adoption of the board's report and recommendations will change Ohio law to require "open discovery" in criminal proceedings. That assertion is simply wrong. Each disciplinary case is unique on its facts. This disciplinary case is about one prosecutor's violation of four disciplinary rules. This disciplinary case is not about a change in the procedural law of Ohio but rather about applying the facts to the disciplinary rules charged in the complaint.

For the reasons set forth herein, this Court should overrule respondent's objections and the arguments of amici curiae and adopt the Findings of Fact, Conclusions of Law, and Recommendation of the board.

STATEMENT OF FACTS

The allegations of misconduct in this disciplinary case arose from the state of Ohio's prosecution of Joshua Giles in Logan County, Ohio. At all times relevant to the prosecution of Giles, respondent served as the Chief Assistant Prosecuting Attorney in Logan County. Stip. 3¹. As the Chief Assistant Prosecuting Attorney and the attorney representing Ohio in *State v. Giles*, respondent had the authority to determine what evidence would be disclosed to Giles. Stip. 27. It was respondent's failure to disclose two items of evidence to Giles, i.e. the Cooper and Dorsey reports, that resulted in the board's finding that she violated three disciplinary rules. It was statements that respondent made regarding that evidence that resulted in the board's finding that she violated DR 1-102(A)(4).

In her role as the prosecutor in *State v. Giles*, "[r]espondent was ethically and legally required to disclose evidence that tended to negate guilt, mitigate the degree of the offense or reduce the punishment." Report at 14. As emphasized by the board, "[t]he State's failure to disclose evidence favorable to a criminal defendant implicates more than the defendant's discovery rights; the prosecutor has an affirmative duty to disclose such evidence under the Fourteenth Amendment's Due Process Clause. Failure to reveal this evidence implicates the defendant's right to a fair trial." Id. at 11. In order to fulfill her "responsibility to observe Giles' right to due process of law, [r]espondent was required to disclose the [Cooper and Dorsey] reports." Id.² Respondent's failure to disclose the reports violated DR 7-102(A)(3), DR 1-102(A)(5) and DR 7-103(B). Id. at 13, 14.

¹ "Stip" refers to the Stipulated Facts agreed to by the parties prior to the hearing.

² In a footnote, respondent objects to the board's conclusion about the Cooper report and the issue of force. Brief at 9. This issue was not raised by Giles in his motion to withdraw his guilty plea; however, it was raised by relator during this disciplinary proceeding. See, e.g. Relator's

In addition, the board determined that the statements respondent made in the Bill of Particulars and at Giles' plea hearing regarding the evidence against Giles were "clearly false" and violated DR 1-102(A)(4). *Id.* at 16. The board also concluded that "[i]n light of the facts and circumstances of the *Giles* case, [r]espondent's violations of DR 1-102(A)(4) are more than troublesome." *Id.* According to the board:

Respondent's misrepresentations in the Bill of Particulars and at sentencing, combined with the failure to disclose the Dorsey and Cooper reports, strike at the very heart and soul of a fair trial. At the time when the statements were made the reports were solely in Respondent's possession. In addition, at the hearing to suppress the confession, time was of the essence because the offered plea would not remain on the table. Accordingly, it would have been virtually impossible for Giles' defense counsel to timely discover the significance of Respondent's misrepresentations. Only Respondent understood the significance of the reports. Moreover, Respondent's actual disclosure of the hospital records and of the victim's retraction to her friends, cast an aura of fairness over the proceedings that is not warranted.

Id. at 17.

In the "Statement of Facts" presented to this Court, respondent offers justification for her activities in an effort to convince this Court that it should reach different conclusions than those reached by the board. Respondent opines that there are two questions that are pertinent to this Court's analysis, i.e. (1) why did respondent withhold the Cooper and Dorsey reports? and (2) why did respondent make the statements in the bill of particulars and at the plea hearing that the board determined violated DR 1-102(A)(4)?

In contrast to respondent's efforts to convince this Court that her reasons for withholding the Dorsey and Cooper reports are ethical and that her decisions were made in "good faith," the board thoroughly evaluated the facts of this case and determined that respondent's explanation of

Trial Brief at 11, 15, 16. The board's decision affirms the arguments advanced by relator regarding respondent's legal and ethical duty to disclose the Cooper report.

“why” she “did not have a duty to disclose the Cooper and Dorsey reports” did not “satisfy a prosecutor’s duty to seek justice.” Id. at 13 (citing EC 7-13). Moreover, according to the board, “[r]espondent’s decision not to disclose the evidence and her reasons for so deciding are legally and ethically wrong.” Id. (emphasis added).

In finding that respondent violated DR 1-102(A)(4), the board soundly rejected respondent’s explanation that she never intended to mislead anyone. According to the board:

If Respondent’s statement in the Bill of Particulars was somehow not what she intended to convey, she had plenty of time before the December 18, 2002 plea hearing to rectify or clear up this matter. Respondent could have filed an amended Bill of Particulars with a truthful reference to the content of the Dorsey report. Respondent could have made a truthful statement regarding the Dorsey report at the plea hearing. Respondent did neither.

Id. at 16.

The facts of *State v. Giles* that led to the board’s finding of four disciplinary rule violations are as follows. In June 2002, then-14-year-old Erica Long was undergoing counseling to address various issues involving her unruliness at home. Id. at 2. During counseling, Erica disclosed to her therapist, Beth Ramsey, that Joshua Giles pressured her into having sexual intercourse on two occasions. Report at 2. Ramsey contacted Erica’s mother, Sarah Long, and Logan County Children’s Services (LCCS). Id.

On June 12, 2002, an LCCS social worker, Joanie Dorsey, met with and interviewed Erica about the sexual abuse allegations. Id. at 3. During the interview and as reflected in Dorsey’s report, Dorsey told Erica that the Children’s Services Board (CSB) was told that Erica had been forced to have sex with Josh Giles two times within the past year. Id. See also Exbs. 3

and 5³. When Dorsey asked Erica whether that statement was true, Erica said, “yes,” prompting Erica to report to Dorsey that the first rape occurred in August 2001 when she was at Mandy Taylor’s house. Id. Erica told Dorsey that the second rape occurred in September 2001 at a man named Haddy’s house. Id. Erica’s date of birth is January 21, 1988; therefore, if the offenses occurred in August and September of 2001, Erica would have been 13 years old at the time. Id.

On June 13, 2002, Dorsey created a narrative report regarding her initial interview with Erica. Stip. 11. Dorsey transmitted the narrative to Detective Jeff Cooper of the Logan County Sheriff’s Office on June 13, 2002. Report at 3 and Exb. 3. In relevant part, the LCCS narrative that was provided to law enforcement by Dorsey states:

[June 12, 2002 10:00 a.m.]

Erica Long, 14 (DOB: 1/21/88) came into the agency with her mother, Sarah, to be interviewed about sexual abuse allegations. [Dorsey] asked if she knew why she was there and Erica stated that she thought it was something to do with Josh Giles (5210 CR 63, Quincy). JD [(Dorsey)] stated that CSB was told that Erica had been forced to have sex with Josh Giles two times within the past year. JD asked if this was true and she stated yes it was. Erica reports the first rape occurred in August 2001 when she was at her friend, Mandy Taylor’s parents’ house (205 Liberty St., Quincy). She stated that Amanda is dating Brian (20 yr. old). He is friends with Josh Giles (20 yr. old) who was at the house that evening. Erica states that they had all been drinking beer and she had about three or four.

* * *

Erica reports that the second rape occurred in September 2001 at a man named “Haddy’s” house (214 Jefferson St., Quincy). He is a friend of Josh and Brian. Erica stated that they stopped at Haddy’s house to get more beer after leaving the racetrack. * * * *

Id. (emphasis added). See also Exb. 3.

³ Stipulated Exhibits are referred to as “Exb.” References to the hearing transcript are designated as “Tr.” followed by the page number.

The same day Detective Cooper received the report from LCCS, Cooper and Detective Larry Garwood interviewed Giles in an unmarked police car near Giles' residence. *Id.* at 4. See also Exb. 6. The June 13, 2002 interview of Giles was tape-recorded. *Id.* The transcript reflects that Giles confessed to engaging in consensual sexual intercourse with Erica once, at Mandy Taylor's house, "a long time ago" "in 2000." *Id.*

Cooper generated a report following his interview with Giles. *Id.* Cooper's report states, in part:

On 6/13/02 I received information from Joanie Dorsey of Logan County Children Services concerning Erica Long, age 14, making allegations that she was raped twice by Josh Giles in August and September of 2001. Joanie interviewed Erica on 6/13/02 (sic) and faxed me information obtained in that interview, see narrative for details.

On 6/13/02 Det. Garwood and I went to Miami Valley Camp at 5210 CR 63 and located Joshua D. Giles. Josh got into the back seat of Det. Garwood's car and we drove down into the camp. Det. Garwood started a digital recorder and I advised Josh that we had received information that he had been sexual (sic) involved with Erica Long and we wanted to talk with him about it. I advised Josh that we did not tell his parents why we wanted to talk with him, it would be up to him to tell his parents as to why we were there.

Cooper and Detective Weaver interviewed Erica on July 3, 2002. *Id.* Cooper supplemented his report following the July 3, 2002 interview. *Stip.* 14 and Exb. 4 ("the Cooper report"). During the interview, Erica told the officers that she had intercourse with Giles on two occasions when she was 12 years old. *Report* at 4. Cooper's report (Exhibit 4) reflects that Erica also told Cooper that she told Giles that she was 12 years old. *Id.* According to Cooper's report, Erica stated that "she did not tell Josh to stop or try to fight him during the incidents of intercourse." Exhibit 4.

In or about early July 2002, the Cooper report, a tape of Cooper's interview with Giles, and Giles' signed waiver of rights form were provided to the office of the Logan County prosecuting attorney. *Id.* Shortly thereafter, responsibility for prosecuting Giles was assigned to respondent. *Id.* A three-page narrative report prepared by LCCS was provided to respondent after July 19, 2002 and at some time prior to August 2002. *Id.* See also Exb. 5 ("the Dorsey report").

After reviewing the information that had been provided to her, respondent realized that she needed to confirm the dates when the sexual abuse occurred in order to determine what charges to pursue against Giles. *Id.* Specifically, respondent needed to determine whether Erica was 12 or 13 years old at the time of the sex.⁴ See, e.g. Tr. at 52. Before charges were filed, respondent met with and separately interviewed Erica and her mother. *Id.* at 5. During the interview, Erica told respondent that the sex occurred before she was injured in a snowmobile accident and that the injuries from the accident prevented her from completing her seventh grade basketball season. *Id.* Erica told respondent that the first incident of sexual abuse occurred in August 2000 at her then-friend Mandy Taylor's house; the second rape occurred in September 2000 at Haddy's house; and, that Giles was aware that she was 12 years old. *Id.*

In an effort to verify Erica's report that that the sex occurred before she was injured in a snowmobile accident, respondent obtained Erica's hospital records relating to treatment for injuries received in a snowmobile accident. *Id.* The hospital records indicated that Erica was treated in December 2000. *Id.*

On August 9, 2002, a criminal complaint was filed in Bellefontaine Municipal Court charging Giles with two counts of violating R.C. 2907.02(A)(1)(b) (rape of a person under the

age of 13), a first degree felony. *Id.* After deciding to take its case against Giles to the grand jury, the state moved to dismiss the complaint on August 20, 2002. *Id.* at 6.

On or about September 11, 2002, an indictment was signed by respondent and filed against Giles. The indictment charged Giles with six first degree felonies: five counts of violating R.C. 2907.02(A)(1)(b) (rape of a person under the age of 13) (Counts 1, 2, 3, 4) and two counts of violating R.C. 2907.02(A)(1)(b) and R.C. 2907.02(A)(2) (rape of another under the age of 13 when the offender compels the person to submit by force or threat of force) (Counts 5, 6).⁵ *Id.* and Exb. 9. *State v. Giles* was assigned to the docket of Hon. Mark S. O'Connor as Case No. CR 02 09-0184. *Id.*

At the time of Giles' indictment, R.C. 2907.02(B) required a trial court to impose a sentence of life in prison when an offender was convicted of raping a person under the age of 13 by force or threat of force. *Id.* To wit:

Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

Exb. 30.

Giles was originally represented by Attorney Bridget Hawkins. *Id.* From approximately mid-August 2002 through October 31, 2003, Giles was represented by Attorney John H. Fisher,

⁴ Giles' date of birth is May 1, 1980 making him 20 years old in August 2000 (when Erica was 12) and 21 years old in August 2001 (when Erica was 13). See Stips. 6, 7.

an attorney with 22 years of criminal defense experience. *Id.* The state of Ohio was represented by respondent. *Stip.* 22. On or about August 29, 2002, Fisher was provided with the state's initial discovery response that had initially been provided to Giles' former attorney, Bridget Hawkins. *Id.* See also *Exb.* 11.

The prosecution's initial discovery response included Erica's hospital records. On the first page of the discovery response, respondent stated that among "documents and tangible objects," the state was providing a "Copy of Wilson Memorial Hospital records to substantiate dates of major event in victim's life in relationship to timing of the crimes." *Id.* at 7. See also *Exb.* 11. Respondent identified Dorsey and Cooper, among others, as witnesses. *Id.*

On or about September 19, 2002, through Fisher, Giles made a request for discovery under *Crim. R.* 16(A) and (B). *Id.* At the time she received Giles' discovery demand, respondent was in possession of the Cooper report from the Logan County Sheriff's Office and the Dorsey report from LCCS. *Stip.* 25. Respondent did not disclose the Dorsey report or the Cooper report to Giles. *Stip.* 26.

Also on September 19, 2002, Giles filed a motion seeking a Bill of Particulars. *Report* at 7. Respondent signed and filed a Bill of Particulars on September 23, 2002. *Id.* See *Exb.* 18.

The Bill of Particulars states, in part:

The victim disclosed the facts of this case to her therapist, Beth Ramsey of Consolidated Care, Inc. at her initial assessment. The therapist honored her obligation as a mandated reporter and contacted the authorities about the abuse disclosure. The victim was interviewed by Joanie Dorsey of Logan County Children's Services on June 12, 2002. She reported that the Defendant raped her on two occasions over the summer of 2000. The victim's date of birth is 01/21/88, making her twelve (12) years of age at the time of the crimes.

Id.

⁵ The parties agree that the indictment contained an error in that only Count Five should have

On September 23, 2002, in a supplemental discovery response, respondent provided Giles with what she described as “evidence favorable to defendant.” Id. and Exb. 19. This “favorable evidence” was a statement Erica made to a friend that the sexual abuse “never happened.” Id.

On October 2, 2002, Giles filed a motion to suppress the statements he made to law enforcement officers and a motion to compel “the State of Ohio to specify the precise date and location of the offense as to each count of the indictment; or in the alternative, to dismiss each count of the indictment due to the State’s failure to specify the precise date and location of each offense.” Id. See also Exb. 21 and 22. Giles also requested an evidentiary hearing on his motion. Id. at 8.

On November 12, 2002, Giles filed a motion pursuant to Crim.R.16(B)(1)(g) and 16(B)(1)(f). Inter alia, Giles, asked the court to order the state “to obtain transcripts of any and all statements made by the victim to her counselors, probation officers, law enforcement officers, Grand Jury testimony, and any statements, which she has made and can be ascertained by the State of Ohio.” Id. See also Exb. 24. In the memorandum in support of his motion, Giles further stated:

If the victim in this case has given differing statements, they are exculpatory to the defendant; and as such they should be discoverable. Defendant submits that any and all statements made by the victim should be transcribed and submitted to the court for in camera inspection, and that any exculpatory evidence should be supplied to defendant pursuant to discovery.

Id.

On December 18, 2002, Giles pled guilty to one amended count of a violation of R.C. 2907.04. Id. According to Fisher, the day Giles agreed to the plea offered by respondent, was the same day that a hearing was scheduled on the motion to suppress. Tr. at 194. On that day,

alleged the element of force or threat of force. Tr. at 107-108.

Fisher understood that the offer would not remain “on the table” if a hearing were held on the motion to suppress and that time was of the essence. Tr. at 196. See also Report at 17.

As amended, the charge to which Giles pled guilty reflected that Giles engaged in sexual conduct with a person who was between the ages of 13 and 16 at the time of the offense and that Giles was more than 10 years older than the victim of the offense. Id. The charge to which Giles pled guilty was a felony of the third degree. Id.

At the plea hearing, respondent made the following statement regarding the evidence against Giles:

The State’s evidence in this case would show that the victim in this case, Erica Long, disclosed the fact concerning the abuse to her therapist, Beth Ramsey, of Consolidated Care, Inc. at her initial assessment. The therapist then in turn on a[n] obligation as a mandated reporter contacted the prosecutor (sic) about the abuse. The victim was interviewed by Joanie Dorsey of the Logan County Childrens Service’s on June 12, 2002. She reported what had taken place over the year 2000.

The victim’s date of birth is January 21 of 1988, which makes her 12 years of age at the time she reported, although for the record there has been a stipulation that we will treat her as if she was 13.

Id. at 9. See also Exb. 26 at 20-21.

At the time of her statements to the court, respondent was in possession of the Dorsey report. Id. As reflected in that report, during her initial interview with Dorsey, Erica reported that the sexual activity occurred in 2001, not 2000. At no time prior to the entry of the guilty plea did respondent provide the Dorsey report or the report generated by the Sheriff’s office to Giles. Id.

Giles’ sentencing hearing was held on February 3, 2003. Stip. 38 and Exb. 28. On February 12, 2003, Giles was sentenced to three years in prison and classified as a sexually

oriented offender. Report at 9. See also Exb. 29. Giles was granted judicial release and placed on community control on October 31, 2003. Id.

In January 2003, Sarah Long applied for reimbursement with the Ohio Attorney General's Victims of Crime Compensation Program. Id. On May 20, 2003, the Ohio Attorney General issued a letter to Sarah Long indicating that her application for benefits from the Crime Victims Compensation Fund had been approved in the amount of \$435.49. Id.

In and about November 2004 and January 2005, Giles requested information from the Attorney General's office regarding Sarah Long's claim for compensation. Id. Information including but not limited to the Cooper report and the LCCS narrative and were provided to Giles by the Attorney General. Id.

On or about December 16, 2005, Giles (through Attorney Marc S. Triplett) filed a motion seeking to withdraw his guilty plea pursuant to Crim R.32.1.⁶ Id. See also Exb. 33. Giles' motion to withdraw his plea asserted that "exculpatory evidence was not timely supplied" and that "[i]ts suppression has rendered the [guilty] plea involuntary as have been based upon a false state of the evidence as presented by the prosecution." Id. at 10 and Exb. 33 at 7.

A hearing on Giles' motion to withdraw his guilty plea was held May 18, 2006. Report at 10. Respondent, Cooper, Ramsey, and Fisher (by deposition) testified at the hearing. Exb. 34. The state of Ohio was represented by Gerald Heaton, the Logan County Prosecutor.⁷ Id.

By entry filed July 11, 2006 the trial court denied Giles' motion to withdraw his plea. Report at 10. See also Exb. 37. In relevant part, the trial court held:

⁶ Crim. R.32.1 states: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

⁷ At all relevant times and to this date, Heaton serves as the Logan County Prosecuting Attorney.

The theory of the Defendant's motion is that he did not make a knowing, intelligent and voluntary plea. The evidence before the Court was that when the complaint initially became known to children services, the initial complaint was that the events occurred in 2001. The indictment alleged throughout that the other person's date of birth was January 21, 1988. If the events happened in 2001, the charges would have been sexual battery because the victim was thirteen years of age. By the testimony of the Assistant Prosecutor Kim Kellogg Martin and Deputy Jeff Cooper the children service's record was introduced which confirmed Defendant's allegation that the initial complaint indicated that the events happened in 2001. It was also agreed that this information was not disclosed to defense counsel as *Brady* material. Assistant Prosecutor Martin, in her testimony advised that the dates were constructed around a certain event in the victim's life which the State verified happened in the year 2000. The State therefore was convinced the events occurred when alleged in the indictment. Mr. Fisher, in his deposition says that if he would have known of the inconsistent prior statement, it would probably have changed his advice as to whether or not to accept the plea.

The Court has reviewed all documents available to it including the court of appeals file CA03-02-0006. That file contains a number of transcripts including the plea hearing which occurred December 18, 2002. The Defendant was accompanied by his attorney, John Fisher and a plea petition was completed. Prior to the Defendant entering a plea the Court asked the prosecutor for a statement of the facts. Among the facts the prosecutor advised the Court was this statement, "In a recorded interview with the Defendant he admitted having intercourse with the victim at the home of Mandy Taylor, 205 Liberty Street in Quincy, Ohio. He said this occurred one time only. He also agreed that the reporting – with the reporting that the conduct took place in the summer of 2000 when he was being interviewed by Detective Jeff Cooper." While Mr. Fisher says that the initial statement that the events occurred in 2001, would have changed his advise (sic), the Court finds that the ultimate outcome where the Defendant has confessed and stated the date would not have changed. In this instance, the Court, from the totality of the record, does not find that the defense has established any manifest injustice. The Court finds that the Defendant's motion is not well taken.

Giles did not file a direct appeal of the denial of his motion to withdraw his guilty plea. *Id.*

Respondent's assertion in her "Statement of Facts" that in denying the motion, the trial court made a determination that "no *Brady* violation occurred" is simply incorrect.⁸ As set forth above, the trial court's only reference to *Brady* is a characterization of the evidence withheld "as *Brady* material." Further, even if it existed, such a determination by the trial court would not preclude this Court from affirming the board's findings given that this Court has exclusive jurisdiction over the discipline of Ohio's attorneys. Ohio Const. Art.IV(2).

Fisher filed a grievance against respondent on September 26, 2006. Report at 10. A formal complaint was filed alleging that respondent violated the four rules found by the board, i.e. DR 1-102(A)(4), DR 1-102(A)(5), DR 7-102(A)(3), and DR 7-103(B), and the complaint was certified with probable cause on August 13, 2007.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

Answer to Objection I

As Determined by the Board, Respondent's Failure to Disclose the Cooper and Dorsey Reports Violated DR 7-103(B)

In her first objection, respondent argues that the board reached the wrong conclusion in determining that a "materiality" requirement does not apply to a prosecutor's duty to disclose evidence under DR 7-103(B).⁹ Respondent urges this Court to conclude that a violation of DR 7-103(B) can occur only if the evidence that is improperly withheld by a prosecutor is

⁸ All references to "*Brady*" are to *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215. The *Brady* Court held, "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." *Id.* at 87. "Favorable" evidence under *Brady* encompasses both exculpatory and impeachment evidence and evidence must be both favorable and material before disclosure is required." *United States v. Acosta* (D.Nev.2005), 357 F. Supp.2d 1228, (citing *United States v. Bagley* (1985), 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481).

⁹ This argument is also advanced by amici curiae.

“material.” This Court should reject respondent’s objection and adopt the conclusions of the board.

First and foremost, although relator will respond to respondent’s first objection, the practical effect of this argument is nil in light of the fact that as determined by the board, the evidence withheld by respondent was “material to the defense[.]” Report at 12 (emphasis added). Accordingly, regardless of this Court’s analysis of respondent’s first objection, by failing to disclose the Cooper and Dorsey reports, respondent violated DR 7-103(B) as well as DR 7-102(A)(3) and DR 1-102(A)(5).

Second, although this disciplinary case may be viewed as a matter of “first impression,” the facts of this case and the application of the disciplinary rules are not new. This is a case involving a prosecutor who failed to disclose evidence. The board’s conclusion that there was a legal and ethical duty to disclose that evidence does not make new law.

Third, a prosecutor’s duty to disclose evidence under DR 7-103(B) is different than the prosecutor’s duty under *Brady*. The disciplinary rules, DR 7-103(B) and Prof. Cond. Rule 3.8(d), require prosecutors to disclose exculpatory information at the beginning of a case whereas the “materiality” requirement in *Brady* is a “harmless error” rule used in the context of reviewing a conviction.¹⁰ Accordingly and as determined by the board, two separate standards of analysis are required.

Respondent asserts that this Court should hold that a judicial determination of a Crim. R.16/*Brady* violation must exist as a predicate to finding a violation of DR 7-103(B).

Respondent and amici curiae repeatedly argue that a decision by this Court upholding the board’s

¹⁰ This Court may take judicial notice of the three comments received by the Task Force for the Ohio Rules of Professional Conduct regarding proposed Rule 3.8(d). None of the comments suggested adding a “materiality standard” or the word “intentionally.”

recommendations will “transform” Ohio into an “open file” state for purposes of criminal discovery. Respondent suggests that the entire body of Ohio law interpreting *Brady* and Crim. R.16 will become meaningless.

There is absolutely no support for respondent’s argument that if the board’s report is adopted, trial courts will have a new standard under which to decide motions to withdraw guilty pleas or motions for new trial.¹¹ The board’s recommendation in this disciplinary case is not an “end around” *Brady* or Crim. R.16 for criminal defendants.¹² It is solely a determination regarding whether respondent violated the disciplinary rules. On the whole, respondent’s arguments and the arguments amici curiae amount to pure speculation.

Respondent argues that if a violation of DR 7-103(B) is found without the addition of a “materiality” requirement, criminal defendants will seek relief from the disciplinary system solely on grounds that the prosecutor violated an ethical duty to disclose evidence. Respondent’s arguments are pure speculation and ignore Ohio law.

DR 7-103(B) was adopted on October 5, 1970 and remained unmodified until February 1, 2007, the effective date of the Ohio Rules of Professional Conduct. Respondent herself points out that after 37 years this is a case of first impression. Accordingly, there is simply no support for respondent’s speculation that if the Court follows the board’s recommendation, it will open Pandora’s box for challenges to criminal convictions through the disciplinary system. Respondent’s argument ignores the obvious practicality that the result of a disciplinary case has

¹¹ Respondent asks this Court to “rest assured” that if this Court adopts the board’s report, Giles will attempt to pursue a “delayed appeal” under App. R.5(A)(1). Notably, respondent’s approach to that possibility flies in the face of a “prosecutor’s duty to seek justice” under EC 7-13. Further, there is simply no support for respondent’s inference that a ruling by this Court under Gov. Bar R.V would operate as res judicata for a court of appeals in a case that would be premised upon the Due Process Clause of the United States Constitution.

absolutely no effect on the merits of an underlying legal matter. To put it bluntly, no one will be released from jail based upon this Court's decision in a disciplinary case.

In her efforts to convince this Court that the board's recommendation is erroneous, respondent suggests that it is something new that DR 7-103(B) "would govern criminal proceedings[.]" Respondent complains that no court has "provided any guidance for prosecutors" and argues that a prosecutor's ethical duties cannot possibly be broader than her "legal duties."

Respondent's argument overlooks the fact that DR 7-103(B) has always expressly required prosecutors to disclose all evidence that tended to "negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." Further, guidance for Ohio's prosecutors in the form of the Ethical Considerations has been provided since 1970.¹³ In pertinent part, EC 7-13 provides:

The responsibility of a public prosecutor differs from that of the usual advocate; [the prosecutor's] duty is to seek justice, not merely to convict. ... With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to [the prosecutor], that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

The very foundation of respondent's argument is defeated by the fact that the words "exculpatory" and "materiality" are not in DR 7-103(B). The comment to DR 7-103(B) affirms that this omission makes the ethical rule broader than the due process duty. To wit:

¹² In fact, relator could not agree more with the OPAA's opinion that the disciplinary process should be reserved for the "most serious" discovery violations – such as in *State v. Giles*.

¹³ The preface to the Code of Professional Responsibility states, in part, "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." (Emphasis added.)

Given the restrictive qualifying language of [*United States v. Agurs* [(1976), 427 U.S. 97], it appears that a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's disclosure duty as a matter of ethics. Disciplinary Rule 7-103(B) does not limit the prosecutor's ethical duty to disclose to situations in which the defendant requests disclosure. Nor does it impose a restrictive view of "materiality." Disciplinary Rule 7-103(B) states that the prosecutor has a duty to make timely disclosure of any evidence that tends to negate guilt, mitigate the degree of the offense, or reduce the punishment. It appears possible, therefore, that a prosecutor may comply with the constitutional standards set forth in *Brady* and *Agurs* and still be in violation of Disciplinary Rule 7-103(B). See *State v. Harwood*, 94 Idaho 615, 495 P.2d 160, 162 (1972), in which the court stated that Disciplinary Rule 7-103 and Ethical Consideration 7-13 imposed a duty on the prosecution "to make available all evidence which tends to aid in ascertaining the truth."

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) cmt. (1979).

In reaching its conclusion that "materiality" does not apply to DR 7-103(B), the board held that respondent's explanation for withholding the reports did "not satisfy a prosecutor's duty to seek justice, 'not merely to convict.'" Report at 13. According to the board, "[t]he defense was entitled to know that Erica Long provided direct evidence of the date making her 13 years old at the time of the offenses." *Id.* at Footnote 4.

As the board concluded:

- Nowhere in DR 7-103(B) does it state that the prosecutor need only turn over evidence that she has determined is material.
- Nowhere in DR 7-103(B) is the prosecutor required to make a "reliability" or "credibility" determination before turning over evidence.
- Nowhere in DR 7-103(B) is there an exception for evidence that the prosecutor deems to have been outweighed by other evidence.
- A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. (Citing Comment [1], Ohio Prof. Cond. Rule 3.8.)

- As a minister of justice, a prosecutor's duty to disclose exculpatory evidence to a defendant cuts to the very core of her duty as both an advocate for the prosecution and a minister of justice.
- When a prosecutor's role as an advocate is in conflict with her role as a minister of justice, the minister of justice role should take precedence.
- Although she is an advocate, a prosecutor cannot permit her advocacy duties to supplant her duty to do justice.

Report at 11-12.

Respondent urges this Court to construe a series of cases as supporting her argument that this Court should add a predicate "materiality" requirement to DR 7-103(B). Respondent relies in part upon two cases previously decided by this Court, *Disciplinary Counsel v. Wrenn*, 99 Ohio St.3d 222, 2003-Ohio-3288, 790 N.E.2d 1195 and *Cuyahoga Cty. Bar Assn. v. Gerstenslager* (1989), 45 Ohio St.3d 88, 543 N.E.2d 491. Respondent also opines that a third case in which a violation of DR 7-103(B) took place is not applicable to this matter. See *Disciplinary Counsel v. Jones* (1993), 66 Ohio St.3d 369, 613 N.E.2d 178. Respondent claims that the referenced cases are distinguishable because in *Wrenn* and *Gerstenslager*, another court determined that the prosecutors violated their legal duty to disclose evidence and claims that "just the opposite" occurred in this case.

Although the defendant in the criminal case underlying *Wrenn* was successful in arguing that he should be permitted to withdraw his guilty plea, the *Wrenn* decision does not hold nor is there even an intimation that this Court would not have considered the disciplinary case "but for" the trial court's decision. This Court did not use the *Wrenn* decision to announce "conditions precedent" to finding violations of the disciplinary rules governing Ohio's prosecutors. More

importantly, this Court held that the fact that the defendant's "eventual conviction and sentence were the same as the original" did not "diminish respondent's wrongdoing." *Wrenn*, 99 Ohio St.3d at 225.

Respondent's recitation of the *Gerstenslager* holding is incorrect. Contrary to respondent's assertion that this Court found a violation of DR 7-103(B), the only rule violation found in *Gerstenslager* was DR 1-102(A)(5). In fact, as further illustration of the flaws in respondent's argument, in the criminal case underlying *Gerstenslager*, the trial court held that the prosecutor (William E. Gerstenslager) violated the mandates of Crim. R.16, yet no violation of DR 7-103(B) was found by this Court.

Although respondent asserts that the *Jones* case is factually distinguishable and therefore inapposite to the instant case, *Jones* provides further proof that a Crim. R.16 or *Brady* violation has never been a condition precedent to a violation of DR 7-103(B). In *Jones*, this Court found violations of DR 7-103(B), DR 7-102(A)(3), and DR 1-102(A)(5). *Jones*, 66 Ohio St.3d at 371. Offering a reason for his conduct that is similar to respondent's explanation, Dwayne K. Jones, claimed that he did not turn over exhibits based upon his erroneous belief that he had fulfilled his responsibilities by giving the exhibits to the clerk. *Id.* In suspending Jones from the practice of law for six months, this Court reiterated the board's characterization of a prosecutor as "'the standard bearer' of 'truth and fairness,' with a "'public mandate to protect the rights of all citizens.'" *Id.*

Although there is no way to know what would have happened *State v. Giles* if respondent had disclosed the evidence, the fact that the trial court determined that Giles had not suffered "manifest injustice," does not obviate respondent's misconduct. There is simply no requirement

that there be a judicial finding of “manifest injustice” before a violation of the disciplinary rules can be found.¹⁴

Respondent also directs this Court’s attention to a handful of disciplinary cases from other states. Respondent relies upon *In the Matter of Attorney C* (Colo. 2002), 47 P.3d 1167; *In the Matter of Grant* (2001), 343 S.C. 528, 541 S.E.2d 540; and, *Comm. on Prof. Ethics and Conduct of the Iowa State Bar Assn. v. Ramey* (Iowa 1994), 512 N.E.2d 569.

The *Attorney C* decision is well outside the meaning and intent of Ohio’s disciplinary rules and, obviously, a Colorado case is not controlling upon this Court. In *Attorney C*, the Colorado court was asked to examine a prosecutor’s failure to timely disclose evidence in two cases. The evidence in the first underlying case involved a letter written by the alleged victim recanting her earlier statements and providing a version of events that was consistent with the version offered by the defendant. The prosecutor recognized the letter was “exculpatory evidence that she needed to provide to defense counsel” but decided to “withhold the letter from the defense until after the [preliminary] hearing.” *Attorney C*, 47 P.3d at 1168. Defense counsel received the letter two days after the preliminary hearing and filed a motion for sanctions against the prosecutor. The district attorney’s office offered to dismiss the charges against the defendant if defense counsel withdrew the motion for sanctions and ultimately that was the outcome.

The second case underlying *Attorney C* involved statements made to the prosecutor by an 11-year old female victim denying that she had made several earlier statements and providing a different version of the events leading to the charges against the defendant. Although the

¹⁴ By comparison, there is no requirement that an attorney be convicted of a crime as a predicate for this Court to find a violation of DR 1-102(A)(3). See, e.g. *Disciplinary Counsel v. Clifton* (1997), 79 Ohio St.3d 496, 684 N.E.2d 33 (W. Deems Clifton II was found to have violated DR 1-102(A)(3) (committing illegal conduct involving moral turpitude) despite the fact that he was

prosecutor again recognized the statements as “exculpatory evidence,” the prosecutor withheld the statements from the defense and instead elicited testimony from the victim designed to mimic her statements to the prosecutor. Defense counsel received the exculpatory statement one day after the hearing and moved for sanctions. The trial court denied the motion for sanctions finding that the prosecutor’s “failure to disclose the exculpatory statements would not have changed the outcome of the preliminary hearing.” *Id.* at 1169.

Attorney C was charged with violating the Colorado Rules of Professional Conduct. The relevant Colorado rule provides, in part:

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

* * *

(d) 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

Colorado’s Prof. Cond. Rule 3.8 differs from Ohio Prof. Cond. Rule 3.8 and obviously differs from DR 7-103(B). The most significant variation can be found in Colorado’s reference to “the ABA Standards of Criminal Justice Relating to Prosecution Function” in Comment [1] to its Rule 3.8. According to the *Attorney C* court, the “ABA Standards for Criminal Justice: Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)” provides that: “A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.” *Attorney C*, 47 P.3d at 1171. Ohio’s rule does not contain such a reference. The *Attorney C* court relied upon the ABA Standards in justifying its addition of a

acquitted of aggravated theft for misappropriating funds from his ward). See *State v. Clifton*,

“materiality standard” to Rule 3.8 and in imposing the requirement of mens rea intent upon prosecutors.

The facts underlying the *Grant* disciplinary case are similar to the case underlying Ohio’s *Wrenn* decision. *Grant*, 343 S.C. 528. Although the *Grant* court noted the criminal court’s finding of a *Brady* violation, like *Wrenn*, the South Carolina court did not address the question of whether the element of “materiality” applied to the enforcement of Prof. Cond. Rule 3.8(d). Similarly, the *Ramey* case does not expressly impose a “materiality” requirement upon DR 7-103(B). *Ramey*, 512 N.W.2d 569.

Even if this Court imposes a parallel between respondent’s ethical duty to disclose exculpatory evidence and her legal duty to do so, respondent was legally and ethically required to disclose the Cooper and Dorsey reports. Report at 13. The Cooper and Dorsey reports were material in that they offered independent and direct proof that Erica was not “a person under 13” at the time of the offenses. *Id.* at 12. The Cooper report offered proof that Giles did not use force against Erica Long. *Id.* Age was an element of every offense in the indictment and force was an element of the offense that carried a mandatory life sentence. *Id.*

Respondent and amicus curiae OPAA repeatedly describe this case as a “discovery dispute” and urge this Court to follow the *Attorney C* decision in declining to discipline respondent. This case is not a “discovery dispute.” Respondent’s failure to disclose the Cooper and Dorsey reports was not revealed until more than two years after “discovery” in *State v. Giles ended*. The mechanisms for challenging respondent’s discovery violations at the trial court level that are suggested by amicus curiae OPAA were simply not available to Giles.¹⁵ In fact,

Hamilton County C.P. Case No. 9403728.

¹⁵ By its express terms, Crim. R.16’s provision for the “regulation of discovery,” applies “during the course of the proceedings.” Crim. R.16(E)(3).

respondent's misconduct was not discovered until long after Joshua Giles served his time in prison.

As determined by the board, DR 7-103(B) required respondent to disclose the Cooper and Dorsey reports. A finding by this Court that respondent violated DR 7-103(B) means that the undisclosed evidence "tend[ed] to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." It does not mean that the rules of discovery have changed or that *Brady* is no longer relevant.

Answer to Objection II

As Determined by the Board, Respondent Was Required by Law to Disclose the Cooper and Dorsey Reports

Respondent's second objection is the first of two claims that the board incorrectly concluded that she was legally required to disclose the Cooper and Dorsey reports.¹⁶ Respondent asserts that the board misinterpreted her "legal duty" to disclose evidence and that the board applied the wrong standard of "materiality" in determining that respondent violated DR 7-102(A)(3). Respondent asserts that the law did not require disclosure of the Cooper and Dorsey reports because the evidence was not "material" and that the board was required to explain "why" there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Brief at 26. This objection amounts to a one-sided debate over the board's semantics.

From the inception of this disciplinary case, both parties have argued extensively that respondent's legal duty to reveal the Dorsey and Cooper reports was rooted in Crim. R.16 and *Brady*. Relator argued that the law required respondent to reveal the reports and that her failure

¹⁶ Respondent's second argument to that effect is Objection IV.

to do so violated DR 7-102(A)(3) and DR 1-102(A)(5).¹⁷ In contrast, respondent argued that “the law did not require disclosure because the information is not ‘material’ under Crim. R.16/Brady.” See, e.g. Brief at 27. The board agreed with relator and found that respondent violated DR 1-102(A)(5) and DR 7-102(A)(3).

In arguing that respondent violated DR 7-102(A)(3), relator asserted that as applied to *State v. Giles*, following were the essential elements of respondent’s legal duty to disclose evidence:

1. The evidence withheld was clearly favorable to Giles because it was exculpatory as to the elements of age and force.
2. The question of whether the evidence was “suppressed” is answered in two parts. First, it has been stipulated that the evidence was in respondent’s possession. Respondent suppressed the evidence by failing to reveal it. Second, the failure to disclose the reports precluded Fisher from fully considering the evidence at the time he gave his client advice regarding the proposed plea agreement. Suppression of the evidence also prevented the defense from accurately considering whether to allocate resources to challenging significant elements of the crimes charged.
3. The component of materiality is established in this case. The Cooper and Dorsey reports offered independent and direct proof that Erica was not “a person under 13” at the time of the offenses. It is reasonably probable that had respondent revealed the suppressed information to the defense, Giles would have chosen to stand trial rather than pleading guilty.¹⁸

Respondent’s testimony at the hearing established that respondent believed she did not have a duty to disclose the Cooper and Dorsey reports because according to respondent, the

¹⁷ Inter alia, relator argued that this Court has held that compliance with Crim. R.16(B)(1)(f), fulfills the state’s due process obligations. *State v. Keene*, 81 Ohio St.3d 646, 650, 1998-Ohio-342, 693 N.E.2d 246 (citing *Brady v. Maryland* (1963), 373 U.S. 83, 87 S.Ct. 1194, 10 L.Ed.2d 215), (“We therefore conclude that the terms ‘favorable’ and ‘material’ in Crim. R.16(B)(1)(f) have the same meaning as they do in *Brady* and its progeny.”)

¹⁸ Despite respondent’s assertion, there is no requirement that the board provide a more detailed explanation of why there was a “reasonable probability” that had the evidence been disclosed, the results may have been different. The possibilities are self-evident. Giles may have chosen to go to trial and been found guilty of all or some of the charges. He may have chosen to stand trial

evidence “became immaterial” after her own investigation. Report at 13. Respondent considered the Dorsey report “unreliable” for various reasons including her own perception of Erica’s ability to recite “dates” versus “ages.” Id. In contrast, a “materiality” analysis of evidence under *Brady* must focus “upon facts known to the state, not the prosecutor’s conclusions.” *Gibson v. South Carolina* (1999), 334 S.C. 515, 527, 514 S.E.2d 320 (emphasis added.) In other words, for all of her protestations about the board’s report, respondent’s legal analysis of the evidence was incorrect at its inception.

During her prosecution of Joshua Giles, respondent’s approach to the evidence was inconsistent. For example, respondent rejected the dates in the Dorsey report but believed the accuracy of Dorsey’s report in other respects. With the exception of Giles’ statements that the sex occurred and that it occurred “in 2000,” respondent wholeheartedly rejected Giles’ description of the events in question. Moreover, if the Dorsey and Cooper reports were unreliable or inconsequential, why not turn them over? Respondent turned over Erica Long’s statement that the “events never happened,” yet respondent testified that she did not believe that statement was accurate.

The board’s report features an intertwining discussion of DR 7-103(B) and DR 7-102(A)(3); however, the board’s conclusions are unmistakable. The board found that Crim. R.16(B)(1)(f) requires a prosecutor to disclose “all evidence, known or which may become known to the prosecuting attorney, favorable to the Defendant and material either to guilt or punishment.” Report at 11 (emphasis provided). The board found that despite the legal requirements of Crim. R.16, the ethical rule, DR 7-103(B), does not contain a “materiality”

and been acquitted. As determined by the board, based upon the evidence presented, there is a reasonable probability that the results may have been different.

requirement. The board held that “materiality” did not apply to the ethical mandate of DR 7-103(B). *Id.*

After discussing the application of DR 7-103(B), the board stated, “[h]owever, it is clear to the panel that the evidence withheld in the instant matter was material to the defense so that defendant and his counsel would have all relevant information disclosed to them prior to disposition of the case.” *Id.* at 12. As established from the totality of the board’s report, respondent had an ethical duty to disclose evidence that tended to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment under DR 7-103(B) and an ethical duty to disclose “material” evidence under DR 7-102(A)(3). The board clearly held that the evidence was “material,” and found that a failure to disclose the evidence violated “Giles’ right to due process of law[.]” *Id.* at 13.

In its amicus curiae brief, the OPAA offers a footnote stating that in pleading guilty, Giles waived his “right to receive from prosecutors exculpatory impeachment material.” The OPAA and respondent cite *United States v. Ruiz* (2002), 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 in support of this proposition. The characterization of *Ruiz* and its applicability to this case is inaccurate and should be rejected by this Court.¹⁹

Angela Ruiz was indicted for unlawful drug possession after immigration agents found 30 kilograms of marijuana in her luggage. Ruiz was asked to enter into a “fast-track” plea agreement in which she would waive her right to receive “impeachment information relating to any informants or other witnesses” or information supporting any affirmative defenses in exchange for a two-level downward departure from the United States Sentencing Guidelines.

¹⁹ Respondent’s assertion that because of *Ruiz* she was simply not required to disclose “impeachment information,” is markedly inconsistent with the fact that respondent provided defense counsel with the statement made by Erica Long that “the events never happened.”

The waiver included the government's assurance that it had turned over "any [known] information establishing the factual innocence of the defendant" and acknowledged the "Government's 'continuing duty to provide such information.'" *United States v. Ruiz*, 536 U.S. at 624. Ruiz refused to sign the agreement and ultimately pled guilty without any agreement as to sentencing.

The *Ruiz* Court reversed the Ninth Circuit's opinion that the standard "fast-track" plea agreement was unlawful. In reaching its decision, the Court noted that "the Ninth Circuit's requirement could force the Government to abandon its 'general practice' of not disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." *Id.* at 632 (citing Brief for United States 25).

The *Ruiz* decision is factually distinguishable from this case and *State v. Giles*. First and foremost, the focus in this case is not on the validity of Giles' plea agreement, the focus is on evidence withheld by respondent before Giles decided to plead guilty. Second, in contemplation of pleading guilty, Giles was not asked to sign any type of waiver of his right to receive "impeachment information relating to any informants or other witnesses" in exchange for favorable sentencing.

Notwithstanding its factual differences, the holding in *Ruiz* actually operates to make the decision in this disciplinary case even more clear – respondent was required to disclose the Dorsey and Cooper reports to the defense. In contrast to the "information" considered by the Court in *Ruiz*, the Dorsey and Cooper reports amounted to "information establishing the factual innocence of the defendant," and should have been provided to the defense before Giles' entered his guilty plea.

Respondent also criticizes the board's use of the word "relevance." Respondent argues that "relevancy" has "never been the test for determining 'materiality.'" While respondent is correct that "relevance" does not trigger a prosecutor's legal duty to disclose evidence, the board did not find that respondent was required to disclose the evidence "because it was relevant." On the contrary, the board held that the evidence that had been withheld was "material" and that it should have been disclosed to the defense "so that defendant and his counsel would have all relevant information disclosed to them prior to disposition of the case." Report at 12 (emphasis added). It is undisputable that the Dorsey and Cooper reports were "relevant." They were also exculpatory. They were also material. Accordingly, it cannot be disputed that the term "all relevant information" clearly includes the Cooper and Dorsey reports, i.e. evidence that respondent was ethically required to reveal under DR 7-103(B) and DR 7-102(A)(3).

As determined by the board, respondent violated DR 7-102(A)(3) and DR 1-102(A)(5) because she "knowingly failed to disclose that which she [was] required by law to reveal." Report at 14.

Answer to Objection III

Respondent Willfully Violated The Code of Professional Responsibility

In her third objection, respondent asserts that regardless of whether this Court agrees that "materiality" does not apply to DR 7-103(B), respondent cannot be found to have violated DR 7-103(B) because she did not "willfully" violate the rule. Respondent urges the addition of a "mens rea standard of intent" to the rule and suggests that this Court should do what the Colorado court did in *Attorney C*. Respondent's arguments should be rejected in their entirety.

In urging the addition of “mens rea intent” to the rule, respondent claims that pursuant to Gov. Bar R.IV(1), discipline can be imposed only upon a finding that respondent willfully breached the Code of Professional Responsibility. Respondent’s argument is simply incorrect.

In cases decided by this Court, attorneys have been sanctioned for engaging in conduct that violates the Code of Professional Responsibility. It is the conduct that must be purposeful and voluntary. The application of Ohio’s criminal statutes is comparable to the foregoing analysis. A person is prosecuted for engaging in an act that violates a law. No one would argue that a criminal prosecution could not occur without “an act.”

In arguing that “mens rea intent” should be added to the rule, respondent complains that reading DR 7-103(B) as written will somehow subject every prosecutor already found to have violated Crim. R.16/*Brady* to discipline. This proposition is pure conjecture. Every disciplinary case is distinguishable upon its facts. See, e.g. *Cincinnati Bar Assn. v. Heisler*, 113 Ohio St.3d 447, 2007-Ohio-2338, 866 N.E.2d 490 and *Disciplinary Counsel v. Kramer*, 113 Ohio St.3d 455, 2007-Ohio-2340, 866 N.E.2d 498. There is simply no foundation upon which respondent may assert that a particular result would transpire in “every” case.

In *Attorney C* and notwithstanding its determination that the evidence should have been disclosed to the defense, the Colorado court chose to read its Rule 3.8(d) “as including the mens rea of intent” and declined to find a disciplinary violation. *Id.* at 1174. As previously discussed and based upon the fact that neither the Code of Professional Responsibility nor Ohio Rules of Professional Conduct make any reference to the ABA Standards relied upon in *Attorney C* nor do they expressly or impliedly require the element of “intent,” this Court should reject respondent’s argument that the mens rea of intent be applied in enforcing DR 7-103(B).

The *Wrenn* case was decided after *Attorney C* and this Court did not impose the mens rea of intent in determining that a prosecutor violated the same four disciplinary rules charged in this case. *Wrenn*, 99 Ohio St.3d 222. The *Wrenn* court stated that the prosecutor “breached his duties as an officer of the court and his public responsibility as an assistant prosecutor. He had ethical and legal obligations to disclose discoverable information that was relevant, exculpatory, and not privileged and he failed to do so on more than one occasion.” Id. at 225 (emphasis added).

Similarly, finding solely a “failure” to disclose exculpatory evidence, this Court imposed a sanction for a violation of DR 7-103(B) in *Jones*. *Jones*, 66 Ohio St.3d 369. Likewise, courts in states other than Colorado have not determined that a mens rea of intent should be added to their disciplinary rules and have imposed sanctions based on a prosecutor’s “failure” to disclose discoverable evidence. See, e.g. *In the Matter of Morris* (Minn. 1987), 419 N.W.2d 70; *Grant*, 343 S.C. 528; *In the Matter of Jordan* (2004), 278 Kan. 254, 91 P.3d 1168; and, *Ramey*, 512 N.W.2d 569. Relator’s research also disclosed that Louisiana determined that sanctions were warranted for a prosecutor who “knowingly” withheld *Brady* evidence.²⁰ *In re Jordan* (La.2005), 913 So.2d 775.

A decision that respondent violated DR 7-103(B) means one thing, i.e. that within the context of *State v. Giles*, the Dorsey and Cooper reports tended to negate the guilt of the accused, tended to mitigate the degree of the offense, or tended to reduce the punishment and that respondent did not make timely disclosure to counsel for the defendant of the Dorsey and Cooper

²⁰ The ABA Standards for Imposing Lawyer Sanctions define “knowledge” as: “The conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.”

reports. This Court should reject respondent's argument that "mens rea intent" should be required before discipline is imposed upon an Ohio attorney for violating DR 7-103(B).

Answer to Objection IV

As Determined by the Board, Respondent's Failure to Disclose the Cooper and Dorsey Reports Violated DR 7-102(A)(3)

In her fourth objection, respondent first asserts that the board's conclusion that she violated DR 7-102(A)(3) is wrong because according to respondent, the board erroneously referred to DR 7-103(B) and not Crim. R.16 or *Brady* in its analysis of DR 7-102(A)(3).²¹ Respondent then claims that the board's finding must be rejected because there is "no evidence" that respondent "concealed" the reports knowing that she was obligated to produce them. Respondent's arguments should be soundly rejected by this Court.

Respondent's assertion that the board found only that "DR 7-103(B)" required respondent to reveal the evidence and that therefore, there can be no violation of DR 7-102(A)(3) is quite troubling. The record in this case as well as the board's report establish that the "law" the board was referring to in finding a violation of DR 7-102(A)(3) is Giles' Constitutional right to due process.

Obviously, members of the board well know that a violation of DR 7-102(A)(3) could occur only if respondent was required by law to reveal the Dorsey and Cooper reports and, contrary to respondent's argument, that is what the board determined. The board's discussion of respondent's "legal" duties to disclose evidence begins at page 10 of the board's report. The board first discussed respondent's legal responsibilities under Crim. R.16 and noted that "materiality" applied to Crim. R.16 but not to DR 7-103(B). The board then stated:

A criminal defendant is deprived of a fair trial when the State withholds exculpatory evidence this is relevant to guilt or punishment. The State's failure to disclose evidence favorable to a criminal defendant implicates more than the defendant's discovery rights; the prosecutor has an affirmative duty to disclose such evidence under the Fourteenth Amendment's Due Process Clause. Failure to reveal this evidence implicates the defendant's right to a fair trial.

Id. at 11.

The board further distinguished respondent's ethical duties under DR 7-103(B) from her legal duties by "find[ing] that materiality does not apply to DR 7-103(B)." Id. Accordingly and in conjunction with its discussion of a defendant's right to a fair trial, the board concluded, "[i]t is clear to the panel that the evidence withheld in the instant matter was material to the defense so that the defendant and his counsel would have all relevant information disclosed to them prior to the disposition of the case." Id. at 12 (emphasis added).

The board then compared and contrasted respondent's legal duty and her ethical duty "to disclose evidence that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." In closing its discussion and in light of the fact that it found violations of both rules, the board simply tied respondent's legal and ethical duties together. The board stated, "Respondent was ethically and legally required to disclose evidence that tended to negate guilt, mitigate the degree of the offense or reduce the punishment as required under DR 7-103(B). In compliance with Respondent's responsibility to observe Giles' right to due process of law, Respondent was required to disclose the reports." Id. at 13 (emphasis added).

In finding that respondent violated DR 7-102(A)(3), the board referenced its discussion of DR 7-103(B). The board concluded:

²¹ DR 7-102(A)(3) provides that "in her representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which she is required by law to reveal." (Emphasis added.)

As stated above in the discussion concerning DR 7-103(B), Respondent was ethically and legally required to disclose evidence that tends to negate guilt, mitigate the degree of the offense or reduce the punishment. Respondent, by not disclosing the Cooper and Dorsey reports, violated DR 7-103(B) as discussed above and therefore, in her representation of a client, she knowingly failed to disclose that which she is required by law to reveal. Therefore, we find by clear and convincing evidence that Respondent violated DR 7-102(A)(3) [in representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which she is required by law to reveal]. For the same reasons, we find that the evidence is clear and convincing Respondent violated DR 1-102(A)(5) [engage in conduct that is prejudicial to the administration of justice].

Id. at 14.

In its discussion of respondent's violation of DR 1-102(A)(4), the board again referenced respondent's violation of Giles' right to a fair trial:

Respondent's misrepresentations in the Bill of Particulars and at sentencing, combined with the failure to disclose the Dorsey and Cooper reports, strike at the very heart and soul of a fair trial. At the time when the statements were made the reports were solely in Respondent's possession. In addition, at the hearing to suppress the confession, time was of the essence because the offered plea would not remain on the table. Accordingly, it would have been virtually impossible for Giles' defense counsel to timely discover the significance of respondent's misrepresentations. Only Respondent understood the significance of the reports. Moreover, Respondent's actual disclosure of the hospital records and of the victim's retraction to her friends, cast an aura of fairness over the proceedings that is not warranted.

Id. at 17 (emphasis added.)

The clear and convincing evidence also establishes that respondent knowingly failed to disclose that which she was required by law to reveal in violation of DR 7-102(A)(3).

Respondent's assertion that there is "no evidence" that she knew she was obligated to produce the reports must be rejected by this Court.

In the absence of an “admission” that respondent knew she was “legally required,” to produce the reports and that she chose not to do so, “knowing” conduct may be inferred from the circumstances including respondent’s own reaction to the reports. The evidence establishes that respondent knew she was in possession of the reports; therefore, she also knew she was “not disclosing” the reports. The evidence also shows that after respondent conducted an investigation, she elected not to reveal the evidence and that she intentionally provided misleading information regarding the nature of that evidence. Respondent’s “nondisclosure” of the reports that she was required by law to reveal was not “negligent,” it was “knowing” and violates DR 7-102(A)(3).

As determined by the board, respondent repeatedly provided inconsistent explanations for her decision not to turn over the reports. *Id.* at 13. Respondent claimed that during discovery, she told Fisher that Erica initially provided “an unreliable or bad date.” *Id.* at 12. In contrast, Fisher testified that he was never provided with such information but that if he had been, he would have considered it very significant. *Id.* Finding respondent’s approach “not consistent,” the board asked, “[i]f respondent was willing to tell Fisher that the victim initially gave unreliable information, why was Respondent unwilling to disclose the Dorsey and Cooper reports?” *Id.* at 13. The answer is: because respondent knowingly made a choice to conceal the reports.

It is also notable that respondent went to great lengths to convince the panel that her own investigation rendered the reports “immaterial” and testified that for various reasons, she considered the Dorsey report “unreliable.” Clearly, respondent “knowingly” concealed the reports notwithstanding the fact that she was required by law to reveal them.

Respondent's "knowing" failure to disclose the evidence is most evident in the misrepresentations she made about the evidence in the Bill of Particulars and at the plea hearing. When the misrepresentations were made, the reports were "solely in Respondent's possession." Report at 17. It would have been virtually impossible for Giles' defense counsel to discover the significance of respondent's misrepresentations in time to provide advice to his client regarding the reports. Id. Only respondent understood the significance of the reports. Id. She chose to conceal them and to make misrepresentations about their contents.

In summary, throughout its report, the board was cognizant that respondent had both ethical and legal duties to disclose the Cooper and Dorsey reports. In finding that respondent violated DR 7-102(A)(3), the board concluded that the law required respondent to disclose the reports and that her failure to do so violated Giles' legal right to a fair trial. Further, the evidence clearly shows that respondent conducted an investigation that she believed would prove each element of the state's case. Upon concluding that investigation, respondent elected not to share evidence with the defense and intentionally provided misleading information regarding the nature of that evidence. This Court should reject respondent's fourth objection.

Answer to Objection V

As Determined by the Board, Respondent Violated DR 1-102(A)(5)

Respondent's fifth objection relies exclusively upon the reasoning in her fourth objection and therefore must be rejected by this Court. As determined by the board, in withholding the Cooper and Dorsey reports, respondent engaged in conduct that was prejudicial to the administration of justice in violation of DR 1-102(A)(5).

Nowhere is there a case in which a violation of DR 1-102(A)(5) could be more clear. As the board concluded, as a prosecutor, respondent had the responsibility of a minister of justice and not simply that of an advocate. Report at 11 (citing Comment [1], Rules Prof. Cond. 3.8). Respondent's duty to disclose exculpatory evidence is at the very core of her responsibility as an advocate for the prosecution and a minister of justice. *Id.* When a prosecutor's role as an advocate is in conflict with her role as a minister of justice, the role as a minister of justice should take precedence. *Id.* at 11. Although she is an advocate, a prosecutor cannot permit her advocacy duties to supplant her duty to do justice. *Id.* Accordingly, respondent's failure to disclose the Dorsey and Cooper reports establishes that her conduct was prejudicial to the administration of justice in violation of DR 1-102(A)(5). See, Report at 11-12.

Answer to Objection VI

As Determined by the Board, Respondent Violated DR 1-102(A)(4)

In her efforts to convince this Court that she did not violate DR 1-102(A)(4), respondent embarks upon a slippery slope. Notwithstanding her efforts at rationalization, for purposes of determining whether respondent violated DR 1-102(A)(4) (or any other disciplinary rule), it is irrelevant whether the crime occurred in 2001 or 2000. It is irrelevant whether respondent believed the crime occurred in 2001 or 2000. For purposes of determining whether respondent made false statements in the Bill of Particulars and at the plea hearing, what is relevant is what Erica Long told Joanie Dorsey and in turn, how respondent described Erica's statement to the court.

As previously set forth, the day after her June 12, 2002, interview with Erica, Dorsey created a narrative report regarding that interview. Stip. 11. Dorsey's narrative states that Erica

reported that she had been “forced to have sex with Josh Giles two times within the past year.”

Exb. 3. According to Dorsey, Erica reported that the “first rape occurred in August 2001” and “the second rape occurred in September 2001.” Id. (emphasis added).

Contrary to the plain language in Dorsey’s report, the Bill of Particulars, signed by respondent, states, in part:

The victim was interviewed by Joanie Dorsey of Logan County Children’s Services on June 12, 2002. She reported that the Defendant raped her on two occasions over the summer of 2000. The victim’s date of birth is 01/21/88, making her twelve (12) years of age at the time of the crimes.

Exhibit 18 (emphasis added).

At the time the Bill of Particulars was signed and filed, respondent was in possession of the Dorsey report. Obviously, the Dorsey report states that when Erica Long was interviewed on June 12, 2002, Erica reported to Dorsey that the sex occurred in 2001. Respondent’s declaration that on June 12, 2002, Erica “reported that the Defendant raped her on two occasions over the summer of 2000” was false. Report at 15.

At the plea hearing on December 18, 2002, respondent made the following statement:

The State’s evidence in this case would show that the victim in this case, Erica Long, disclosed the fact concerning the abuse to her therapist, Beth Ramsey, of Consolidated Care, Inc. at her initial assessment. The therapist then in turn on a[n] obligation as a mandated reporter contacted the prosecutor about the abuse. The victim was interviewed by Joanie Dorsey of the Logan County Children’s Services on June 12, 2002. She reported what had taken place over the year 2000.

See Exhibit 26, page 20 (emphasis added).

Again, at the time of her statements to the court, respondent was in possession of the Dorsey report expressly stating that when she was interviewed on June 12, 2002, Erica reported that the sex acts occurred in 2001. Respondent’s declaration at the December 18, 2002 hearing

that Erica's report to LCCS concerned "what had taken place over the year 2000" was false.²²
Report at 15.

In light of the facts and circumstances of *State v. Giles*, respondent's violations of DR 1-102(A)(4) are "more than troublesome" and "strike at the very heart and soul of a fair trial." Report at 17. In the Bill of Particulars and at the plea hearing, respondent misrepresented the content of the very report that she withheld from the defense in violation of DR 7-102(A)(3) and DR 7-103(B). Both times the statements were made, the reports were solely in respondent's possession; accordingly, it would have been impossible for Fisher to discern the significance of respondent's misrepresentations. Only respondent knew what the reports really said.

Just like she did at the hearing, respondent endeavors to provide this Court with justification for her statements. Respondent claims that her statements were intended to be a reflection of what the evidence "would show." At the hearing respondent claimed that her own investigation had somehow rendered the reports "immaterial" and that she considered Dorsey's report "unreliable." Report at 13. Respondent's explanation for her overtly false statements must fail. Regardless of whether the crime occurred in 2000 or 2001, the state's evidence would not (and could not) show that Erica Long told Joanie Dorsey that the incidents happened in "2000." Respondent's statements to that effect were false.

Under similar circumstances in *Wrenn*, this Court determined that a violation of DR 1-102(A)(4) occurred after the prosecutor was asked about the status of the undisclosed test results. This Court concluded that Wrenn violated DR 1-102(A)(4) in that he failed to affirmatively acknowledge that he was already in receipt of the report after defense counsel suggested that the state was "still waiting" for the test results. *Wrenn*, 99 Ohio St.3d at 225.

²² Respondent testified that the "she" to whom respondent referred was Erica. Tr. at 284.

As noted by the board, if respondent's statement in the Bill of Particulars was somehow not what she intended to convey, respondent had plenty of time before the December 18, 2002 plea hearing to rectify her falsehood. Respondent could have filed an amended Bill of Particulars with a truthful reference to the content of the Dorsey report. Report at 16. Respondent could have made a truthful statement regarding the Dorsey report at the plea hearing. Id. The fact that respondent never corrected her misrepresentation speaks volumes regarding her intentions, her awareness of the overt significance of Erica's statements to Dorsey, and her consciousness that the evidence was material.

Respondent chose her words. Respondent knew the content of the Dorsey report yet she chose to make misleading statements about the report concerning an element of the offenses charged. Respondent's statements were not "innocent misrepresentations" and both of the statements violate DR 1-102(A)(4).

Answer to Objection VII

As Recommended by the Board, Respondent Should be Suspended from the Practice of Law for 12 Months with Six Months Stayed

In her seventh objection, respondent urges this Court to reject the sanction recommended by the board. Respondent discusses the panel's recommendation and concludes that this Court should issue no more than a public reprimand. This Court should reject respondent's argument in its entirety. As the board found, this Court should hold that respondent violated DR 7-103(B), DR 7-102(A)(3), DR 1-102(A)(5), and DR 1-102(A)(4) and order that she be suspended for 12 months with six months stayed.

In support of her argument that the board's recommendation is too harsh, respondent cites the *Wrenn* decision and in a footnote, refers this Court to *Gerstenslager*.²³ Notwithstanding the *Wrenn* decision and the panel's finding of mitigating factors, it is essential not to lose sight of the reason that the board increased the sanction recommended by the panel: "Respondent's important role in the public justice system and her conscious conduct that violated DR 1-102(A)(4) in making two false statements including one in open court at the sentencing of the defendant[.]" Report at 20. As set forth by this Court in several previously decided cases, respondent's misconduct justifies an actual suspension from the practice of law.

In *Disciplinary Counsel v. Greene*, 74 Ohio St.3d 13, 15, 1995-Ohio-97, 655 N.E.2d 1299, this Court found that the actions of an assistant prosecutor presented the court "with an opportunity to state a clear test that should be consistently applied in all cases where an officer of the court intentionally misrepresents a crucial fact to the court in order to effect a desired result to benefit a party." Christopher L. Greene falsely told a judge that a school speed zone was not in effect at the time of a speeding citation so as to secure dismissal of the traffic charges against a defendant. This Court determined that Greene violated DR 1-102(A)(4); DR 1-102(A)(5); DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects upon his fitness to practice law); and, DR 9-102(C) (a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official).

In suspending Greene for one year with 10 months stayed, this Court stated, "[Greene] not only violated his obligations as an officer of the court, but also his public responsibility as [an] assistant prosecutor to protect the rights of all citizens[.] * * * * Indeed, [Greene's] deception would never have been uncovered if Judge Evans had not reviewed the ticket several

²³ The board and this Court determined that *Gerstenslager* did not knowingly refuse to turn over

days after the incident occurred.” *Id.* at 16. Just like Greene, respondent misrepresented a crucial fact both in the Bill of Particulars and on the record at the December 18, 2002 plea hearing. Respondent’s deception would never have been discovered had Sarah Long not filed a claim with the Crime Victims Compensation fund.

In a disciplinary case arising from comparable issues but occurring during a civil case, this Court suspended Philip J. Marsick from the practice of law for six months after he failed to disclose evidence during discovery. *Cincinnati Bar Assn. v. Marsick*, 81 Ohio St.3d 551. 1998-Ohio-337, 692 N.E.2d 991. Marsick was representing the defendant-trucking company in a motor vehicle case. Despite repeated discovery requests, Marsick failed to reveal that he had interviewed the tow truck driver and that he had a statement from him that tended to absolve the car’s driver and place 100 per cent of the blame for the accident on the truck’s driver.

Quoting the court of appeals in the motor vehicle case, this Court held, “our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case. * * * [C]ounsel’s actions * * * show contempt for the rules of discovery and violate the trust placed in counsel to obey the fundamental rules of the court.” *Id.* at 552 (citation omitted). This Court determined that Marsick’s conduct violated DR 1-102(A)(4), DR 7-102(A)(3), DR 7-102(A)(5), DR 7-102(A)(7), and DR 7-109(A).

In *Ramey*, the Iowa prosecutor who misrepresented a chain-of-custody issue by falsely stating that he had personally examined the evidence and who failed to disclose exculpatory evidence was suspended with no possibility for reinstatement for three months. *Ramey*, 512 N.W.2d 569. The Supreme Court of Iowa determined that Ramey violated DR 1-102(A)(4) and

evidence but that he was “grossly negligent and ‘sloppy’” in violation of only DR 1-102(A)(5).

DR 7-103(B). Like respondent, the DR 1-102(A)(4) violation involved Ramey's courtroom statement that proved to be false.

In *Jones*, the prosecutor was suspended from the practice of law for six months after he failed to disclose the existence of potentially exculpatory or mitigating evidence during a criminal trial for domestic violence. *Jones*, 66 Ohio St.3d 369. Jones admitted that it was an error not to disclose the exhibits and stipulated to violating DR 1-102(A)(5), DR 7-102(A)(3), and DR 7-103(B). Both sides recommended a public reprimand and the board recommended a one-year suspension stating that the "bench, bar and public must know that this fraud undermines our justice system and that prosecutors are fully accountable for such actions".

As noted by respondent, in *Wrenn*, this Court imposed a six-month stayed suspension despite finding a violation of four disciplinary rules including DR 1-102(A)(4). *Wrenn*, 99 Ohio St.3d 222. In his dissent in *Wrenn*, Chief Justice Moyer was joined by Justice Pfeiffer in opining that a stayed suspension was "inadequate" in light of "such egregious behavior." *Id.* at 225. Noting his agreement "with the majority that respondent's behavior was 'inexcusable and undermined the integrity of the criminal justice system,'" the Chief Justice stated that it was for that very reason that "[a] more stringent sanction" was warranted. *Id.* That "more stringent sanction," is warranted in this case.

In arguing that the board's recommendation should be rejected, respondent opines that the public does not need protection from her and asserts that a stayed suspension would not deprive the public of the "benefits" of respondent's legal services. This Court should reject respondent's assertions. As a prosecutor, respondent was a representative of the government endowed with special powers and privileges. See, e.g. *Imbler v. Pachtman* (1976), 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128. As an officer of the government, respondent had a unique and

special obligation to “do justice”. This obligation included a duty to assure that the rights of the public, including criminal defendants, are protected. At all times, respondent’s special duty was to seek justice. Respondent’s failure to disclose evidence and her misrepresentations about that evidence were a significant and pervasive breach of the Code of Professional Responsibility from which the public should be protected and for which respondent should receive an actual suspension.

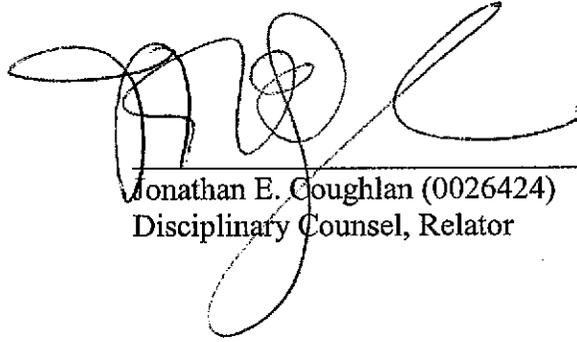
CONCLUSION

While acting as counsel for the state of Ohio, respondent failed to disclose crucial evidence to a criminal defendant. Respondent misrepresented that evidence in the Bill of Particulars and in statements to the court. One of the charges against that defendant was a crime that could have resulted in life in prison. In the end, respondent never disclosed the evidence.

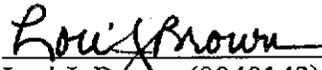
For all of the reasons stated herein, DR 7-102(A)(3), DR 7-103(B) and DR 1-102(A)(5) required that respondent disclose the Cooper and Dorsey reports to the defense before Giles entered his guilty plea. Moreover, DR 1-102(A)(4) required that respondent be completely truthful about the nature of the evidence in statements she made in the Bill of Particulars and to the court at the plea hearing.

Based upon the nature of respondent’s violations as well as this Court’s overriding objective of protecting the public, relator asks that the board’s recommendation be affirmed and respondent be suspended from the practice of law for 12 months with six months stayed.

Respectfully submitted,



Jonathan E. Coughlan (0026424)
Disciplinary Counsel, Relator

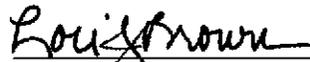


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CERTIFICATE OF SERVICE

A photocopy of the foregoing Relator's Answer to Respondent's Objections has been served upon Counsel of Record for Respondent, Christopher J. Weber, Kegler, Brown, Hill & Ritter, L.P.A., 65 E. State Street, Suite 1800, Columbus, OH 43215, upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 S. Front Street, 5th Floor, Columbus, OH 43215, and upon Counsel for Amicus Curiae, The Ohio Prosecuting Attorneys Association, Joseph T. Deters, Prosecuting Attorney, Ronald W. Springman, Assistant Prosecuting Attorney, and Philip R. Cummings, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202, and upon Counsel for Amicus Curiae, Butler County Prosecuting Attorney Robin N. Piper, Daniel G. Eichel and Lina N. Alkamdawi, Assistant Prosecuting Attorneys, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45012-0515 via regular U.S. mail, postage prepaid, this 1st day of December 2008.



Lori J. Brown
Counsel for Relator