IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

In re: Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163	)	
and	)	M2018-01932-SC-BAR-BP
Petition to Vacate Formal Ethics Opinion 2017-F-163	)	

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE BOARD OF PROFESSIONAL RESPONSIBILITY

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April 2019

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF AMICI CURIAE

The Tennessee Association of Criminal Defense Lawyers ("TACDL") is a non-profit corporation chartered in Tennessee in 1973. It has over 750 members statewide, mostly lawyers actively representing citizens accused of criminal offenses. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating for the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee. TACDL files numerous *amicus curiae* briefs each year.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues

of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Federal Defenders of Tennessee are Federal Defender Organizations created in accordance with the Criminal Justice Act plans of the three federal judicial districts and funded under the annual Criminal Justice Act appropriation. The offices in the Western and Middle Districts of Tennessee are Federal Public Defender offices. The office in the Eastern District of Tennessee is a not-for-profit Community Defender Organization. These offices annually represent thousands of persons accused or convicted of federal crimes but who lack the financial resources to retain private counsel. Each of these offices also provide training and a variety of support services to private attorneys on Criminal Justice Act panels appointed under the Act in thousands more cases in their districts. The issues presented in this appeal are of obvious importance to our work and the welfare of the clients we serve.

Each one of the *amici* has been involved in the consideration of Formal Ethics Opinion 2017-F-163 by the Board of Professional Responsibility. At the request of the Board, the Federal Public Defenders provided written briefing and an oral presentation at the September 14, 2018 meeting. *See Board App'x* at 21, 23. TACDL provided a written statement and a presentation at that meeting. *Id.* NACDL submitted a written statement as well.

STATEMENT OF ISSUES ADDRESSED BY *AMICUS CURIAE*

1. Rule 3.8(d) requires prosecutors to disclose all information that "tends to negate the guilt of the accused or mitigates the offense." There is no language in the Rule or commentary that includes any reference to materiality. Is the Board of Professional Responsibility correct that this provision should be given its plain-language interpretation and therefore is not limited to the constitutional minimum of information that would have a reasonable probability of changing the result of a trial if disclosed?

2. Rule 3.8(d) requires that such disclosure be "timely." Is the Board of Professional Responsibility correct that this means that disclosure should be made "as soon as reasonably practicable"?

ARGUMENT AND POSITION OF *AMICI CURIAE*

I. INTRODUCTION.

The petitioner Tennessee District Attorneys General Conference along with *amici* United States and the Attorney General & Reporter of the State of Tennessee [hereinafter "the petitioner and supporting *amici*"] have challenged Formal Ethics Opinion 2017-F-163 of the Board of Professional Responsibility, arguing that its interpretation of Rule of Professional Conduct 3.8(d) imposes unnecessary, unlawful, and burdensome obligations on prosecutors across Tennessee. For the reasons set forth below, TACDL, NACDL, and the Federal Defenders of Tennessee [hereinafter "defense *amici*"] herein argue that the Formal Ethics Opinion represents the only reasonable reading of Rule 3.8(d), as it does not contain any language that would support the petitioner's interpretation. Further, defense *amici* contend that the Formal Ethics Opinion provides a sensible and workable standard that is entirely appropriate in the overall framework of our criminal justice system.

The petitioner and supporting *amici* have raised a variety of attacks both on the conclusions of the Formal Ethics Opinion and on various smaller details regarding the exact form of the Formal Ethics Opinion. Most of those minor complaints have been addressed in detail in the brief of the Board of Professional Responsibility, and are not discussed again herein. In this brief, defense *amici* discuss the most basic disputes: (1) whether Rule 3.8(d) requires disclosure of any information that would not be deemed "material" under *Brady v. Maryland*, 373 U.S. 83 (1963), but which nonetheless tends to negate the defendant's guilt or mitigates

the offense, and (2) whether the rule should be interpreted to require disclosure of such information "as soon as reasonably practicable."

II. THE PLAIN LANGUAGE OF THE RULE, CONSISTENT WITH THE BOARD'S INTERPRETATION, REQUIRES DISCLOSURE OF ALL INFORMATION THAT NEGATES GUILT, NOT MERELY INFORMATION THAT MAY QUALIFY AS "MATERIAL" UNDER *BRADY*. FURTHER, THE LANGUAGE REQUIRES SUCH DISCLOSURE OCCUR IN AN EXPEDITIOUS MANNER.

A. Summary of Applicable Law.

1. Rule 3.8(d).

Rule of Professional Conduct 3.8(d) [hereinafter "the Rule" or "Rule 3.8(d)"] provides:

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

2. Principles of interpretation.

This Court has explained that, in interpreting the Supreme Court Rules, ordinary principles of statutory construction should be applied. It has written:

> In construing Rule 9 of the Rules of the Tennessee Supreme Court, we are confronted with an issue of first impression. There are well-established and well-known rules of construction which we apply when interpreting statutes enacted by legislative bodies. In addition, we have also

> applied "these general rules of statutory construction to rules and regulations drafted by administrative agencies pursuant to a legislative delegation of power." *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 679 (Tenn.2002) (*citing Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 762 (Tenn.1998)). Importantly, however, the rule at issue in this case was not drafted by a legislative body or administrative agency. It was drafted by this Court. Upon due consideration, we conclude that it is prudent for this Court to likewise apply the traditional rules of statutory construction to Rule 9 of the Rules of the Tennessee Supreme Court. Accordingly, this Court's role in statutory construction is to ascertain and "give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Aramark*, 90 S.W.3d at 678 (*quoting Owens v. State*, 908 S.W.2d 923, 926 (Tenn.1995)); *see also State v. Flemming*, 19 S.W.3d 195, 197 (Tenn.2000); *State v. Butler*, 980 S.W.2d 359, 362 (Tenn.1998). We determine intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." *Flemming*, 19 S.W.3d at 197 (*citing Butler*, 980 S.W.2d at 362).

Doe v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee, 104 S.W.3d 465, 469 (Tenn. 2003). In *Lockett v. Bd. of Prof'l Responsibility*, 380 S.W.3d 19 (Tenn. 2012), the Court held that this conclusion applies specifically to Rule 8 as well. *Id.* at 25 ("When interpreting the Rules of the Tennessee Supreme Court, we apply the traditional rules of statutory construction").

3. The *Brady* standard.

The Sixth Circuit recently summarized the *Brady* standard as follows:

> Under *Brady*, a defendant must show "(1) suppression by the prosecution after a request by the defense, (2) the evidence's favorable character for the defense, and (3) the materiality of the evidence." *Moore v. Illinois*, 408 U.S. 786, 794, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). *Brady* imposes a duty to disclose exculpatory evidence "even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (*citing United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). Impeachment evidence is also encompassed within the *Brady* rule because a jury's reliance on the credibility of a witness can be decisive in determining the guilt or innocence of the accused. *See United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Wilson v. Sheldon, 874 F.3d 470, 478 (6th Cir. 2017). The standard of materiality was defined in *Bagley*:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

473 U.S. at 682.

As noted, there can be a *Brady* violation due to a failure to disclose impeachment information prior to trial. *State v. Jackson*, 444 S.W.3d 554, 593 (Tenn. 2014) (*citing Giglio v. United States*, 405 U.S. 150, 154 (1972)). On the other hand, the Supreme Court has held that, because impeachment evidence is more closely related to the fairness of a trial than the voluntariness of a guilty plea, "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633 (2002). The issue of whether *Brady* can be

violated by a failure to disclose exculpatory, non-impeachment evidence prior to entry of a guilty plea remains an uncertain one under federal law.[1]

B. Application of Law to Facts.

1. The Rule should be interpreted, consistent with its plain language, to require disclosure of any information that "tends to negate the guilt" of the defendant. The Rule does not include any materiality standard.

The key task in interpreting Rule 3.8(d) is to determine the intent of the drafters of the Rule, based on "the natural and ordinary meaning of the [Rule's] language." *Doe*, 104 S.W.3d at 469. The petitioner and supporting *amici*, however, largely ignore the plain language of the Rule. They seek not to understand that language but rather to re-write this provision to include qualifiers that are not present. In particular, the petitioner and supporting *amici* seek inclusion of a materiality standard in Rule 3.8(d) for which there is no textual justification. This effort should be rejected.

There is a clear and obvious contrast between the *Brady* standard and the language of Rule 3.8(d). As is frequently explained, the *Brady* standard has multiple components, including that: the State must have

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[1] The United States has cited *Alvarez v. City of Brownsville*, 904 F.3d 382, 393 (5th Cir. 2018), for the proposition that material exculpatory information need not be turned over prior to a plea under *Brady*. *United States' Brief* at 5 n.1. Decisions from other courts reach the opposite conclusion, however. *See*, *e.g.*, *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007); *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003).

suppressed the information; "The information must have been favorable to the accused"; and "The information must have been material." *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). The language of the Rule parallels the second of these requirements (evidence favorable to the accused); it does not, however, give any indication that the "materiality" requirement applies. This Court should not read an additional requirement into the Rule which simply is not there. *See Schultz v. Comm'n for Lawyer Discipline*, No. 55649, 2015 WL 9855916, at *5 (Tex. Bd. Discipl. App. Dec. 17, 2015) (finding that language of parallel rule "is unambiguous" and broader than *Brady*); *In re Disciplinary Action Against Feland*, 820 N.W.2d 672, 678 (N.D. 2012) ("the plain language of Rule 3.8(d) does not impose a materiality element similar to that applied under *Brady* and Rule 16.").

Nor is it the case that the drafters did not and do not understand materiality issues. In a different subsection of the very same rule, added after Rule 3.8(d), the drafters chose to include a materiality standard, and did so explicitly. Rule 3.8(g) imposes post-conviction obligations of disclosure for a prosecutor who "knows of new, credible, and **material** evidence creating a **reasonable likelihood** that a convicted defendant did not commit an offense of which the defendant was convicted." (*Emphasis added*). This demonstrates that if the drafters wanted to include a materiality standard in Rule 3.8(d), they knew very well how to do so -- through the standard terms such as "material" and "reasonable likelihood." As this Court has explained, it is a canon of statutory construction that "where the legislature includes particular language in

one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject." *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000). Instead, the standard specified here is merely of evidence that "tends to negate" guilt, a much different and lower standard.[2]

In short, the only interpretation of the Rule that is faithful to its actual language is one that imposes an obligation of disclosure on prosecutors that is not limited to "material" information as defined by *Brady* but instead covers all information that tends to negate a defendant's guilt or mitigates a defendant's offense. The petitioner's proposed interpretation is without any textual justification and should not be adopted.

2. Interpreting Rule 3.8(d) to track *Brady* would render language regarding protective orders surplusage.

There is another flaw in the petitioner's proposed interpretation. If Rule 3.8(d) is intended merely to codify *Brady*, as claimed by the petitioners and supporting *amici*, it makes no sense to include the possibility of a prosecutor obtaining a "protective order" to "relieve[]" him or her "of this responsibility." If discovery is required by the Constitution,

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[2] This "tends to" language parallels the definition of relevant evidence in Rule 401: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 3.8(d) therefore covers relevant evidence that goes against a defendant's guilt.

then no court has the power to excuse a prosecutor from giving such discovery. A court order cannot trump the due process clause. Under the petitioner's construction, the protective order provision in Rule 3.8(d) could therefore never be used.

It is a bedrock rule of statutory construction that such an outcome, with some statutory language rendered irrelevant, should be avoided. As this Court has written: "We are constrained to interpret statutes so that no part or phrase of a statute will be rendered inoperative, superfluous, void, or insignificant." *Jordan v. Baptist Three Rivers Hospital*, 984 S.W.2d 593, 600 (Tenn. 1999). Thus, Rule 3.8(d) should not be interpreted to cover only constitutionally-required disclosures. The fact that drafters viewed the disclosure required by Rule 3.8(d) as something that could, in some circumstances, be avoided by court order strongly suggests that the drafters believed Rule 3.8(d) covered more than the constitutional minimum.

3. The Rule's requirement of "timely" disclosure is reasonably interpreted to require disclosure as soon as reasonably practicable.

The Formal Ethics Opinion construes "timely" as meaning "as soon as reasonably practicable." The petitioner and supporting *amici* launch a flurry of arguments about this interpretation. The United States, for example, contends that "timely" means "fitting, suitable, favorable, or right," and that it should therefore be interpreted as merely requiring disclosure by the relevant deadline imposed by substantive law. *United States' Brief* at 23-24. The petitioner concurs, stating:

> Thus, the only way to read the words "timely disclosure" in a manner that is consistent with treating our ethics rules as "rules of reason" and that does not create unnecessary conflict with the use of "promptly" in the same rules is to conclude that "timely disclosure" under RPC 3.8(d) means disclosure in compliance with the deadlines imposed under existing, substantive law.

Petitioner's Brief at 21.

There are two flaws to this position. First, interpreting "timely" to merely refer to other rules providing legal deadlines for disclosure of materials makes sense only if the scope of Rule 3.8(d) is determined to be co-extensive with *Brady*. Otherwise, there is no separate rule or constitutional provision that provides a precise deadline for disclosure of favorable but non-material information, and therefore it makes no sense to interpret "timely" disclosure of such information as merely pointing to some other standard. The petitioner's argument on this timing point presupposes acceptance of its flawed argument regarding the scope of required discovery.

Second, contrary to the petitioner, the word "timely" does not only denote compliance with some external standard, but can also refer to being immediate or early. Indeed, the first definition offered by *Merriam-Webster* is "coming early or at the right time." The *Oxford English Dictionary* offers as one definition: "Of an action or circumstance: done or occurring sufficiently early or in good time; prompt." These definitions are consonant with the Board's interpretation.

For legal purposes, "timely" can be used in one of two different ways: either referring to an external legal duty or referring to immediacy.

The Committee on Professional Ethics of the Bar of the City of New York has helpfully explained how one can differentiate between these meanings. It has written:

> We acknowledge the possibility that "timely" can be used to incorporate legal duties outside the Rules, where the rule in question itself is solely incorporating legal duties. However, the Rules elsewhere appear to equate "timely" with "as soon as practical" in situations where the duty in question is established by the Rules themselves, not exclusively by other law.

New York City Bar Ass'n Prof'l Ethics Comm. Formal Opinion 2016-3: Prosecutor's Ethical Obligations to Disclose Information Favorable to the Defense (*available online at* https://www.nycbar.org/pdf/report/uploads/20073140-2016-3_Prosecutors_Ethical_Obligations_PROFETH_8.22.16.pdf) (last visited April 3, 2019).

Here, "timely" in Rule 3.8(d) does not point towards any external deadline -- because there is none -- but rather refers to action regarding obligations stemming from the Rules of Professional Conduct themselves, and therefore should be construed to mean as soon as practical. Such an interpretation is consistent with the way that term is used in other places in the Rules, where it clearly does not refer to any external standard and is used to connote quick or early compliance. For example, Rule 1.18 disqualifies lawyers and their firms from representation in a matter if they received information from another prospective client, with adverse interests, relating to that matter. It provides an exception for other members of a firm, however, if the lawyer who received the information from the prospective client took measures to receive no more information

than necessary, and "the disqualified lawyer is **timely** screened from any participation in the matter." Rule 1.18(d)(2)(i) (*emphasis added*). In that context, "timely" cannot refer to some statutorily-imposed deadline for screening, as there is no such deadline. It must, rather, be interpreted to require immediate or expeditious compliance with the screening required by the Rules. This further aligns with the definition of "screening" in Rule 1.0(k) as "the isolation of a lawyer from any participation in a matter through the **timely** imposition of procedures within a firm that are reasonably adequate under the circumstances…." (*Emphasis added*). Given that the requirement of screening procedures is imposed by the Rules themselves, and not by external law, the meaning of "timely" in this context again can only be prompt and expeditious. Finally, in the same way, Rule 1.13(c) allows attorneys to withdraw from representation of an organization if that organization fails to "to address in a timely and appropriate manner" some action that is a violation of law; in context, "timely" again connotes immediacy of action, not compliance with some other external standard.

In sum, the requirement of "timely" disclosure required by Rule 3.8(d) is correctly interpreted as meaning "as soon as reasonably practicable." Such an interpretation is consistent with the plain-language meaning of "timely," especially in light of the fact that the phrase relates to a duty imposed by the Rules of Professional Conduct rather than by external substantive law.

III. PUBLIC POLICY IS SERVED BY HAVING AN ETHICAL RULE THAT DOES NOT MERELY TRACK THE CONSTITUTIONAL MINIMUM.

A. Introduction.

As outlined above, the plain language of Rule 3.8(d) differs from the constitutional requirements of *Brady v. Maryland*, and thus cannot reasonably be interpreted as being coextensive with *Brady*. Further, the interpretation of "timely" to refer to as soon as reasonably practicable is, in light of the fact that Rule 3.8(d) is not merely a codification of *Brady*, the only plausible interpretation that is faithful to the language.

That should be the end of the matter. As the Court has said in dealing with a statute: "When a statute is clear, courts simply apply the plain meaning without complicating the task." *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013). To the extent that this Court goes beyond the plain language to consider the policy merits of the different interpretations of the Rule, defense *amici* submit that an ethical rule requiring disclosures in line with the Formal Ethics Opinion is manifestly in the public interest.[3] *Brady* was never intended to provide a prospective guide for the actions of prosecutors, and adaptation of it for that purpose will inevitably be both over- and under-inclusive. The Rule as correctly interpreted by the Formal Ethics Opinion, on the other hand,

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[3] Even if Rule 3.8(d) established a completely unwise regime of disclosures, the solution to that problem would be to revise the rule, not to interpret it in a way contrary to its plain language. However, given that many of the arguments offered by the petitioner and supporting *amici* focus on policy concerns, defense *amici* address these issues herein to assist the Court.

provides a definite standard by which evidence can be evaluated prospectively; furthers the goal of providing a fair, truth-seeking process; and helps avoid wrongful convictions.

B. *Brady* is a Due Process Right of a Defendant.

The *Brady* right stems from the constitutional guarantee of a fair trial under the Sixth Amendment.[4] Because *Brady* is focused on the fairness of the proceedings to a defendant, there is no requirement of intentional prosecutorial misconduct. As the Court wrote in *Brady* itself, there can be a violation if material information is suppressed "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Further, *Brady* is not limited to information within the possession of the attorney prosecutors. As this Court has explained: "*Brady* applies not only to evidence in the prosecution's possession, but also to ' "any favorable evidence known to the others acting on the government's behalf in the case, including the police." ' " *Jackson*, 444 S.W.3d at 594 (*quoting Strickler v. Greene*, 527 U.S. 263, 275 n. 12, (1999)).

C. *Brady* is Not a Prospective Guide for Discovery.

Brady does not, and was never intended to, provide a prospective standard for regulating discovery by prosecutors in criminal cases. It is, instead, a backwards-looking rule, providing an after-the-fact assessment of whether the defendant was afforded a fair trial. In

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[4] *Brady* has never been limited merely to the determination of guilt or innocence, but also applies to the imposition of sentence. *See Brady*, 373 U.S. at 87 (due process violated if evidence suppressed "where the evidence is material either to guilt or to punishment").

particular, it approaches this question by asking whether, in light of the course of that trial as it actually happened, there is a reasonable possibility that the outcome would have been different if additional information had been turned over. It includes within it a harmlessness analysis of a kind usually employed in evaluating on appeal the effects of a legal error.

It would be strange to define an ethical rule by reference only to the effect it has on a subsequent trial, leaving it virtually impossible to assess, at the moment of disclosure or nondisclosure, whether a prosecutor is acting ethically or not. As one court has explained:

> [I]t makes little common sense to premise a violation of an ethical rule on the effect compliance with that rule may have on the outcome of the underlying trial.... We see no logical reason to base our interpretation about the scope of a prosecutor's ethical duties on an ad hoc, after the fact, case by case review of particular criminal convictions.

In re Kline, 113 A.3d 202, 208-10 (D.C. 2015).

Similarly, *Brady* provides a particularly poor guide for decision-making by prosecutors prior to trial. The requisite materiality calculus is, almost by definition, one that is nearly impossible to perform with certainty in advance. Whether information is "material" or not depends on how it interacts with the defense theory of the case and with other information available to the defendant. Yet the prosecutor will not necessarily know the defense theory or all the other information available to the defense. There can be information that is "material" under *Brady* because, in combination with other information that can be presented by the defense, it would have a reasonable probability of leading to a

different outcome, as it could be the exact piece necessary to establish reasonable doubt. The prosecutor, however, may have no idea that the information is of particular importance, for he or she may not be privy to the other information known by the defense or to the defense theory.

Similarly, it is hard for prosecutors to provide a fully-objective evaluation of the materiality of evidence. It is difficult for someone who has already reached a certain conclusion to evaluate conflicting information in a truly neutral way. This is not to fault prosecutors but merely to acknowledge human nature. As one commentator has explained, this means that the *Brady* analysis is inevitably complicated by cognitive bias: "zealous prosecutors who interview crime victims, consult with police officers, and diligently prepare their cases for trial" are less likely to believe that a given piece of information could reasonably lead to acquittal. Cynthia E. Jones, "Here Comes the Judge: A Model for Judicial Oversight and Regulation of the *Brady* Disclosure Duty," 46 Hofstra L. Rev. 87, 106 (2017); *see also* Bruce A. Green & Ellen Yaroshefsky, "Prosecutorial Discretion and Post-Conviction Evidence of Innocence," 6 Ohio St. J. Crim. L. 467, 488 (2009) ("Tunnel vision has had an obvious impact in the pretrial stage: having formed an initial judgment that a particular defendant is guilty of a crime, prosecutors and police will tend to discredit or discount the significance of new exculpatory evidence or fit it into their pre-existing theory."). As another commentator has phrased it, *Brady* "presents a significant and unique departure from the traditional, adversarial mode of litigation" by placing prosecutors in a "schizophrenic situation" of having to "balance

competing and contradictory objectives." Bennett L. Gershman, "Litigating *Brady v. Maryland*: Games Prosecutors Play," 57 Case W. Res. L. Rev. 531, 533 (2007); *see also* Alafair S. Burke, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science," 47 Wm. & Mary L. Rev. 1587, 1609 (2006).

The point here is not to criticize *Brady* as an appropriate standard for assessing a due process violation. *See generally* Miriam H. Baer, "Timing *Brady*," 115 Colum. L. Rev. 1, 20 (2015). It is, rather, to make the limited, but more relevant, point that *Brady* was never designed to provide prosecutors with clear direction *ex ante* as to what evidence should be turned over, and indeed is strikingly poorly calibrated to perform such a function. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").

Similarly, as set forth above, *Brady* can be violated by non-disclosure of information that is never even known by a prosecutor, so long as it is known to another member of the prosecution team. *Jackson*, 444 S.W.3d at 594. *Brady* violations can thus occur in trials in which the individual prosecutor is blameless. The Constitution is not violated because a prosecutor has acted wrongly, but because the defendant has not received a fair trial. As the Supreme Court said in *Brady* itself, the issue is not the actions of prosecutors but on the resulting fairness of a trial: "The principle … is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady*, 373

U.S. at 87. For this reason, *Brady* would be over-inclusive as an ethical rule by imposing discipline on prosecutors for the actions of others.

In short, *Brady* is a poor guide to determining ethical conduct in advance and would not translate to a workable ethical standard. It is eminently sensible that the drafters of the Rules of Professional Conduct would not merely seek to codify *Brady*.

D. Rule 3.8(d) Provides a Clear Standard For Prosecutors To Rely Upon in Making Decisions.

A standard such as that adopted in Rule 3.8(d), as explicated in Formal Ethics Opinion 2017-F-163, avoids many of these problems. *See Matter of Larsen*, 379 P.3d 1209, 1216 (Utah 2016) ("It [Rule 3.8(d)] is aimed not only at assuring a fair trial—by articulating a standard for a motion for a new one [as does *Brady*]—but also at establishing an ethical duty that will avoid the problem in the first place.") In particular, it does not force a prosecutor to speculate, under penalty of ethical discipline, as to the impact of certain pieces of favorable evidence when combined with other pieces of evidence (which may not even be known to the prosecutor). Unlike an ethical standard that merely copies the *Brady* standard, the Rule does not impose disciplinary penalties on suppression caused not by a prosecutor but by another member of a prosecution team. It imposes, rather, a straightforward requirement: if information serves to make it less likely that the defendant is guilty (tends to negate the defendant's guilt), it must be disclosed. As the Board in Texas has explained:

> The ethics rules acknowledge that a prosecutor shall not make a determination of materiality in his ethical obligation to disclose information to the defense.... Rule 3.09(d) is

> specifically intended to advise—and prevent—a prosecutor from making an incorrect judgment call…. The clarity of Rule 3.09(d) is a safeguard for prosecutors and citizens alike: if there is any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure.

Schultz, 2015 WL 9855916 at *6.[5]

E. It is Not "Confusing" to Have an Ethical Requirement that May Go Beyond a Constitutional Minimum.

Perhaps the primary reason cited in jurisdictions that have rejected the position of the Formal Ethics Opinion is that having an ethical standard that differ from the constitutional standard would be too "confusing" for prosecutors. Compliance with more than one standard is viewed as too difficult. As one court has written:

> [U]nder conflicting standards, prosecutors would face uncertainty as to how to proceed, as they could find themselves in compliance with the standard enumerated in *Brady*, but in potential violation of the obligation set forth in Rule 3.8(d). In finding the obligations coextensive in Rule 3.8(d) and *Brady*, we decline to impose inconsistent disclosure obligations upon prosecutors, thereby eliminating confusion.

In re Seastrunk, 236 So. 3d 509, 519 (La. 2017); *In re Riek*, 834 N.W.2d 384, 390 (Wis. 2013) ("Disparate standards are likely to generate confusion and could too easily devolve into a trap for the unwary"); *In re Attorney C*, 47 P.3d 1167, 1171 (Colo. 2002) ("we are disinclined to impose inconsistent obligations upon prosecutors").[6]

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[5] Texas Rule 3.09(d) is the same as Tennessee Rule 3.8(d).

[6] This argument was adopted by the United States, directly quoting from *In re Seatrunk*. *See United States' Brief* at 37.

As is apparent upon closer consideration, these contentions are specious. There is no "inconsistency" or "confusion" caused by having different standards that can both be met. To use the common metaphor, the constitutional standard is a floor, not a ceiling, and prosecutors can easily comply with both ethical and legal standards at the same time. The obligations here are not "inconsistent" -- as if one required certain disclosures but the other prohibited them -- but rather complementary. Indeed, a prosecutor who complies with the Rule will almost[7] automatically have precluded a successful *Brady* claim after trial.[8] To

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[7] A prosecutor concerned with providing a fair trial would also, although it is not required by the ethical rule, make every effort to ensure that none of the other members of the prosecution team possessed undisclosed exculpatory information.

[8] As suggested by the Board, *see Board's Brief* at 22-23, the sophistry of the argument lodged here can be appreciated by considering the situation of a defense attorney. As a matter of ethical obligation, defense counsel is required to act zealously and diligently in defense of his or her client. *See* Rules of Professional Conduct, Preamble [8]; Rule of Professional Conduct 1.3. On the other hand, the right to effective assistance of counsel is violated only in a narrow set of circumstances. *See*, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance only where there is a reasonable probability that the outcome of a trial would have been different if he or she had acted differently). The Sixth Circuit, for example, has reasoned that the Sixth Amendment is violated by defense counsel sleeping during trial only if counsel was asleep during a "substantial portion" of trial. *Muniz v. Smith*, 647 F.3d 619, 623 (6th Cir. 2011). Thus, the Sixth Amendment may be satisfied if an attorney merely manages to stay awake during most of a trial. No one could, with a straight face, make an argument that defense counsel could be "confused," or led into a "trap for the unwary," by the "inconsistent" obligations of (1) being awake for most of the trial as required by the Constitution and (2) also somehow performing zealously and diligently

suggests that prosecutors are unable to juggle multiple discovery obligations without becoming confused is to take rather a dim view of prosecutors.

IV. IT WAS APPARENT AT THE TIME RULE 3.8(d) WAS ADOPTED THAT IT HAD A BROADER SCOPE THAN *BRADY*.

A. Argument by the Petitioners and Supporting *Amici*.

Having failed to engage with the plain language of the Rule, the petitioner and supporting *amici* devote much of their arguments to the contention that the Formal Ethics Opinion breaks new and unexpected ground. The United States notes, for example, that oral argument was not heard on Rule 3.8(d), and contends that: "No one – not the drafters, not the organization representing the State's prosecutors, and not this Court – understood the Rule to mean what the Opinion now says it means." *United States' Brief* at 34. The petitioner similarly contends, equally without any particular citation to authority:

> No stakeholder in the process thought anything was changing with respect to the ethical obligations of a prosecutor relating to the disclosure of exculpatory information. For the many years that have passed since the adoption of this ethics rule in 2002, the relevant stakeholders in the process seemed to be on the same page as to what the rule meant.

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during trial to the best of his or her ability as required by ethical rules. Yet that is the equivalent of the argument offered here, that a prosecutor cannot be trusted to turn over both all information tending to negate guilt and also the more limited set of all information that would affect the outcome of the trial.

Petitioner's Brief at 12-13.[9] In short, the petitioner and supporting *amici* suggest that, at the time Rule 3.8(d) was adopted, no one could have anticipated that, rather than being an awkwardly-worded codification of the *Brady* obligation, Rule 3.8(d) would be interpreted in a more expansive manner.

B. It was Clear in 2003 that Rule 3.8(d) Would Be Construed to be Different from *Brady*.

There are two glaring flaws in this argument. First, it was apparent to any educated legal observer in 2003 that Rule 3.8(d) would likely be interpreted to impose obligations beyond the materiality of *Brady*, because the Supreme Court itself had prefigured that exact interpretation in *Kyles v. Whitley*, 514 U.S. 419 (1995). In *Kyles*, it discussed two pattern rules. ABA Model Rule of Professional Conduct 3.8 issued in 1984 provided, as Rule 3.8 does here: "The prosecutor in a criminal case shall ... 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." *Quoted in Kyles*, 514 U.S. at 437. ABA Standard for Criminal Justice 3-3.11(a) issued in 1993 (3rd edition) provided, similarly:

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity,

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[9] In its brief, the United States points to, as support for this proposition, a statement offered by the District Attorney Generals Conference. *United States' Brief* at 10. It is not clear why this self-serving statement should be somehow proof that all the "stakeholder[s]," including for example defense attorneys, were "on the same page" as to the meaning of the rule.

> 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.

Quoted in id., 514 U.S. at 437. In *Kyles*, issued in 1995, the Court quoted and discussed these rules, and wrote as follows:

> We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.

Id.

The United States Supreme Court's interpretation of the ABA Standards is not necessarily binding authority in interpreting Tennessee's Rule 3.8(d). However, it does establish that when Rule 3.8(d) was adopted in Tennessee in 2003, stakeholders should have been fully aware that the exact language in question ("tends to negate the guilt of the accused…") had been interpreted some eight years before by the Supreme Court as providing broader disclosure than is required by the Constitution under *Brady*.[10] No one who had read *Kyles* could have been surprised that Rule 3.8(d) might be construed to be broader than *Brady*.

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[10] Federal decisions have continued to reflect this distinction. *See*, *e.g.*, *Brooks v. Tennessee*, 626 F.3d 878, 892 (6th Cir. 2010) ("the *Brady* standard for materiality is less demanding than the ethical obligations imposed on a prosecutor"); *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.")

Second, as is spelled out in detail in the Board's brief, at pp. 13-15, at the time of adoption of the Rules, the District Attorneys General Conference and the United States Attorney's Office were well aware that the Rules could impose obligations beyond the constitutional minimum. In particular, the United States Attorneys directly stated that the Department of Justice had "concern" that "aspects of Rule 3.8 in particular, may be interpreted as, or have the effect of imposing special restrictions on prosecutors beyond the requirements imposed by the Constitution, federal statutes and case law." *Board's Brief* at 14; *Board App'x* at 036-037. The United States Attorneys specifically sought inclusion of a proviso that the Rule did not "restrict or expand the obligations of prosecutors derived from the United States Constitution, … statutes, and court rules of procedure." *Board App'x* at 36. No such proviso was included in the commentary. It is passing strange for the petitioner and supporting *amici*, having complained about the possible consequences of the Rule at the time of its proposal, to now profess that they were unaware of the possibility.

C. The Absence of Direct Complaint About the Language of Rule 3.8(d) in 2003 Does Not Support the Petitioner's Argument.

Finally, it should be realized that the Rules followed the language in the prior Code of Professional Responsibility, which dated to the 1970s. It is therefore understandable that there was not an outcry for or against Rule 3.8(d) in 2003, as it did not purport to alter prior obligations. The United States takes this one step further, however, suggesting that under the Code, prosecutors had no disclosure obligations beyond the

constitutional minimum. It asserts that this Court had "generally treated the obligations imposed by the relevant portions of the Code of Professional Responsibility as co-extensive with those imposed by substantive law." *United States' Brief* at 9. It offers scant support for this assertion, however. In particular, in suggesting that the Code of Professional Responsibility merely tracked the *Brady* standard or other obligations imposed by law, it cites only to *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Crim. App. 1993). *See United States' Brief* at 9-10. *Spurlock* cannot conceivably be interpreted to support that conclusion, however.[11] There, the Court quoted the language of the cognate provision (along with other provisions), and offered the statement that "a district attorney general has both a legal as well as ethical duty to furnish the accused with exculpatory evidence or favorable information." *Id.* at 611-612. At no point did it provide any further analysis of the interaction between the ethical rule and the *Brady* standard. It certainly did not hold that ethical obligations are equal to the constitutional ones. The argument that the Board's interpretation of Rule 3.8(d) constitutes a clear departure from prior precedent of this Court should not be accepted.

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[11] The United States wrongly cites *Spurlock* as being a decision of this Court. *United States' Brief* at 10. It was instead decided by the Court of Criminal Appeals.

V. CORRECT INTERPRETATION OF RULE 3.8(d) WILL NOT DESTROY THE FUNCTIONING OF THE JUSTICE SYSTEM OR SUBJECT PROSECUTORS TO IMPOSSIBLE OBLIGATIONS. THE RULE EXPRESSLY PROVIDES A SOLUTION FOR THE UNUSUAL SITUATION IN WHICH DISCLOSURE MAY NOT BE IN THE INTEREST OF JUSTICE.

A. The Board's Interpretation of Rule 3.8(d) is Similar to Department of Justice Guidelines.

The United States suggests that the Board's interpretation will have baleful consequences by leaving prosecutors with insoluble dilemmas regarding disclosure, and further contending that it is "preferable to rely on the reasoned and balanced judgment of Congress, legislatures, and the courts…." *United States Brief* at 21-22, 24. Any argument that prosecutors cannot be given additional obligations beyond the constitutional minimum without disrupting the functioning of the criminal justice system puts the United States in an awkward position. As it has had to acknowledge, *see United States App'x* at 048-049, the "Justice Manual" (previously titled the United States Attorneys' Manual) already requires federal prosecutors to make pre-trial disclosures greatly in excess of the constitutional minimum. The Justice Manual states, in pertinent part:

> **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.** Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy

> requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.
>
> 1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.
> 2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

Justice Manual 9-5.001(C) (*bold in original*).

To be sure, the Justice Manual does not set forth the exact same standard as Rule 3.8(d). For example, it requires disclosure of information that "is inconsistent with any element of the crime" rather

than information that "tends to negate the guilt."[12] But this does put the lie to the claim by the United States that the Board's opinion is contrary to "the traditional materiality standard that has long governed prosecutors' discovery obligations," *United States Brief* at 27, unless it is to be assumed that federal prosecutors have not been following their own internal requirements. Under the Justice Manual, and its predecessor United States Attorneys' Manual,[13] disclosures are not, in fact, governed only by "traditional materiality standard" of *Brady*, but rather are explicitly determined "regardless" of whether the information in question would make the difference between conviction and acquittal.

In its letter to the Board addressing this policy, the United States offered the following response to this point:

> [W]hile the Department's policy requires disclosure of information beyond that which is constitutionally and legally required, it also recognizes "that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes *only* to such matters does not advance the purpose of a trial and thus is not subject to disclosure."

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[12] The terminology "is inconsistent with" is, if anything, less clear than the "tends to negate" language (which more closely aligns with the traditional definition of relevance), but the import seems to be largely the same.

[13] The relevant provisions seem to be unchanged from the United States Attorneys' Manual to the Justice Manual. *See* https://www.justice.gov/archives/usam/archives/usam-9-5000-issues-related-trials-and-other-court-proceedings (archived copy of 1997 version of USAM) (last visited April 2, 2019).

> Justice Manual § 9-5001.C (emphasis added). While the Department's policy encourages prosecutors to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching information," it does not purport to eliminate any consideration of materiality whatsoever.

App'x 049. This argument is misguided in at least two ways. First, it is not correct to say that the Justice Manual requires "consideration of materiality" with respect to disclosure of evidence "inconsistent with any element" -- or at least not of "materiality" in the *Brady* / *Bagley* sense. Rather, what it requires, by its own terms, is consideration of whether evidence is "irrelevant" or "significantly probative." Second, the United States here engages in misdirection in quoting language that prosecutors should "take a broad view of materiality." Such language comes not from the relevant subsection of the Justice Manual, but rather from an earlier subsection specifically discussing the constitutional obligation under *Brady*, entitled "Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence." That is, prosecutors are required, by the Justice Manual: (1) to disclose information covered by *Brady*; (2) to err on the side of a broad interpretation of materiality under *Brady*; and (3) to disclose information not covered by *Brady* when it is relevant, meaning that it is inconsistent with a defendant's guilt. It is the third category which is relevant here, given the similarities between it and a properly-interpreted Rule 3.8(d). The United States' discussion of the scope of the first and second category is beside the point. The Justice Manual does not merely require a broad interpretation of *Brady* but also disclosure of information which, by

definition as that which would not make a difference between conviction and acquittal, is not covered by *Brady*. This is parallel to Rule 3.8(d) as interpreted by the Board. For any federal prosecutor following the requirements of the Justice Manual, Rule 3.8(d) as interpreted by the Board imposes almost no additional obligations.

B. The Rule Provides that Prosecutors Can Seek a Protective Order if They Fear Harm to Witnesses.

The United States argues that, if its interpretation is not adopted, there will be dangers posed to witnesses and victims. It cites at great length hypothetical examples and statistical information relating to the use of discovery materials to harm or threaten witnesses. *United States' Brief* at 39. Defense *amici* herein do not dispute that, in certain situations, information could be used to the detriment of witnesses or victims. But that is exactly why the Rule provides that a prosecutor can seek a protective order that relieves the prosecutor of the responsibility of disclosure in such a situation.

1. There is no reason to believe that protective orders will impose massive burdens on the court system.

The United States recognizes this safeguard, as it must, but contends that it is not enough. It offers three separate reasons for finding it inadequate. Its first reason is that requiring a prosecutor to seek a protective order "creates further steps in the litigation" and "imposes resources costs on the courts." *United States' Brief* at 36.[14] Defense *amici*

[14] As support for this contention, the United States cites a single law review article. R. Michael Cassidy, "Plea Bargaining, Discovery, and the

do not doubt that this requirement would impose an additional obligation on prosecutors, and occasionally require action by judges. But the United States has not offered any reason to be unduly concerned about the scale of this supposed problem. It cites no statistics regarding how often these would be required or how time-consuming they would be. Strikingly, given that several other jurisdictions have adopted this view of the Rules, the United States has not provided any evidence, even anecdotal, of any such problems being encountered in those jurisdictions by compliance with this requirement. The United States' forecast of injurious consequences by forcing prosecutors to occasionally seek protective orders is little more than speculation.

2. The Rule covers different materials than the Jencks Act.

The second argument offered by the United States is that "requiring judges to make case-by-case judgments about the necessity of protective orders, and the appropriate timing of the related disclosures, would completely overturn Congress's judgment in enacting the Jencks Act, which adopted a blanket rule in lieu of case-by-case adjudications." *United States' Brief* at 40. This conflates two largely distinct issues. The Jencks Act, 18 U.S.C. § 3500, and its Tennessee analogue, Rule 26.2, deal with separate concerns than Rule 3.8(d). They cover all pretrial statements by witnesses, which must be turned over by the State prior to cross-examination even if unhelpful to the defense or otherwise entirely

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Intractable Problem of Impeachment Disclosures," 64 Vand. L. Rev. 1429, 1484 (2011).

consistent with the witness's direct testimony. Rule 3.8(d), though, requires only disclosure of statements if they, in some way, provide information that "tends to negate" the defendant's guilt or mitigates the offense. Unless prosecutors are routinely presenting the direct testimony of witnesses who have previously provided statements that go against a defendant's guilt, Rule 3.8(d) correctly interpreted is not focused on pretrial witness statements. While there may be an occasional overlap, even after Rule 3.8(d), the Jencks Act can be followed with respect to the vast majority of witness statements.[15] The supposed conflict is more apparent than real.

3. Protective orders will not blur lines between prosecutor and judge.

Third, the United States contends that the requirement of protective orders would force increased *ex parte* communications between prosecutors and judges and thus "have the unintended effect of shifting traditional prosecutorial responsibilities to the courts, depriving the courts of their traditional independence from the role of the prosecutors." *United States' Brief* at 40. This claim of unintended consequences is a non sequitur. To be sure, prosecutors would have to discuss certain information with a judge in order to obtain a protective order. But that in no way means that the courts will take on "traditional prosecutorial responsibilities" such as investigating cases, making charging decisions,

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[15] Despite its language, § 3500 has not been interpreted as prohibiting voluntary early disclosure of witness statements by prosecutors, and indeed such early disclosure is frequently "encouraged" by courts.

negotiating resolutions, or presenting the case to a jury. It is, in fact, quite common for courts to review information on an *ex parte* basis as part of determinations regarding disclosure. *See*, *e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). There is no reason to believe that Rule 3.8(d) will cause any great disruption to the roles of judges and prosecutors.

4. Disclosure of statements that tend to negate guilt is in the public interest.

Finally, neither the petitioner nor the United States offers any reason why it would not be in the public interest for such statements covered by both Rule 3.8(d) and the Jencks Act to be turned over prior to trial. Consider an eyewitness to an alleged crime. The eyewitness tells police, in a recorded interview, that he saw the defendant pull the trigger in a shooting. If the State intends to use that eyewitness at trial to testify that he saw the defendant shoot, Rule 3.8(d) does not require any pretrial disclosures. After the eyewitness testifies, the recorded interview must be provided to defense counsel (upon request), but defense counsel might not even use that statement in cross-examination unless there are contradictions with the trial testimony.

Consider, however, a situation where the same eyewitness provided two recorded interviews, and in the second recorded interview stated that he did not see the shooting because he was on the other side of the street deep in conversation with a third party at the time he heard the shots fired. If the State intends to use that eyewitness to testify that he did see the defendant pull the trigger, then what public policy purpose would

be served by allowing it to delay disclosure of the second recorded statement until the middle of trial -- at which point defense counsel may not have the time or ability to locate and subpoena the third party as a witness?[16]

C. Concerns about the Rule Being "Weaponized" Are Overblown.

The petitioner and supporting *amici* argue repeatedly that the Board's interpretation of Rule 3.(d) will open the gates to expanded discovery motions and to increased disciplinary complaints. The United States complains that the Rule will become a "procedural weapon," and will lead to threatened or filed disciplinary complaints. *United States' Brief* at 40-41.

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[16] Under the United States' argument, apparently, the second recorded statement would not have to be provided prior to trial under *Brady*, even though mid-trial disclosure would be too late for a defendant to effectively use the statement by obtaining the testimony of the third party. *See United States' Brief* at 8 (*citing United States v. Bencs*, 28 F.3d 555, 561 (6th Cir. 1994)). Suffice it to say that this position is not universally accepted. *See*, *e.g.*, *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984) ("compliance with the statutory requirements of the Jencks Act does not necessarily satisfy the due process concerns of *Brady*"); *see*, *generally*, Cara Spencer, "Prosecutorial Disclosure Timing: Does Brady Trump the Jencks Act?," 26 Geo. J. Legal Ethics 997, 1005 (2013). The Sixth Circuit's solution to this problem in *Bencs* was that a trial court could grant a recess for defense counsel to explore how to use the information. That approach -- placing a trial on hold for potentially an extended period of time for the defense to locate, interview, and subpoena witnesses -- could possibly work in federal court but is unlikely to be feasible in much-busier state courts.

To the extent that the fear is that defense attorneys will file motions seeking discovery in compliance with Rule 3.8(d), that issue is beyond the scope of this petition. If, as the United States argues, Rule 3.8(d) should not be invoked as part of a motion to compel discovery, then trial courts can certainly deny such motions. This does not affect the crucial issue at stake here, which is the proper interpretation of Rule 3.8(d). Unless prosecutors are planning to ignore their ethical obligations, though, it is not clear why this matters -- a court order requiring them to do something they would already be doing regardless is hardly a great imposition.

To the extent the fear is that defense attorneys or defendants would file meritless disciplinary complaints alleging violations of Rule 3.8(d), that concern is unsubstantiated. As noted by the Board, there is little support for that conclusion from other jurisdictions, s*ee Board's Brief* at 35, and the petitioner has offered no affirmative evidence to the contrary. In our adversary system, there are any number of disputes between prosecutors and defense attorneys which are litigated aggressively and occasionally heatedly across the state. Defense attorneys certainly could file marginal or frivolous complaints in many of these cases. Based on available data, however, such complaints are relatively uncommon.[17] There is no reason to think that the Formal Ethics Opinion is going to

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[17] In the Board of Professional Responsibility's 37th Annual Report (July 1, 2017 to June 30, 2018), 2% of all complaints related to "criminal convictions." In the 36th Annual Report (July 1, 2016 to June 30, 2017), 3% related to "criminal convictions." *Available online at* http://www.tbpr.org/www.tbpr.org/news-publications (last visited April 24, 2019).

work a fundamental change in the culture of the bar across the state and lead to defense attorneys pursuing such complaints wholesale as a regular litigation strategy. Similarly, while defendants could file *pro se* complaints, there is no reason to believe that they will begin doing so *en masse*, particularly when even a successful complaint might not accomplish anything for the defendant.[18] Finally, and most importantly, the Board is well-equipped to efficiently screen and resolve frivolous ethical complaints filed either by counsel or *pro se* defendants. In short, these fears provide scant support for the petitioner's preferred reading of the Rule.

VI. THE BOARD HAS NOT ENGAGED IN IMPROPER RULE MAKING BUT HAS INTERPRETED A PROPERLY-ADOPTED RULE.

The Attorney General, in his brief, offers a lengthy argument that it would be inappropriate for the Board of Professional Responsibility to single-handedly alter rules of court or procedure in order to impose new and different discovery obligations on the State. *See Attorney General's Brief* at 14-17. This premise is undoubtedly correct, but entirely begs the question: what is the meaning of Rule 3.8(d) as drafted and adopted in 2003 by this Court? As argued above, based primarily on the plain

[18] It is for this reason that post-conviction petitions (which could result in a conviction being vacated) alleging ineffective assistance of defense counsel are much more common than ethical complaints against defense attorneys, which will likely have no effect on a defendant's conviction.

language of the Rule, prosecutors have had certain ethical obligations imposed on them since 2003 (if not before). The Board's opinion merely serves to recognize and explain those obligations. The Attorney General's criticism of the Board makes no more sense than contending that a court is prevented from interpreting a statute because, in doing so, it abrogates the function of the legislature. The relevant question is not whether the Board somehow acted in the place of the Court and the legislature but simply whether the Board's interpretation of Rule 3.8(d) as adopted in 2003 is the correct one. As argued above, primarily for reasons of plain-language construction but also for reasons of public policy, the Board's interpretation is correct and should be affirmed by this Court.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I, Jonathan Harwell, hereby certify that the foregoing brief complies with the requirements of Tenn. Supreme Court Rule 46 governing e-filing. It has been prepared in 14-point Century Schoolbook font and contains a total of 10,108 words in the main text (excluding tables and certificates).

JONATHAN HARWELL

CERTIFICATE OF SERVICE

I, Jonathan Harwell, hereby certify that the foregoing document has been filed electronically. Further, a true and exact copy has been forwarded by first-class mail, postage prepaid, to: Brian S. Faughnan, 40 South Main Street, 29th Floor, Memphis, Tennessee 38103; and Sandy Garrett, Chief Disciplinary Counsel, Board of Professional Responsibility, 10 Cadillac Drive, Suite 220, Brentwood, TN 37027, this the 26th day of April 2019.

JONATHAN HARWELL