LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: RONALD SEASTRUNK

NUMBER: 14-DB-060

RULING OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

INTRODUCTION

This is a discipline matter based upon the filing of formal charges by the Office of Disciplinary Counsel ("ODC") against Ronald Seastrunk ("Respondent"), Louisiana Bar Roll Number 21871. The charges allege that Respondent violated Rule of Professional Conduct 3.8(d).[1] The Hearing Committee assigned to this matter concluded that Respondent violated Rule 3.8(d) and recommended that he be publicly reprimanded.

For the following reasons, the Board adopts the Committee's conclusion that Respondent violated Rule 3.8(d) and adopts the Committee's recommendation that Respondent be publicly reprimanded.

PROCEDURAL HISTORY

ODC filed the formal charges in this matter on December 10, 2014. The charges state, in pertinent part:

> Beginning in 2010, the respondent RONALD SEASTRUNK, an assistant district attorney employed by the office of the Vernon Parish District Attorney –

[1] Rule 3.8(d) states:

> The prosecutor in a criminal case shall … (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either 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; …

along with Assistant District Attorney Scott Westerchil[2] – was trial counsel assigned the prosecution of a defendant, Justin Sizemore, in the case *State of La. v. Justin Sizemore.* [FN1. No. 79569-57 – C, 30th JDC Vernon Parish.] The defendant was charged with R.S. 14:30.1 (Second Degree Murder) in connection with the homicide of Christopher Hoffpauir on June 14, 2010. The case was later tried on three separate occasions, the first two ending in mis-trials [sic] before the defendant was finally convicted in May of 2012. The totality of evidence underpinning the state's case consisted almost exclusively of the testimony of one key witness – and the only admitted participant – in the homicide: the victim's estranged wife, Kristyn Hoffpauir. Kristyn initially was charged as a co-defendant with Sizemore, but in May 2011 she entered a guilty plea agreeing to testify for the state at trial against her former co-defendant.

In multiple interviews with the Vernon parish Sheriff's office following her arrest, and later in three interviews with Assistant District Attorney Scott Westerchil following her plea, Kristyn gave multiple, conflicting accounts of how the crime had occurred and the extent of her prior knowledge and participation therein. Her statements to the respondent were not recorded but were memorialized by him in contemporaneous handwritten notes made during the interviews. Because these conflicting statements constituted impeachment evidence bearing directly upon her credibility, they were exculpatory evidence which the state was obliged to disclose to the defense prior to trial, but did not.

Before the first trial in November 2011, defense counsel filed written multiple discovery motions expressly calling for the prosecution to produce any and all exculpatory evidence in its possession. In response to discovery, respondent, Seastrunk, was responsible for answering discovery but did not disclose Kristyn's conflicting statements made to prosecutors following her plea. The defense only discovered the existence of these statements after the first trial began in November 2011.

During the trial, when the defense objected to the failure to disclose the existence or contents of Kristyn' s interviews with prosecutors, in an effort to avert a mistrial Assistant District Attorney Westerchil immediately proffered his handwritten notes to the defense. The trial proceeded, but ultimately ended in a mistrial nonetheless when the jury was unable to reach the required verdict for either guilt or acquittal.

A similar episode occurred during the first re-trial of the case, which took place in February 2012. In the first trial, prosecutors had gone to some lengths to suggest that Kristyn could not have been the "shooter" who had fired the murder weapon (a pistol), because she was not the slightest bit knowledgeable or sophisticated in the handling of firearms. Between the first and the second trial,

[2] On September 2, 2014, ODC filed formal charges against Mr. Westerchil alleging the same misconduct contained in the charges in this matter. *See* LADB Docket Number 14-DB-037. Upon the motion of ODC, this matter was consolidated with the charges against Mr. Westerchil. The two matters were tried together before Hearing Committee Number 6. However, after the hearing, but before the Committee issued its report, Mr. Westerchil was elected as a judge for the 30th JDC (Vernon Parish). He was sworn into office on November 23, 2015. Mr. Westerchil's election interrupted the LADB's jurisdiction. *See* Louisiana Supreme Court Rule XIX, §6(C). Accordingly, the formal charges against Mr. Westerchil were dismissed without prejudice on February 18, 2016, pursuant to a joint motion filed by ODC and Mr. Westerchil's counsel.

the district attorney instructed the Vernon parish sheriff's department to interview a defense witness, Jody Thibeaux, who had testified in the first trial.

During that oral interview, the detective, Ray Ortiz, learned that Thibeaux's former wife, (and Kristyn's sister) Misty, had been present with their mother some two years earlier when they discovered a .22 cal. revolver which Kristyn had apparently stolen from her mother and concealed in her personal belongings, after verbally threatening to kill the mother. The witness had not testified about this evidence during the first trial, nor was the defense otherwise aware of its existence.

Following the witness interview, Detective Ortiz contacted the respondent and told him about the gun episode involving the co-defendant. Later in a meeting with Assistant District Attorney Scott Westerchil and the district attorney, Asa Skinner, Ortiz once again advised the respondent of the existence of this evidence, but prosecutors decided not to have this evidence included in the detective's report or to otherwise disclose the evidence to the defense, and defended their decision by claiming that it constituted inadmissible "hearsay."

In the second trial, respondent and ADA Westerchil continued with their trial strategy of having Kristyn claim to be entirely unfamiliar with the handling of firearms. However, during the eighth day of the second trial, the defense learned that the state had previously acquired specific evidence of Kristyn's gun possession prior to trial, but failed to disclose it. Defense counsel immediately moved for a mistrial based on the prosecution's failure to timely produce exculpatory evidence in advance of trial. Following an overnight recess, Mr. Westerchil returned to the courtroom the following day and agreed to the defense motion for mistrial, conceding that the state's failure to disclose the information constituted "reversible" error. Based on the state's acknowledgment, the trial judge granted the mistrial and the case was re-fixed for May of 2012.

During the third trial, Westerchil, on behalf of the state, for the first time acknowledged the episode involving Kristyn's possession of the gun and elicited direct testimony from her about the incident. Following the submission of the case to the jury, the defendant was found guilty of second degree murder and sentenced to life imprisonment. His conviction was affirmed on appeal.

By his acts and omissions in the above instances, the respondent, Ronald Seastrunk, has knowingly violated Rule 3.8(d) by "failing to make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense …"

Respondent filed an answer to the charges on January 7, 2015, in which he denied violating Rule 3.8(d).

The hearing of this matter was held on June 3-4, 2015, before Hearing Committee Number 6 ("the Committee").[3] Deputy Disciplinary Counsel Robert S. Kennedy appeared on behalf of ODC. Dane S. Ciolino appeared on behalf of Respondent. Richard T. Simmons, Jr., appeared on behalf of Mr. Westerchil. The Committee heard the testimony of Tony Tillman (complainant; defense counsel for Justin Sizemore); Honorable James R. Mitchell (complainant; presiding judge in Justin Sizemore matter); Detective Ray Ortiz (participated in the investigation of the Hoffpauir murder); Asa Skinner (District Attorney for Vernon Parish); Clifford Strider, III (argued against motion to quash on behalf of the Vernon Parish District Attorney's office); Scott Westerchil; and Respondent. The Committee also considered the deposition testimony of Lisa Nelson (defense counsel for Kristyn Hoffpauir), which was taken after the hearing. The Committee also admitted into evidence ODC Exhibits 1-27.

The Committee issued its report on December 23, 2015. The Committee made very detailed and accurate factual findings. *See* Hearing Committee Report, pp. 1-8. The Committee concluded that Respondent violated Rule 3.8(d) with regard to the information provided to Detective Ortiz during his interview of Jody Thibeaux.[4] The Committee offered the following analysis:

> Mr. Seastrunk is charged with violating Rule of Professional Conduct 3.8(d), which states:
>
> > The prosecutor in a criminal case shall:
> > …
> > (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with

[3] The Committee was composed of Michael D. Hislop (Chairman), Andrew E. Schaffer (Lawyer Member), and Rebecca Broussard (Public Member).

[4] The Committee did not address the inconsistent statement issue that occurred during the first trial of Justin Sizemore. Thus, presumably, the Committee concluded that ODC did not prove those allegations by clear and convincing evidence.

> 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; …

The information related by Detective Ortiz represents a troublesome issue. Mr. Westerchil questioned Kristyn at each trial, including the third, about her familiarity with firearms. At the first two trials, he did not ask her whether she "possessed" a firearm; at the third trial, he effectively disarmed Mr. Tillman by asking about the gun found in her room. This information was pertinent, as Sizemore's version of the events placed him stranded along the side of the road; after he hit the ice chest, he pulled over and got out to check on the car. Kristyn jumped into the driver's seat and left him to go murder her husband. While each of the witnesses at the hearing apparently found this defense laughable- based upon their reactions- that theory would *tend* to be supported by Detective Ortiz's information, in that it would demonstrate that Kristyn was more familiar with firearms than she admitted in the first two trials.

The seminal Louisiana case on this issue is *In Re Jordan,* 04-2397 (La. 6/29/05), 913 So.2d 775. In *Jordan,* a prosecutor withheld a statement to police by an eyewitness to a homicide that she was not wearing her contact lenses or glasses and could only distinguish shapes. Because there is no constitutional distinction between exculpatory and impeachment evidence, the supreme court found that the statement should have been disclosed to the defense. Accordingly, the statement was clearly exculpatory and should have been disclosed. However, the case and its holding are limited to its facts, and the facts demonstrated a violation of *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963) and its progeny, particularly *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375 (1985) and *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555 (1995).

One point of contention in this matter is whether the standards requiring a prosecutor to disclose information under Rule 3.8(d) is broader than the constitutional requirement under the *Brady* line of cases. In *Kyles,* Justice Souter, writing for the U.S. Supreme Court, stated (emphasis added):

> 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.* See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("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"); ABA Model Rule of Professional Conduct 3.8(d)

> (1984) ("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").

Kyles, 514 U.S. at 437, 115 S. Ct. at 1567. As noted, the ABA Standards for Criminal Justice track the language of the ABA Model Rule of Professional Conduct, from which our Rule 3.8(d) was substantially derived.

In the first two trials, Kristyn was questioned about her familiarity with firearms. She denied any familiarity on both occasions. Not only would this information have been useful for purposes of impeaching her testimony, it might also tend to have negated Sizemore's guilt by demonstrating that Kristyn could possibly have been the shooter.

Mr. Westerchil was ordered by Skinner to not disclose this information. Respondent argues that he should be shielded from discipline by virtue of Rule 5.2(b), which reads:

> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

We disagree. A subordinate lawyer is only insulated by Rule 5.2(b) when the supervisory lawyer is faced with a *reasonable* resolution of an *arguable* question of professional duty. Here, we find that the supervising lawyer's resolution was neither reasonable nor arguable. His decision that such information should not be given to the defense does not logically follow from the premise that the information was hearsay. The defense could have called as witnesses the people identified by Mr. Thibeaux as possessing firsthand knowledge of the events in question, but not if it does not possess the information in the first place. Kristyn's gun familiarity was questioned in the first two trials, and one of those occasions was after the prosecutors learned that Kristyn not only may have had a gun, but may have threatened to kill her own mother.

We are not persuaded by the fact that this issue did not arise in the third trial. The issue is not what happened in the third trial, but before and during the second. We find that the Office of Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Rule 3.8(d) in failing to disclose the information procured by Detective Ortiz. Respondent has substantial experience as a prosecutor, and neither he nor Mr. Westerchil was principally responsible for the case.

Hearing Committee Report, pp. 8-12. Based upon these findings and conclusions, the Committee recommended that Respondent be publicly reprimanded. After determining that

ABA Standard 5.23[5] established the baseline sanction at public reprimand, the Committee offered the following analysis:

> It bears remembering that Mr. Thibeaux was a witness identified by the defense. However, when notified of Detective Ortiz's findings, Mr. Westerchil's first reaction was to dictate a supplemental discovery response. In other words, he knew this information should be shared with the defense. We are also forced to conclude - as Judge Mitchell did - that this action caused potential injury to the defense. Accordingly, we find that, at most, Respondent was negligent in failing to seek disclosure of Detective Ortiz's findings. Respondent, who was directly involved in the prosecution, had a duty to disclose this information to the defense. That Mr. Thibeaux was not "his witness" does not absolve him of such a duty.
>
> The only reported case involving such misconduct is *In re Jordan,* 04-2397 (La. 6/29/05), 913 So.2d 775. *Jordan* involved the withholding of evidence that clearly discredited the testimony of an eyewitness. The sanction imposed in *Jordan* was a three-month suspension, fully deferred, subject to the condition that the respondent's suspension would become executory for any misconduct during a one-year period following the supreme court's judgment.
>
> In the present matter, we find that Respondent's misconduct was of far less potential injury to the defense or the legal system than found in *Jordan*; indeed, the misconduct in *Jordan* resulted in the defendant's conviction being reversed, as opposed to a mistrial in this matter to which Respondent and Mr. Westerchil acquiesced. And while we find that Respondent's position regarding Mr. Thibeaux's testimony does not absolve him of responsibility, we do find that it substantially attenuates any harm from Respondent's failure to act.
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> We find no aggravating factors in the present matter. In mitigation, we find that Respondent was cooperative in the disciplinary process, had no dishonest motive, and possesses a good reputation in the legal community and the community at large.
>
> We therefore recommend that Respondent be reprimanded.

Hearing Committee Report, pp. 14-15.

ODC filed an objection to the Committee's report on January 13, 2016. Its objections are the following:

> Objection No. 1
>
> The hearing committee found the Respondents acted "negligently" in violating Rule 3.8(d). Nonetheless, the [Committee] also found that Respondent was aware that the undisclosed information was exculpatory and understood that it should have been disclosed to the defense. Under the facts adopted by the

[5] ABA Standard 5.23 states: "Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process."

> hearing committee, respondent acted, at a minimum, "knowingly", as that term is defined by the ABA Standards.
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> Objection No. 2
>
> ODC objects to the [recommended] sanction of a public reprimand as entirely too lenient. Given the prior disciplinary precedent of *In re: Roger Jordan,* 04-2397 (La. 6/29/05); 913 So.2d. 975, ODC submits that the sanction imposed in *Jordan*, a three month suspension fully deferred, is the minimal sanction appropriate to the facts of the instant case.
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> Objection No. 3
>
> ODC objects to the [Committee's] conclusion of law that the case of *In re: Jordan* is inappropriate to the instant case because *Jordan* also involved a demonstrated violation of constitutional standards of disclosure established in the United States Supreme Court case of *Brady v. Maryland* 373 U.S. 83,83 S. Ct. 1194 (1963). ODC submits that the *Jordan* case is entirely applicable to the facts of the instant case inasmuch - as in the instant case - it involves a lawyers [sic] violation of his duty to disclose under RPC 3.8(d) and should be considered by the Disciplinary Board as bearing both on the underlying misconduct and the sanction to be imposed.

Respondent filed his brief on July 19, 2016. He argues that the Committee erred in concluding that he engaged in misconduct. In the alternative, argues that public reprimand is the appropriate sanction. ODC filed its brief on July 21, 2016, in which it further explains its objections.

Oral argument of this matter was heard on September 29, 2016, before Board Panel "C".[6] Deputy Disciplinary Counsel Robert S. Kennedy, Jr., appeared on behalf of ODC. Dane S. Ciolino appeared on behalf of Respondent.

ANALYSIS OF THE RECORD BEFORE THE BOARD

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in §2 of Louisiana Supreme Court Rule XIX. Rule XIX, §2(G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges … and petitions for reinstatement, and

[6] Board Panel "C" was composed of Melissa L. Theriot (Chairwoman), Laura B. Hennen (Lawyer Member), and R. Lewis Smith, Jr. (Public Member).

prepare and forward to the court its own findings, if any, and recommendations." Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004, Recommendation of the Louisiana Attorney Disciplinary Board (1/22/92).

A. The Manifest Error Inquiry

The factual findings of the Committee do not appear to be manifestly erroneous. The Committee's detailed recitation of the facts and chronology of events is consistent with the testimony and evidence in the record.

B. *De Novo* Review

The Committee correctly concluded that Respondent violated Rule 3.8(d).[7] However, the Committee's reasoning is not consistent with the Court's holding in *In re Jordan*, 2004-2397 (La. 6/29/05); 913 So.2d 775. Pursuant to the Court's analysis in *Jordan*, a finding that Rule 3.8(d) was violated is dependent upon determining whether the withheld evidence was "material," which is derived from *Brady* and its progeny. The Committee did not conduct this analysis. For the reasons stated below, the Board finds that the withheld evidence considered by the Committee was material and that Respondent violated Rule 3.8(d).

Rule 3.8(d) states, in pertinent part: "The prosecutor in a criminal case shall … (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the

[7] In its analysis, the Committee did not discuss whether the allegation that Respondent's failure to disclose Ms. Hoffpauir's inconsistent statements during the first trial violated Rule 3.8(d). Rather, its decision that Respondent violated Rule 3.8(d) was based solely on the evidence gathered by Detective Ortiz from Mr. Thibeaux. In its brief to the Board, ODC objected to the Committee's failure to address the inconsistent statements specification in the formal charges. The record clearly demonstrates that Respondent was not present for the inconsistent statements and that he was never in possession of Mr. Westerchil's notes, which evidenced the inconsistent statements. Thus, Board adopts the Committee's decision to not address these allegations and concludes that the allegations do not violate Rule 3.8(d).

prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense …" The issue in this matter is whether the ethical duty imposed by Rule 3.8(d) is the same as or broader than the constitutional duty imposed by *Brady*. Respondent argues that Rule 3.8(d) is coexistent with *Brady*. ODC argues that Rule 3.8(d) imposes a broader duty of disclosure, thereby requiring the disclosure of evidence that would not need to be disclosed pursuant to *Brady*.

In *Brady*, the Supreme Court of the United States ("SCOTUS") held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In *U.S. v. Bagley*, SCOTUS further defined the materiality component of Brady by stating: "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. 667, 682 (7/2/85). SCOTUS also held in *Bagley* that impeachment evidence fell within its holding in *Brady*. *Id.* at 676, *citing Giglio v. U.S.*, 405 U.S. 150 (1972). Thus, the point of contention between ODC and Respondent in this matter is whether a violation of Rule 3.8(d) is dependent upon the conclusion that the suppressed evidence was material.

The Court's opinion in *Jordan* clearly indicates that materiality will be considered when determining whether Rule 3.8(d) was violated. In *Jordan*, a defendant was on trial for first degree murder. Mr. Jordan was the assistant district attorney assigned to the matter. A witness who identified the defendant from a photographic lineup had given a previous statement in which she stated "it was dark and I did not have my contacts nor my glasses so I'm coming at this at a

disadvantage…" *Jordan*, 913 So.2d at 777. This statement as not disclosed to the defense and was the basis of the disciplinary action, in which Mr. Jordan was charged with violating Rule 3.8(d). When analyzing whether Mr. Jordan violated Rule 3.8(d), the Court stated "[t]he language of Rule 3.8(d) is recognizably similar to the prosecutor's duty set forth in [*Brady v. Maryland*, 373 U.S. 83 (5/13/63)] and its progeny." *Jordan*, 913 So.2d at 781. The Court then determined the materiality of the suppressed statement using the following analysis outlined by *Brady*, its progeny, and the Court's case law:

> Whether the questioned evidence is material under *Brady* has been explained by this Court in *Marshall*, 94-0461 p. 16 (La.9/5/95), 660 So.2d 819, 826:
>
> > The issue is whether the exculpatory evidence is material under the *Brady-Bagley-Kyles* line of cases. Evidence is material only if it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed to the defense. A reasonable probability is one which is sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383. This Court must provide a cumulative evaluation of the suppressed evidence, keeping in mind that Marshall does not have to show that, with the addition of the suppressed evidence, his trial would have resulted in acquittal or that there would be an insufficiency of the evidence to support a conviction. Marshall need only show that "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Kyles*, 514 U.S. at 440, 115 S.Ct. 1555.

Id. at 781-782. Using this analysis, the Court concluded that the suppressed statement was material and, thereby, concluded that Respondent violated Rule 3.8(d). Furthermore, when discussing the appropriate sanction for Mr. Jordan, the Court again referred to the suppressed evidence as "***material*** exculpatory evidence." (Emphasis added.) *Id*. at 783. Accordingly, contrary to the arguments of ODC, the Court's holding in *Jordan* indicates that the Court

considers a prosecutor's ethical obligation under Rule 3.8(d) to be the same as the constitutional obligation imposed by *Brady* and its progeny.[8]

Thus, in order to determine whether Respondent violated Rule 3.8(d), the Board must determine whether the withheld evidence – the statement provided by Mr. Thibeaux – was material evidence. In order to determine materiality, the Board must determine whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Kyles*, 514 U.S. at 440 (adopted by the Louisiana Supreme Court in *Marshall*, *supra*). As stated in *Bagley*, *supra*, a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The evidence about Ms. Hoffpauir's possession of a gun provided by Mr. Thibeaux to Detective Ortiz was material and should have been disclosed to the defense.[9] At the first trial of Mr. Sizemore, the following testimony was given by Ms. Hoffpauir:

[Mr. Westerchil]: All right. Now, you ever owned a gun?
[Ms. Hoffpauir]: No, sir.
[Mr. Westerchil]: Do you have any experience of – with guns at all?
[Ms. Hoffpauir]: No, sir.
[Mr. Westerchil]: Have you ever shot a gun?

[8] It is worth noting other jurisdictions have reached the same conclusion in attorney discipline matters, that is the ethical obligation of a prosecutor is the same as the constitutional obligation. *See In the Matter of Attorney C*, 47 P.3d 1167 (Co. 5/13/02); *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415 (Ohio 2/4/10); *In re Riek*, 350 Wis.2d 684 (Wis. 7/23/13) (relying on the Louisiana Supreme Court's holding in *Jordan*). However, it is also worth noting that other jurisdictions have concluded that a prosecutor's ethical obligation to disclose exculpatory evidence is broader than his or her constitutional obligation. *See In re Feland*, 820 N.W.2d 672 (N.D. 8/20/12); *In re Kline*, 113 A.3d 202 (D.C. 4/9/15) (also relying on *Jordan*); *Schultz v. Comm'n for Lawyer Discipline*, No. 55649 (Board of Disciplinary Appeals 12/7/15); and *In the Matter of Larsen*, --- P.3d ---, 2016 WL 3369545 (UT 6/16/16). In fact, SCOTUS in the *Kyles* decision acknowledged that *Brady* and its progeny "requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles*, 514 U.S. at 437. Likewise, secondary sources have concluded that the ethical obligation imposed by Rule 3.8(d) is broader than the constitutional obligation imposed by *Brady*. *See* ABA Formal Opinion 09-454 (7/8/09); *see also* Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering*, vol. 2, §37.07 (Fourth Edition).

[9] Detective Ortiz's initial report, which does not contain Mr. Thibeaux's statement about the gun, is in the record as ODC Exhibit 19. Detective Ortiz's amended report, which was amended after the second trial, is in the record as ODC Exhibit 20. The Board notes that Mr. Thibeaux's statement about Ms. Hoffpauir's threat to kill her mother (see amended report) was not mentioned by Detective Ortiz during his meeting with Mr. Skinner, Mr. Westerchil, and Respondent prior to the second trial.

[Ms. Hoffpauir]: No, sir.
[Mr. Westerchil]: You ever been around them?
[Ms. Hoffpauir]: Yes, sir.
[Mr. Westerchil]: In what way?
[Ms. Hoffpauir]: My family hunts in Ruston, Louisiana. I've seen them.
[Mr. Westerchil]: And have you ever hunted?
[Ms. Hoffpauir]: No, sir.

ODC Exhibit 11(a), Bates 513. As stated above, the first trial of Mr. Sizemore ended with a hung jury. Before the second trial of Mr. Sizemore, Mr. Skinner, Mr. Westerchil, and Respondent became aware of the statement by Mr. Thibeaux that he was told Ms. Hoffpauir was found in possession of a gun approximately three years prior. This evidence was not disclosed to the defense before the second trial. Nonetheless, Ms. Hoffpauir gave the following testimony at the second trial of Mr. Sizemore:

[Mr. Westerchil]: All right. Now, what – what, if any, experience do you have with firearms?
[Ms. Hoffpauir]: None.
[Mr. Westerchil]: Have you ever hunted?
[Ms. Hoffpauir]: No, sir.
[Mr. Westerchil]: You ever owned a weapon?
[Ms. Hoffpauir]: No, sir.
[Mr. Westerchil]: Have you ever shot a pistol?
[Ms. Hoffpauir]: No, sir.

ODC Exhibit 14(c), pp. 6-7. Ms. Hoffpauir twice stated under oath that she did not have experience with guns. The statement provided by Mr. Thibeaux calls into question the truthfulness of this testimony.

Ms. Hoffpauir's credibility was an important issue in the trials of Mr. Sizemore. First, Ms. Hoffpauir was the primary witness for the prosecution of Mr. Sizemore. Ms. Hoffpauir claimed Mr. Sizemore committed the murder. Mr. Sizemore claimed that he was not at the murder scene and alleged that Ms. Hoffpauir was the murderer. Therefore, Ms. Hoffpauir's credibility was very important to the prosecution and any evidence negatively affecting her

credibility would be material to the defense. Specifically, evidence suggesting that Ms. Hoffpauir was more familiar with guns then her testimony indicated would be material to the defense. Second, as evidence of how important Ms. Hoffpauir's credibility was to the prosecution, Mr. Skinner, Mr. Westerchil, Respondent, and Ms. Nelson all testified that Mr. Skinner lectured Ms. Hoffpauir on the truthfulness of her statements when it became apparent to the prosecutors, prior to the first trial, that she was not giving a truthful statement of the facts that preceded the murder. Third, after Mr. Skinner lectured Ms. Hoffpauir, she changed her story. These inconsistent statements became an issue in the first trial, which resulted in a hung jury. Thus, any evidence negatively impacting Ms. Hoffpauir's credibility would reasonably undermine confidence in the outcome of the proceeding. Accordingly, the Board concludes that the statement provided by Mr. Thibeaux was material evidence, tending to negate the guilt of Mr. Sizemore, which should have been disclosed to the defense pursuant to Rule 3.8(d). Furthermore, the Board finds that Respondent's eventual disclosure of the Thibeaux statement to the defense was not timely. Respondent became aware of the statement at least one week before the second trial. However, the statement was not disclosed until after several days into the second trial.

Respondent argues that he did not violate Rule 3.8(d) because he reasonably relied on Mr. Skinner's decisions to not include the information in Mr. Ortiz's report and to not provide the report to the defense. However, Respondent is not protected Rule 5.2(b) under the particular facts of this matter. Rule 5.2(b) states: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." As an assistant district attorney, Respondent was subordinate to Mr. Skinner, the elected district attorney. However, there was

not an arguable question of a professional duty. As discussed above, the evidence provided by Mr. Thibeaux was material and should have been disclosed to the defense. Thus, Respondent was not reasonable in his reliance on Mr. Skinner's directive to not include the information in Detective Ortiz's report and to not disclose the report to the defense.

Based upon the foregoing, the Board concludes that Respondent violated Rule 3.8(d).

II. The Appropriate Sanction

A. Rule XIX, §10(C) Factors

Louisiana Supreme Court Rule XIX, §10(C) states that when imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
2. whether the lawyer acted intentionally, knowingly, or negligently;
3. the amount of actual or potential injury caused by the lawyer's misconduct; and
4. the existence of any aggravating or mitigating factors.

Here, Respondent negligently violated his duty to the public and the legal system. Respondent should have known that the statement of Mr. Thibeaux impacted the credibility of Ms. Hoffpauir, and, thus, should have been disclosed to the defense. The failure to disclose the statement caused actual harm to the legal system. The failure resulted in the parties agreeing to a mistrial, which led to a ***third*** trial of Mr. Sizemore.

The Board adopts the mitigating factors recognized by the Committee: absence of a dishonest or selfish motive, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and Respondent's good character and reputation. The Board also recognizes the additional mitigating factors of absence of a prior disciplinary record and timely good faith effort to make restitution or to rectify consequences of misconduct. With regard to

the latter factor, Mr. Westerchil and Respondent agreed to a mistrial once the undisclosed evidence came to light.

The only aggravating factor is Respondent's substantial experience in the practice of law. He was admitted to the practice of law in Louisiana on October 16, 1992. He has been a part-time prosecutor for twenty-one years. Transcript (June 4, 2015), p. 341.

B. The ABA Standards and Case Law

The *ABA Standards for Imposing Lawyers Sanctions* suggests that public reprimand is the baseline sanction in this matter. Standard 5.23 states: "Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." Here, Respondent's negligent failure to disclose the evidence at issue in this matter caused actual harm to the legal system in the form of a mistrial, necessitating additional proceedings.

The only public matter in which a Louisiana attorney was disciplined for violating Rule 3.8(d) is *In re Jordan*, *supra*. The *Jordan* matter was based upon the following facts:

> On March 2, 1995, Michael Gerardi was shot at point-blank range during an armed robbery attempt outside the Port of Call restaurant in New Orleans. Connie Ann Babin, Mr. Gerardi's date that evening and the only eyewitness to the murder, gave three separate statements to the New Orleans Police Department during the homicide investigation. When questioned on the night of the murder, a "visibly shaken" Ms. Babin told the police that she "did not get a good look at the perpetrators and probably could not identify them." (Statement 1). [FN4. This statement by Ms. Babin is incorporated into the initial police report, which respondent disclosed to defense counsel.] In the second statement, which was tape recorded by police at Ms. Babin's home on March 5, 1995, three days after the murder, Ms. Babin was asked by a New Orleans Police Department detective whether she could "describe the person who did the shooting, his clothing?" In response, Ms. Babin said that she remembered the shooter was wearing an oversized denim jacket (Statement 2). She continued:
>
> > I don't know, it was dark and I did not have my contacts nor my glasses so I'm coming at this at a disadvantage.. I.. you know you could see outlines and shapes and things that stick out, but er.. the

> socks, I remember the colorful socks, because he kept drawing my attention to it when he kept fidgeting at his ankle area, ...

Ms. Babin went on to describe the shooter's hair and to say that the shooter was in his late teens and five feet seven or eight inches tall. After providing this description, Ms. Babin stated:

> As he looked to me … I keep getting this vision of a young man with, with an older man's face ... er I don't know that if this is coming ... er somewhere, or if I really did see this person ... if this is just coming from my imagination or what, but I ... every time I go over it and close my eyes er ... I remember thinking that he had an older man's face or a young body, on a young person ... how I visualize that, I don't know ...

On March 25, 1995, three weeks after the murder, Ms. Babin viewed a photographic lineup presented by the police and positively identified sixteen-year old Shareef Cousin as the shooter (Statement 3). [FN5. Statement 3, like Statement 1, was disclosed to the defense pretrial.] Mr. Cousin was arrested a short time later and indicted for the first degree murder of Mr. Gerardi.

In the summer of 1995, the criminal case was assigned to respondent, then an assistant district attorney in Orleans Parish. When respondent was first assigned the case, he recalls that there were three identification witnesses. [Footnote omitted.] However, Ms. Babin was the only witness to positively identify Mr. Cousin. [Footnote omitted.]

In preparing for trial, respondent interviewed Ms. Babin. She informed him that she is nearsighted and only needs her contacts or glasses for nighttime driving, but not to see at close distances. Considering this information, respondent unilaterally determined that the absence of contacts or glasses on the night of the murder did not affect Ms. Babin's identification of Mr. Cousin as the shooter.

Respondent testified at his disciplinary hearing that he believed Ms. Babin's second statement provided significant additional details that tended to corroborate her identification of Mr. Cousin, especially the observation of the killer as having "an old man's face" on "a young person's body." [Footnote omitted.] Respondent therefore concluded that, in his judgment, Ms. Babin's second statement was not material exculpatory evidence to which the defense would be entitled under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–1197, 10 L.Ed.2d 215 (1963). [Footnote omitted.] Accordingly, he did not produce that statement to Mr. Cousin's attorneys in response to their motion for the production of exculpatory evidence. [FN10. As the "senior assistant" prosecuting the Cousin case, it was totally within respondent's discretion to decide what evidence would be disclosed.] Respondent has never maintained that he was unaware of his obligation as a prosecutor to disclose exculpatory evidence pursuant to *Brady*. [Footnote omitted.]

Prior to the trial, Mr. Cousin's defense team filed a motion to suppress Ms. Babin's identification of Mr. Cousin. Ms. Babin testified at the suppression

> hearing, and, in response to questions by respondent, explained the manner by which she came to identify Mr. Cousin in the photographic lineup conducted by the NOPD. On cross-examination, Mr. Cousin's attorney questioned Ms. Babin as to whether she had given a description of the perpetrator to the police "when they questioned you about this case." Ms. Babin testified she described the perpetrator as youthful, slim, slightly shorter than Mr. Gerardi, with short cropped hair and a very distinctive "unusual" or "evil-looking" face. Mr. Cousin's attorney also asked whether Ms. Babin told the police "about any characteristics that you felt were outstanding." Ms. Babin said that she could only recall stating "that he had an older-looking face on a younger body." While Mr. Cousin's attorney attempted to discover whether or not Ms. Babin had given any additional descriptions to anyone else prior to the photographic lineup, respondent objected, and the question was rephrased. Eventually, Mr. Cousin's attorney questioned Ms. Babin as to whether she had provided any additional statements to the police other than the night of the murder (Statement 1) and the photographic lineup (Statement 3). Ms. Babin testified that her description had been consistent throughout. Thus, the only way that the defense could have known about Statement 2 would have been disclosure by respondent.
>
> Ms. Babin testified at trial and repeated her positive identification of Mr. Cousin. Mr. Cousin was convicted of first degree murder. The same jury subsequently sentenced him to death in a bifurcated penalty phase.
>
> Several days after the completion of the guilt phase of the trial but before the penalty phase, a copy of Statement 2 was delivered anonymously to defense counsel. On appeal, the defense raised as error respondent's failure to produce Statement 2 prior to trial. This Court did not reach that issue. Instead, a unanimous Court reversed Mr. Cousin's conviction and death sentence based on the erroneous admission of a witness' testimony as impeachment evidence and respondent's improper use of that evidence in closing argument. *State v. Cousin*, 96–2973 p. 16 (La.4/14/98), 710 So.2d 1065, 1073. Nevertheless, the Court commented in footnotes that Ms. Babin's second statement was "obviously" exculpatory, material to the issue of guilt, and "clearly" should have been produced to the defense under *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *Cousin*, 96–2973 p. 2 n. 2, 710 So.2d at 1066 and 96–2973 p. 17 n. 8, 710 So.2d at 1073.
>
> Following this court's decision in *Cousin*, the Orleans Parish District Attorney's Office elected not to retry Mr. Cousin for the murder of Michael Gerardi.

Jordan, 913 So.2d at 776-779. The Court found that Mr. Jordan's conduct was knowing and caused actual harm. The only aggravating factor considered by the Court was Mr. Jordan's substantial experience as a prosecutor. On the other hand, the Court considered several mitigating factors: absence of any prior disciplinary record, absence of a dishonest motive, full

and free disclosure to the board, a cooperative attitude towards the proceedings, and good character and reputation. The Court concluded that the baseline sanction was a three-month suspension. However, in light of the mitigating factors, the Court fully deferred the suspension.

The facts of this matter appear to be less egregious than those in *Jordan*. First, Mr. Jordan had sole discretion on what evidence was provided to the defense. Here, the facts are quite different. Mr. Skinner directed Detective Ortiz to interview Mr. Thibeaux, unbeknownst to Respondent and Mr. Westerchil. Mr. Skinner directed Detective Ortiz to leave the information regarding the prior gun possession out of his report, and then directed Mr. Westerchil to not disclose the report to the defense. Thus, Respondent was put in the difficult position of having to defy his supervisor's handling of the information. Second, once the undisclosed evidence came to light during the second trial, Respondent and Mr. Westerchil promptly agreed to a mistrial. No such remedial action was taken in *Jordan*. Accordingly, the sanction recommended by the Committee – public reprimand – is appropriate and is adopted by the Board.

CONCLUSION

The Board adopts the factual findings, legal conclusions, and recommendation of the Committee. Thus, the Board will impose a public reprimand. With regard to the costs and expenses of this matter, the Board will assess Respondent with the costs solely related to his matter (14-DB-060, Complaint File #0029179) and not that of Mr. Westerchil (14-DB-037, Complaint File #0029180). As to any costs that are shared by Respondent and Mr. Westerchil (*e.g.* the transcript of the hearing), the Board reduces those costs by half. Given that Mr. Westerchil was dismissed from this matter for lack of jurisdiction after the hearing, it would be unfair to assess Respondent with the entirety of the costs.

RULING

Considering the foregoing, the Board orders that Respondent, Ronald Seastrunk, be publicly reprimanded. The Board also orders that Respondent be assessed with the costs and expenses of this matter in the manner described above. The Board Administrator is directed to assessed the Respondent only with the costs described above.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

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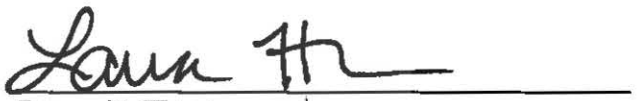
BY: 

Laura B. Hennen
FOR THE ADJUDICATIVE COMMITTEE

Dissents with reason - Dominick Scandurro, Jr.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: RONALD SEASTRUNK

DOCKET NO. 14-DB-060

DISSENT

"I understand the importance of disclosure of BRADY material. My dissent should not be taken as a rejection of established law. The factual details are set out in the majority opinion and appear to be undisputed. I disagree with the conclusion. In my opinion it is unfair to the respondent to issue a public reprimand and tarnish his reputation based on the charges against him. I have not relied on a "Nuremburg Defense" in deciding this case. I think a public reprimand is improper in this case and I vote to dismiss."

LOUISIANA ATTORNEY DISCIPLINARY BOARD

By: _____

DOMINICK SCANDURRO
Adjudicative Committee Member