IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
AMY A. MCGOWAN	)	**Supreme Court No. SC99614**
901 W. 77th Terrace	)	
Kansas City, MO 64114	)	
	)	
Missouri Bar No. 35267	)	
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo.

STATEMENT OF FACTS

Introduction

Missouri Supreme Court Rule 4-3.8(d)[1] expressly requires a prosecutor in a criminal case to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . .." Informant alleges that Respondent Amy McGowan violated Rule 4-3.8(d) in that "she failed to disclose to [Ricky] Kidd's counsel information or evidence known to her that would have tended to negate the guilt of Kidd." **App. 8.** Additionally, Informant alleges that Respondent violated Rule 4-8.4(d) in that her conduct was prejudicial to the administration of justice. **App. 8.**

The criminal cases at the heart of this matter were filed in Jackson County in May of 1996. *State v. Kidd,* Case No. 16CR96-2137A; *State v. Merrill*, Case No. 16CR96-2137B. Ricky Kidd and Marcus Merrill were each charged with first degree murder and armed criminal action. *Id.* Soon thereafter, the cases were joined for trial on the motion of the lead prosecutor, Respondent Amy McGowan. **App. 347 (Tr. 49:3-5).** The outcome of that trial and Mr. Kidd's subsequent post-conviction history was summarized by the Disciplinary Hearing Panel as follows:

[1] The language in Rule 4-3.8(d) remains unchanged from 1996 when these matters first arose, though it appears it was cited at that time without the 4- prefix. This brief cites the Rule using the current format.

Ricky L. Kidd was convicted of two counts of felony murder and two counts of armed criminal action for the 1996 murders of George Bryant and Oscar Bridges. Gary Merrill was tried and convicted as a co-defendant on the charges. Kidd was given two sentences of life without parole and two life sentences, all to run consecutively. The conviction was upheld on appeal in 1999. Kidd subsequently petitioned for post-conviction relief. The denial of such relief was again affirmed by the court of appeals.

Kidd subsequently filed a federal habeas corpus petition arguing that the procedural default of his ineffective assistance of counsel claim was overcome by evidence of his "actual innocence." The Eighth Circuit Court of Appeals affirmed the district court's denial of the habeas petition holding that Kidd has failed to satisfy the test in the 8th Circuit for establishing a "gateway" to a new consideration of his innocence.

Subsequently Kidd filed a state habeas corpus petition. After an extensive evidentiary hearing more than 20 years after the original conviction, the Circuit Court of DeKalb County ordered that habeas relief would be issued unless the State brought Kidd to trial within 30 days. Rather than retrying the case, the State dismissed the charges on September 13, 2019, after Kidd had served 23 years.

App. 24-25 (case citations omitted).

The DeKalb County Circuit Court expressly concluded that Mr. "Kidd is entitled to

relief on his *Brady*[2] claim" after finding that the prosecution failed to disclose exculpatory evidence to Mr. Kidd's defense attorney, Teresa Anderson. **App. 479.** The DeKalb County Circuit Court also stated:

> This Court has observed that Ms. McGowan's and Ms. Anderson's testimony do not differ on key aspects of Kidd's *Brady* claim. For example, the prosecution did not disclose that the Goodspeeds, the alternative suspects in the case, were under police surveillance, that they were in Kansas City allegedly to threaten witnesses, that their depositions had been scheduled to take place in Ms. McGowan's office on Friday, March 14, 1996, and that transcripts of those depositions existed.

App. 403.

Summary of the Criminal Trial Evidence

The following summary of the evidence received during the Jackson County criminal trial is copied verbatim from the DeKalb County Circuit Court's Findings of Fact, Conclusions of Law, and Judgment Granting Writ of Habeas Corpus in Case No. 18DK-CC00017, which is included in the Appendix starting at page A391. The transcript from the proceeding leading up to that judgment is part of the evidentiary record in this disciplinary matter, **R. at Vol. 6-7, pp. 1754-1930**, as is the transcript from the 1996 criminal trial, **R. at Vol. 1-4, pp. 722-1092**.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

The habeas court's summary is included here for background purposes and to illustrate the information that was known to Respondent McGowan as of March 13, 1997. Evidence received later by the Disciplinary Hearing Panel that bears on the question of whether Ms. McGowan violated Rule 4-3.8(d) and Rule 8.4(d) is detailed in the next section.

> On February 6, 1996, neighbors watched in broad daylight as three men fled George Bryant's residence at 7009 Monroe, Kansas City, Missouri, after robbing and murdering George Bryant and Oscar Bridges. George Washington and Shannon Harris heard gunshots and saw three black men wearing black skull caps and knee-length black leather coats jump into a new, white Oldsmobile Sierra and speed away.
>
> When Kansas City Police Officer Gary Cooley arrived at Bryant's home around 11:50 a.m., he found find Bryant's four-year-old daughter, Kayla Bryant, standing in the garage crying, still on the phone with the 911 operator. George Bryant was lying in a pool of blood in the snow in his front yard, shot multiple times. The body of Oscar Bridges was in Bryant's basement, his feet, hands and mouth bound with duct-tape. He had been shot twice in the back of his head.
>
> Although there were three perpetrators according to all accounts, only Ricky Kidd and Marcus Merrill were charged with the crime. Their cases were joined for trial. Kayla Bryant told officers that she was eating a McDonald's Happy Meal and watching television when men came to her

house in a white car. Her father opened the garage door to let them in, and as they were standing in the kitchen she heard a shot. After her father fell to the floor, Oscar Bridges ran downstairs. One of the men followed and shot him. The men searched her father's pockets, the bedrooms, and the rest of the house. Her father got up and ran, and they shot him again. Kayla told the officers that "Daddy's brother" shot her daddy, "but it wasn't Daddy's brother." When asked whom she meant by "Daddy's brother," Kayla shrugged her shoulders and said she didn't know. She said the men who shot her daddy had come to her house two days before the shooting. Detectives asked Kayla's mother, Connie Bryant, if she knew whom Kayla meant by "daddy's brother," and Connie did not know. Sgt. Pruetting testified that detectives never determined who "daddy's brother" was. Kayla also described one robber as "the fat one." Kayla testified that "the fat one" told her, "It's okay." The other perpetrator was described by Kayla as "the skinny one."

Trial evidence revealed that Kidd became a suspect because he was one of ten men named in anonymous calls to police. He was arrested on February 14, 1996, in the company of his girlfriend, Monica Gray. They were transported to police headquarters and questioned. In separate interrogations, Kidd and Gray told police that they were together all day on February 6, 1996, and they had gone to the Sheriff's Office at Lake Jacomo to apply for

a gun permit. Kidd agreed to participate in a video-taped line-up and signed multiple consents to search his car and belongings.

Consistent with his statement to police, Kidd testified and called witnesses to establish the details of his alibi at trial. In February of 1996, he lived at 701 East Armour Boulevard in Kansas City with his girlfriend, Monica Gray. On the evening of February 5, 1996, Kidd's sister, Nechelle "Nikki" Kidd, and her son D.J., spent the night with him because she had an argument with her roommate. The next morning Nikki, a customer service representative for DST Mutual Funds, awoke early and drove to work in Kidd's black 1993 Toyota Corolla, which he bought to replace his unreliable 1981 Oldsmobile Delta 88. Kidd asked Lawson Gratts, his mother's fiancé, to help jump start the Delta 88, then he, Gray, and D.J. drove to DST to pick up his Corolla. Nikki's co-worker, Alina Wesley, testified that she saw Kidd collect the keys from his sister at DST around 11:00 or 11:30 a.m.

Mr. Kidd drove the Oldsmobile home as Gray followed in the Corolla, then they drove together in the Corolla to the Jackson County Sheriff's Office at Lake Jacomo, where Kidd filled out an application for a gun permit. Jackson County Sergeant Tim Buffalow identified a copy of the application, signed by Kidd and dated February 6, 1996. Computer files show that a criminal record check was run on Kidd at 1:37 p.m. that same day. On cross-examination by the State, Sergeant Buffalow testified that Kidd's application could have been received on February 5, 1996.

At trial, Assistant Prosecutor Amy McGowan sought to connect Kidd and Merrill to the crime through identifications made by Kayla Bryant and eyewitness Richard Harris. Ms. McGowan asked Kayla, "Can you look around and do you see either of those men that were at your house that day with your daddy?" She replied, "No." Both Ricky Kidd and Marcus Merrill were in the courtroom. The prosecutor asked again, "You don't see them? You don't see them here?" Kayla again replied, "No." Kayla never identified Kidd in court. Ms. McGowan then presented evidence of Kayla's out-of-court identification of Merrill. Kayla testified that she was shown a photo array and selected only No. 3 as the "fat one." Ms. McGowan had previously asked Kayla, "Did you pick out the skinny guy?" to which Kayla replied, "No." Ms. McGowan asked again, "You didn't pick out the skinny guy?" Kayla responded, "[H]e wasn't in none of the pictures."

Ms. McGowan also sought to present evidence of an out-of-court identification of Kidd from a video made by Kayla Bryant from a video lineup.

Q. Did you see a videotape on TV?

A. Yes.

Q. And did you pick somebody out on that?

A. (No response.)

Q. Do you remember picking somebody out on TV, Kayla?

A. I said that was him on TV, but he's darker than him because they took a picture of him.

Q. But you said you saw somebody on TV?

A. Yes.

Q. Okay. And which person was that?

A. Him. [Indicating Marcus Merrill]

Q. No. Did you see another person on TV?

A. No.

Q. No? Okay. Did you pick out more than one person, Kayla?

A. I only saw him.

After failing to get an identification of Kidd from Kayla, Ms. McGowan made another attempt: "Okay. I'm going to ask you to look around again. Do you see anybody in here that might have been at your house that day?" Kayla replied, "No." Ms. McGowan then approached the bench and advised the trial court that "given [Kayla's] confusion with the identification, I want to show the videotape. I just wanted to let everyone know I was going to do that." The court took a recess. The record is unclear whether Kayla Bryant saw the videotape during the recess; Ms. McGowan testified at the evidentiary hearing that she did not show Kayla the tape; Teresa Anderson, Kidd's trial counsel, after reviewing her trial notes to refresh her memory, testified at the hearing that Kayla was shown the video during the recess, and Kayla repeated her comment "about the difference in skin tone." After the

recess at trial, Ms. McGowan had no further questions for Kayla. Detective Jay Thompson later told the jury that Kayla selected Ricky Kidd from a video lineup.

The only witness at trial who linked Kidd to the crime was Richard Harris, who lived with his mother down the street from George Bryant. At the time of the crime, Harris was wanted for violating his parole on a drug trafficking conviction, and eluded capture until March 11, 1996. Upon arrest on March 11, Harris claimed that he spent the morning of February 6, 1996, watching "The Young and the Restless" at his friend, Michael Holland's house, also on Monroe. When the show was half over, he went home to get something to eat. As he walked past Bryant's house, he saw Bryant run out of his garage, yelling "Somebody help!" Bryant was pursued by two men, one of whom carried a gold-plated pistol. Harris testified at trial that he saw the first suspect grab Bryant and put him on the ground, and that he saw the second suspect walk up to Bryant and shoot him. When the attackers saw Harris, he turned and fled. Based on this brief encounter, Richard Harris identified Ricky Kidd at trial as the shooter. He was the only witness to do so.

No physical evidence linked Kidd to the crime. The murder weapon was never found. A slice of bread on the kitchen floor and a piece of linoleum recovered from the crime scene bore shoe impressions that did not match the footwear of Ricky Kidd, George Bryant or Oscar Bridges.

During the investigation, evidence was collected implicating alternative suspects Gary Goodspeed, Sr., and Gary Goodspeed, Jr., though neither was ever charged. Richard Harris identified Gary Goodspeed, Jr., from a video line-up as one of the three perpetrators—the man who tackled Bryant as he ran from his garage. Marcus Merrill and Gary Goodspeed, Jr., shared an apartment in Decatur, Georgia, and airline and hotel records established that Merrill and the Goodspeeds flew together from Atlanta to Kansas City several days before the homicide, stayed at the Adam's Mark Hotel, and returned to Georgia several days later. At Alamo Rent-A-Car near the Kansas City airport, Gary Goodspeed, Sr., rented a white Oldsmobile Sierra that was believed to be the getaway-car. Gary Goodspeed, Sr.'s, fingerprint was on a Carmex lip balm wrapper found in the rental car with a price tag from a "Good To Go" convenience store. There was a "Good to Go" convenience store a block and a half from the crime scene.

Merrill's counsel argued to the jury that the Goodspeeds committed the crime, and since the police developed four suspects in a crime committed by three people, the issue was whether Merrill or Kidd was the third accomplice or the odd man out. In support of this theory, Merrill's lawyer argued, incorrectly and without correction by the State, that Kidd's fingerprint was in Goodspeed Sr.'s get-away-car. The only fingerprint identified as Kidd's was found on the window of Kidd's own car, a 1981 Delta 88.

> The jury found both Merrill and Kidd guilty of two counts of murder in the first degree, § 565.020.1, RSMo (2000), and two counts of armed criminal action. § 571.015, RSMo (2000). Ricky Kidd was sentenced to life imprisonment without the possibility of parole for each murder, and life imprisonment on each count of armed criminal action.

App. 396-402.

Evidence received by the Disciplinary Hearing Panel

The preceding summary focuses on the evidence presented in the criminal trial, which began on March 17, 1996, and lasted until March 24, 1996. The following account comes from the evidence that was presented during the disciplinary proceeding. That evidence included similar background material as above, but – more significantly – focused on the alleged violations of Rule 4 as detailed in the Information.

Ricky Kidd always maintained his innocence in the February 6, 1996 murders of George Bryant and Oscar Bridges. **App. 107-108 (Tr. 166:24-167:8)**. He told his public defender, Teresa Anderson, that he believed Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr. were involved in the homicides. **App. 109-110 (Tr. 168:23-169:6)**. Accordingly, he wanted Ms. Anderson to pursue the defense that other people, specifically, the Goodspeeds and Merrill, had committed the crimes and not him. **App. 109 (Tr. 168:3-12); App. 150-151 (Tr. 209:24-210:4)**. In fact, the Goodspeeds consistently put themselves with Marcus Merrill on the day of the murders and not with Mr. Kidd. **App.**

120 (Tr. 179:24-180:2); App. 125 (Tr. 184:5-19); App. 141 (Tr. 200:5-14); App. 159 (Tr. 218:21-24); App. 376 (Tr. 78:1-11).

Ms. Anderson considered the defense that Mr. Kidd proposed to be a secondary defense, with Mr. Kidd's alibi as his primary defense. However, she was never able to develop that secondary defense, because she was never able to talk to or depose the Goodspeeds. Without interviewing those individuals, she could not evaluate the validity of the defense. **App. 136 (Tr. 195:15-201:6)**. She had witness statements and police reports, but those statements were not given under oath. **App. 139 (Tr. 198:4-17)**.

Ms. Anderson did not call the Goodspeeds to testify at the murder trial because she had not had the opportunity to talk to or depose them, and she did not know what their testimony might be. Nor would she have had the ability to impeach their testimony. **App. 141-143 (Tr. 200:23-202:21)**. She would not have presented the defense that the Goodspeeds and Merrill committed the murders without first knowing in pretty specific detail what the Goodspeeds would testify to if she called them. **App. 273 (Tr. 121:12-19)**.

Neither Ms. Anderson nor her investigator had been able to track the Goodspeeds down in order to talk to them. **App. 140 (Tr. 199:3-12)**. Ms. Anderson would have liked to interview the Goodspeeds or subpoena them even as early as September of 1996. **App. 151 (Tr. 210:5-17)**. The Goodspeeds, however, were being very difficult to contact. The prosecution provided Ms. Anderson with investigative reports that had phone and pager numbers on them, as well as addresses. But, the Goodspeeds never reached out to her, and they never returned any of her efforts to contact them. **App. 147 (Tr. 206:15-207:2); App.**

297 (Tr. 175:10-18). Unfortunately, Ms. Anderson did not have the resources to send someone to Georgia to locate them. **App. 148 (Tr. 207:3-17)**.

Mr. Merrill's public defenders, Katherine Ladesh and Mona Spencer, had also been trying to locate the Goodspeeds to interview them for a long time. But, they were unsuccessful in contacting the Goodspeeds on their own. While there was some contact information on police investigative reports, Ms. Ladesh testified that using that information to contact witnesses in a criminal case was less than optimal, because often those potential witnesses were not willing to talk to her. **App. 52-54 (Tr. 68:19-70:11); App. 65 (Tr. 81:2-3)**.

One of those witnesses, Kayla Bryant, told the police that the two men who shot her father were at the house a day or so before the murder. **App. 356-357 (Tr. 58:21-59:10)**. Respondent McGowan testified that she believes the two men Kayla was referring to were Marcus Merrill and Gary Goodspeed, Jr. She also believes that when Kayla referenced a "brother" she was referring to Gary Goodspeed, Jr. **App. 372-373 (Tr: 74:23-75:7)**. Ms. McGowan believes Goodspeed, Jr. was present during the murders. **App. 358 (Tr. 60:21-25).** In fact, according to Respondent, Goodspeed, Jr. was developed as a suspect in the case, and Goodspeed, Sr. was considered a person of interest. **App. 355 (Tr. 57:7-19)**.

In September of 1996, a police detective telephoned Respondent McGowan in the middle of the night to tell her that an anonymous source had contacted police to say that Gary Goodspeed, Sr. had come to Kansas City with the intention of harming her witnesses. **App. 312 (Tr. 190:13-20)**. Police surveilled him for about 25 hours, then he left the city. **App. 313 (Tr. 191:15-24)**.

Richard Harris, the State's eyewitness, was deposed on March 11, 1997, at the Jackson County Prosecutor's office. Respondent McGowan, Ms. Anderson, and Mr. Merrill's attorneys were all present for the deposition. **R. at Vol. 9, pp. 2198-2247 (Ex. 34)**. Mr. Harris testified at his deposition that he believed that people had gone to his mother's house asking questions about him. **R. at Vol. 9, pp. 2228-2229 (Tr. 31:19-32:11)**. From the description given to him by his mother, Mr. Harris believed it was "one of Goodspeed's cousins" that was asking the questions. **R. at Vol. 9, pp. 2230-2231 (Tr. 33:15-21)**.

Mr. Harris reported the incidents at his mother's house to police. They responded by putting him "up in a place." **R. at Vol. 9, p. 2230 (Tr. 33:1-8)**. Ms. Anderson asked Mr. Harris at his deposition how long he had been "put up." Ms. McGowan interjected during Mr. Harris's answer to say that he had been housed somewhere "since last week." **R. at Vol. 9, p. 2230 (Tr. 33:11-14)**. Respondent McGowan had not previously disclosed to Ms. Anderson that Mr. Harris had reported being intimated or threatened. She did not disclose to Ms. Anderson that the police took the report of intimidation/threats seriously enough to put Harris up somewhere until the deposition, even though she knew before the deposition about Harris's concerns. **App. 103-104 (Tr. 162:4-163:16)**. Respondent McGowan knew the information needed to be disclosed. **App. 353 (Tr. 55:15-19)**.

On March 14, 1997, the Friday before the Monday start of the Kidd/Merrill murder trial, both of the Goodspeeds were deposed at the office of the Jackson County Prosecuting Attorney. **R. at Vol. 7, pp. 1937-1948 (Ex. I); pp. 1949-1962 (Ex. J).** In addition to the Goodspeeds, the following individuals were present: Respondent McGowan, Merrill's

attorney Mona Spencer, and two Kansas City Police Department detectives. **App. 359 (Tr. 61:11-25)**. Respondent McGowan recalls asking a detective to be present in order to advise Gary Goodspeed, Jr. of his Fifth Amendment rights because he was considered a suspect in the case. **App. 330 (Tr. 32:10-13)**. However, Ms. McGowan testified at Ricky Kidd's state habeas hearing that she had no idea who had arranged for the detectives to appear at the depositions, but that it was not her who asked them to be there. **R. at Vol. 7, p. 1883 (Tr. 505:9-18)**.

Kate Ladesh was the supervising attorney in her district defender office in 1996-97. **App**. **29 (Tr. 45:6-8)**. As Merrill's lead counsel, she would have expected to be present and question the Goodspeeds at their depositions. She would not have tasked Ms. Spencer with the responsibility of taking the depositions unless it was absolutely impossible for her to be there. If she had had control or the ability to work with someone about when the Goodspeeds would appear, then she would have done it so she could have been there herself. **App. 65-66 (Tr. 81:14-82:12)**.

Ms. Ladesh and Ms. Spencer had been trying to communicate with the Goodspeeds for a long time. **App. 65 (Tr. 81:2-3)**. However, neither of them, nor anyone acting on their behalf, had made travel arrangements for the Goodspeeds to appear in Kansas City on March 14, 1997. **App. 62-63 (Tr. 78:22-79:3)**. Ms. Ladesh had not subpoenaed the Goodspeeds to appear for their depositions. **App. 62 (Tr. 78:15-17)**. In fact, Ms. Spencer does not believe the Goodspeeds were subpoenaed. **App. 75 (Tr. 113:12-19)**. Neither public defender had arranged for police detectives to be present. **App. 63 (Tr. 79:4-8)**. Ms. Ladesh has never found that having law enforcement present elicits a free flow

conversation with witnesses. **App. 63-64 (Tr. 79:21-80:6)**. Furthermore, the public defenders had no power or authority over police detectives, whose role is to assist the State. **App. 79 (Tr. 117:7-25)**.

Ricky Kidd's attorney, Teresa Anderson, was not present for the Goodspeed depositions on March 14, 1997. **App. 151-152 (Tr. 210:18-211:9)**. She did not receive any kind of notice about the depositions from Respondent McGowan or from Mr. Merrill's attorneys. **App. 152 (Tr. 211:10-16); App. 154 (Tr. 213:1-9)**. She recalls with confidence that was not a situation where she knew about the depositions and just decided not to attend them. **App. 154 (Tr. 213:10-14)**. In fact, she did not become aware that the depositions had taken place until lawyers from the Innocence Project, who represented Mr. Kidd in his habeas cases, made her aware of them three or four years before her testimony was given in this disciplinary case in 2020. **App. 151-152 (Tr. 210:18-211-9)**. Ms. Anderson did not receive notice of the depositions, and she was not provided with transcripts of the depositions after they had been transcribed. **App. 259 (Tr. 107:18-19); App. 269 (Tr. 117:11-22); App. 274 (Tr. 122:6-17)**. Notably, neither of the Goodspeed deposition transcripts contains any reference to Ms. Anderson nor do they contain an explanation for her absence. **App. 375 (Tr. 77:11-15)**.

Respondent McGowan would not have been the one to give Ms. Anderson notice of the depositions, because they were not her depositions. **App. 362 (Tr. 64:9-14); R. at Vol. 7, p. 1886 (Tr. 514:17-19)**. At that time, March of 1997, prosecuting attorneys did not have the authority to take witness depositions. **App. 326 (Tr. 28:6-7)**. Respondent believes the party taking the deposition was required to give notice, and that she was not required to

give notice. **App. 326 (Tr. 28:13-15)**. Respondent testified to her belief that she had no requirement to provide any notice to Anderson of the depositions. **App. 330 (Tr. 32:22-25)**.

Although the depositions were purportedly done at the request of Mr. Merrill's attorneys, Respondent McGowan was an active participant. Her deposition questions for Goodspeed, Sr. comprised about sixteen pages of the deposition transcript, while Ms. Spencer's questions took up a little over five pages. **App. 361 (Tr. 63:20-25)**. Similarly, Respondent's questioning of Goodspeed, Jr. took up more than eighteen pages of the deposition transcript, while Ms. Spencer's comprised a little over five pages, exclusive of her discussion with him about his Fifth Amendment rights. **App. 362 (Tr. 64:1-8)**.

Admittedly, Teresa Anderson had never expressly asked Respondent McGowan for help in locating the Goodspeeds. **App. 296 (Tr. 174:12-16)**. And, as of September of 1996, neither Defendant Kidd nor Defendant Merrill had filed a witness list naming the Goodspeeds as potential witnesses. **App. 321-322 (Tr. 23:24-24:1)**. Ms. Anderson had never expressed to Respondent an interest in calling the Goodspeeds as witnesses. She made no motions during the murder trial about her inability to interview the Goodspeeds. **App. 337 (Tr. 39:9-19)**.

Even so, an Arraignment and Standard Pretrial Order had been entered on June 21, 1996. **R. at Vol. 7, pp. 1934-1936 (Ex. H)**. That Standard Pre-Trial Order contained the following:

1. The State and defendant are directed to disclose all material and information contemplated by Supreme Court Rules 25.03 and 25.05

within fifteen (15) days of this date. This order is effective without either side being required to file or serve a formal request.

a. The State shall be required to include in this disclosure all material and information in the possession or control of the investigating agency presenting the case for prosecution, and if successful in locating or obtaining, to immediately notify defense counsel;

b. The party required to make disclosure shall be responsible to ensure the delivery of the material and information. This order contemplates immediate compliance of each party's continuing duty to disclose and furnish opposing counsel all additional information as set out in Supreme Court Rule 25.08.

Missouri Rule 25.03(A)(9) (1996 and 1997), states in relevant part:

(A) Except as otherwise provided…the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in such request:

(9) Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment.

App. 387-389.

Missouri Rule 25.08 (1996 and 1997), states in relevant part:

> If subsequent to complying with a request for disclosure or order of court, a party discovers information which he would have been required to disclose under the request or order, he shall furnish such additional information to opposing counsel, and if the additions are discovered during trial, the court also shall be notified.

App. 390.

Also filed on June 21, 1996, was Mr. Kidd's Request for Discovery that included the following:

> 9. Any material or information, within the possession or control of the State, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment[.]

R. at Vol. 7, pp. 1931-1933 (Ex. G).

The jury trial in *State v. Kidd*, 16CR96-2137A and *State v. Merrill*, 16CR96-2137B, started on Monday, March 17, 1997. The State's primary evidence against Mr. Kidd was the eyewitness testimony of Richard Harris and a detective's testimony concerning Kayla's pretrial identification of Mr. Kidd. No physical evidence connected Mr. Kidd to the crime.

R. at Vol. 1-4, pp. 722-1092 (Ex. A).

The Goodspeed's depositions were casually referred to during the trial a couple of times. For example, in colloquies with the trial judge in Ms. Anderson presence, Ms.

McGowan stated, with respect to what names to use for the Goodspeeds,[3] "They both testified that they have legally changed their names." **R. at. Vol. 1, p. 765 (Tr. 140:10-141:4)**. In an oral motion to the court on the third day of trial, Ms. McGowan moved the court to preclude mention of whether Goodspeed, Jr. had been charged with participating in the crime.[4] In answering the judge's question as to whether Goodspeed, Jr. was represented by counsel, Respondent McGowan stated "No, and we did a deposition, and at that time Mona talked to him extensively about his Fifth Amendment rights." **R. at Vol. 2, p. 838 (Tr. 439:12-17)**.

The use of the words "testified" and "deposition" during the murder trial did not trigger Ms. Anderson into asking questions about what had occurred. **App. 278-279 (Tr. 126:17-127:4)**. She does not recall reflecting on the words, and their use in passing during the trial did not alert her to the fact that the Goodspeeds had been deposed. In other words, she did not pick up on the fact that the Goodspeeds had been deposed. **App. 157-158 (Tr. 216:13-217:15); App. 259 (Tr. 107:2-4)**. She was not aware of the depositions and was

[3] Gary Goodspeed, Sr. had changed his name to Abu Muwagkil and Gary Goodspeed, Jr. had changed his to Rahib Muwagkil. **App. 49-50 (Tr. 65:25-66:19)**.

[4] Respondent never charged Goodspeed, Jr. in the case because George Bryant's widow had shown Richard Harris photographs of Goodspeed, Jr. before he talked to the police. Respondent testified to her belief that this event tainted Harris's identification of Goodspeed, Jr. **App. 372 (Tr. 74:11-22)**.

never provided transcripts of the depositions. **App. 157 (Tr. 216:3-12); App. 259 (Tr. 107:18-19)**.

This matter was heard by a Disciplinary Hearing Panel over three different days: October 2, 2020, November 13, 2020, and December 18, 2020. In a Decision dated January 27, 2022, the Panel recommended "that the Information should be dismissed pursuant to Rule 5.16(a)." The Panel's Decision was filed with the Chair of the Advisory Committee on March 21, 2022. **App. 24-27**. Thereafter, Respondent McGowan accepted the Panel's decision in a letter dated March 30, 2022. **R. at Vol. 10, pp. 2465-2468**. The Chief Disciplinary Counsel rejected the Panel's decision on April 15, 2022. **R. at Vol. 10, p. 2469.**

POINT RELIED ON

THIS COURT SHOULD DISCIPLINE RESPONDENT AMY MCGOWAN BECAUSE SHE VIOLATED SUPREME COURT RULE 4-3.8(d) AND RULE 4-8.4(d): (a) BY NOT DISCLOSING TO MR. KIDD'S ATTORNEY THAT THE DEPOSITIONS OF TWO INDIVIDUALS, ONE SHE CONSIDERED A SUSPECT AND THE OTHER A PERSON OF INTEREST, WERE TAKING PLACE JUST BEFORE THE START OF MR. KIDD'S FIRST-DEGREE MURDER TRIAL, AND (b) BY FAILING TO LATER EXPRESSLY MAKE MR. KIDD'S ATTORNEY AWARE THE DEPOSITIONS HAD TAKEN PLACE, AND BY NOT PROVIDING MR. KIDD'S ATTORNEY WITH TRANSCRIPTS OF THE DEPOSITIONS.

Supreme Court Rule 4-3.8(d)

Supreme Court Rule 4-8.4(d)

Supreme Court Rule 25.03

ARGUMENT

THIS COURT SHOULD DISCIPLINE RESPONDENT AMY MCGOWAN BECAUSE SHE VIOLATED SUPREME COURT RULE 4-3.8(d) AND RULE 4-8.4(d): (a) BY NOT DISCLOSING TO MR. KIDD'S ATTORNEY THAT THE DEPOSITIONS OF TWO INDIVIDUALS, ONE SHE CONSIDERED A SUSPECT AND THE OTHER A PERSON OF INTEREST, WERE TAKING PLACE JUST BEFORE THE START OF MR. KIDD'S FIRST-DEGREE MURDER TRIAL, AND (b) BY FAILING TO LATER EXPRESSLY MAKE MR. KIDD'S ATTORNEY AWARE THE DEPOSITIONS HAD TAKEN PLACE, AND BY NOT PROVIDING MR. KIDD'S ATTORNEY WITH TRANSCRIPTS OF THE DEPOSITIONS.[5]

Prosecutors must be held to higher standards of conduct due to their unique role as both advocate and minister of justice.[6]

Rule 4-3.8, "Special Responsibilities of a Prosecutor," contains prohibitions and requirements that are only applicable to prosecutors. Comment [1] to Rule 4-3.8 says that "A prosecutor has the responsibility of a minister of justice and not simply that of an

[5] The Information includes two other alleged violations of Rule 4-3.8(d) that Informant has elected not to pursue at this time in light of the evidence received by and developed through the Disciplinary Hearing Panel's proceeding.

[6] See *Attorney Grievance Comm'n of Maryland v. Gansler*, 835 A.2d 548, 572 (Md. 2003) (citation omitted).

advocate." Indeed, this Court recognized the unique role of prosecutors long before Rule 4-3.8 was adopted.

> Prosecuting officers, even in the heat of debate, ought not to forget that they owe a duty to the defendant as well as to the state; to the state, to fairly prosecute, and to endeavor to secure conviction by all proper methods and legitimate modes; to the defendant, to refrain from doing or saying aught which the highest sense of professional honor will not sanction.

State v. Pagels, 4 S.W. 931, 934 (Mo. 1887). The Supreme Court of the United States has made similar observations:

> [A prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78 (1935).

These authorities, along with the specific provisions in Rule 4-3.8, detail and emphasize the heightened duties imposed on prosecutors. Subsection (d) is the prosecutorial duty at issue in this case:

> 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[.]

As used here, the term "known" references "actual knowledge of the fact in question." Rule 4-1.0(f). However, "[a] person's knowledge may be inferred from circumstances." *Id.*

There is no Missouri precedent interpreting and applying Rule 4-3.8(d) in a disciplinary matter. And, as a New York appellate court recently opined:

> A conflict in authority exists concerning the scope of rule 3.8(b).[7] Some authorities contend that rule 3.8(b), or their local analog—defining a prosecutor's duty to disclose to the defense evidence or information that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence—is coextensive with *Brady*, or stated somewhat differently, a codification of *Brady* (*see e.g. In re Attorney C*, 47 P3d 1167, 1171 [Colo 2002]; *In re Seastrunk*, 2017-0178 [La 10/18/17], *1-2, 236 So 3d 509, 510 [2017]; *Disciplinary Counsel v Kellogg-Martin*, 124 Ohio St 3d 415, 419, 923 NE2d 125, 130 [2010]; *State ex rel. Oklahoma Bar Assn. v*

[7] New York's Rule 3.8(b) is substantially identical to Missouri's Rule 4-3.8(d): "A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of the tribunal."

Ward, 2015 OK 48, ¶ 32-33, 353 P3d 509, 521 [2015]; *In re Petition to Stay Effectiveness of Formal Ethics Opinion 2017-F-163*, 582 SW3d 200 [Tenn 2019]; *In re Riek*, 350 Wis 2d 684, 695-697, 834 NW2d 384, 390 [2013]). Other authorities hold that rule 3.8(b) imposes distinct ethical obligations upon prosecutors that are independent of *Brady* (*see People v Waters*, 35 Misc 3d 855, 859-860 [Sup Ct, Bronx County 2012]; *People v Robinson*, 34 Misc 3d 1217[A], 2011 NY Slip Op 52485[U], *2-3 [Crim Ct, Queens County 2011]; *accord In re Kline*, 113 A3d 202 [DC Ct App 2015]; *Matter of Larsen*, 2016 UT 26, ¶ 40-47, 379 P3d 1209, 1216 [2016]; *In re Disciplinary Action against Feland*, 2012 ND 174, 820 NW2d 672 [2012]; *see also* Joel Cohen, *Disclosure of Information: Is Complying with 'Brady' Enough?, Ethics and Criminal Practice*, NYLJ, June 9, 2015 at 3, col 1; NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 at 2 [2016] ["there is no evidence to support" the view that "Rule 3.8 is simply an ethical codification of *Brady*"]; NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 at 4 ["Rule 3.8(b) is not a codification of disclosure obligations established by law"]; NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 at 4 ["(t)he history and comments to Rule 3.8(b) confirm that it is not meant to codify legal disclosure obligations" (alterations omitted)]; ABA Comm on Ethics and Prof Responsibility Formal Op 09-454 [2009] ["(t)he drafters of Rule 3.8(d)"—the ABA model rule upon which New York's rule 3.8(b) is patterned—"made no attempt to codify the evolving constitutional

> case law"]). The United States Supreme Court has observed in obiter dictum that ethical rules requiring prosecutorial disclosure may impose obligations broader than those imposed under *Brady* (*see Cone v Bell*, 556 US 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"]; *Kyles v Whitley*, 514 US 419, 437 [1995] [*Brady* "requires less of the prosecution than" ethical standards]).

Matter of Kurtzrock, 192 A.D.3d 197, 209-10 (N.Y. App. Div. 2020).

Fortunately, Missouri addressed this apparent conflict by adopting Rules of Criminal Procedure that effectively resolve it. Specifically, Rule 25.03 includes a provision that mandates the voluntary disclosure of information consistent with the requirement in Rule 4-3.8(d) *in addition to* the voluntary disclosure of the information that is required by *Brady*.[8]

> The state shall, without written request, disclose to defendant any material or information that tends to negate the guilt of defendant for the charged offense, mitigate the degree of the offense charged, reduce the punishment

[8] "According to *Brady*, due process requires the prosecution to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment." *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. banc 2001).

> of the offense charged, and any additional material or information that would be required to be disclosed to comply with *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny.

Rule 25.03(g). **App. 387-389.**

This rule makes it clear that in Missouri the ethical disclosure obligations referenced in Rule 4-3.8(d) are broader than the constitutionally required disclosure obligations in *Brady*. Consequently, violations of these disclosure requirements will implicate distinctly different objectives notwithstanding their obvious similarities and overlapping nature. When a violation of *Brady* is alleged in a criminal case,

> [T]he focus is upon the effect of the violation on the defendant's right to due process and a fair trial, and judicial relief is warranted only when the defendant has been significantly prejudiced by denial of a substantial right. The focus of the disciplinary proceeding, however, is upon the conduct of the prosecutor and the protection of the public in general.

In re Feland, 820 N.W.2d 672, 678 (N.D. 2012); *see also U.S. v. Acosta*, 357 F.Supp.2d 1228, 1232 (D. Nev. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999) for the proposition that "the duty to disclose is broader than the narrower question whether failure to disclose violates the constitution" and noting that Nevada has adopted ABA Model Rule 3.8(d), which defines the scope of the prosecutor's duty to disclose).

Respondent McGowan violated Rule 4-3.8(d) by failing to disclose favorable information to Mr. Kidd's public defender.

Informant has the burden to establish the truth of the allegations by a preponderance of the evidence. *In re Cupples,* 952 S.W.2d 226, 228 (Mo. banc 1997). In this case, Informant has alleged a knowing violation of Rule 4-3.8(d). In order to prove this Rule violation, Informant must show that Respondent McGowan acted as a prosecutor in Kidd's criminal case, and she failed make a timely disclosure to Mr. Kidd's counsel of the favorable evidence or information that was known to her.

Rule 4-3.8(d) does not set forth a specific *mens rea* requirement, so the Rule should be interpreted to incorporate three possible levels of culpability.

> The standards generally recognize three levels of culpable conduct – intentionally, knowingly, and negligently. The lowest level of sanction – admonition – requires negligent conduct, and there is no sanction for conduct which does not reach the level of negligence.

See In re Feland, 820 N.W.2d 672, 678-81 (N.D. 2012) (discussing whether Rule 3.8(d) requires proof of an intentional failure to disclose). Where a violation is found, the lawyer's mental state is therefore relevant to the level of the sanction.

Even though the Disciplinary Hearing Panel's decision is merely advisory in nature, *In re Oberhellman*, 873 S.W.2d 851, 852-53 (Mo. banc 1994), it is interesting to note that it appears the Panel's findings only considered whether these violations were intentional. **App. 24-27.** Specifically, the Panel found: "It is not credible that Respondent intentionally tried to conceal the depositions from Kidd's counsel since the witnesses were Merrill's alibi

witnesses and Kidd's name was not even mentioned." **App. 26.** The Panel neither found nor analyzed whether there was a knowing violation of Rule 4-3.8(d), this is despite Informant's argument to the Panel that Respondent McGowan acted "knowingly" and Informant's advocacy for a suspension based upon the application of ABA Standard 5.22 as provided in the ABA Standards for Imposing Lawyer Sanctions (1991). Standard 5.22 states:

> Suspension is generally appropriate when a lawyer in an official or governmental position *knowingly* fails to follow proper procedures or rules and causes injury to a part or to the integrity of the legal process.

(emphasis added). **R. at Vol. 1, pp. 656-60 (Tr. 100:24-104:8).** *Cf. In re Kline*, 113 A.3d 202 (D.C. 2015) (applying D.C. R. Prof. Cond. 3.8(e), which requires intentional conduct), *and In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (choosing to read Colo. RPC 3.8(d) as including the mens rea of intent).

So, what did Respondent McGowan know and when did she know it? As of March 13, 1997, the day before the Goodspeed depositions took place, Respondent McGowan knew that Gary Goodspeed Sr. and his son Gary Goodspeed, Jr. lived in the Atlanta, Georgia area. She knew that they flew into Kansas City on February 1, 1996, and that the Bryant/Bridges murders occurred on February 6. She also knew that the Goodspeeds flew back out of Kansas City on February 9, 1996. She knew that Goodspeed, Sr., rented a white sedan to drive while in Kansas City and that witnesses saw a white sedan leaving the murder scene. She knew that Goodspeed, Sr. had been previously convicted of manslaughter, and as a prosecutor, she knew that as of the date of the murders Ricky Kidd

had no felony convictions.[9] Ms. McGowan knew that her eyewitness, Richard Harris, had identified the first man that followed George Bryant out of the garage as "Goodspeed" and that Harris later believed a Goodspeed cousin had threatened, or tried to intimidate, him by going to his mother's house.

Respondent McGowan knew that Goodspeed, Jr. told police he and Marcus Merrill visited George Bryant at his house on the Friday before the Tuesday murders, and that Junior said Mr. Bryant's uncle had also been at the house. Ms. McGowan knew that Kayla Bryant, George Bryant's 4-year old daughter who was in the house when the murders occurred, told police that two of the murderers had been at her house while her uncle was there, a few days before the murders. Ms. McGowan also knew that Goodspeed, Jr. was thought to look like Mr. Bryant's brother and was referred to as his brother, and that Kayla told police that her dad's brother had shot him.

Respondent McGowan knew that Kansas City police considered Goodspeed a sufficient threat to surveil him when he was in Kansas City in September of 1996. And she knew the Goodspeeds were considered enough of a legitimate threat to Harris that he was "put up" in a hotel for a period of time before the trial started.

Ms. McGowan herself believes that Gary Goodspeed, Jr. was present during the murders. She believes he was the "brother" Kayla referenced as shooting her dad. She knew that Junior was considered a suspect in the case and that Senior was considered a person

[9] Ricky Kidd pled guilty on March 13, 1996, to trafficking drugs in the second degree. *State v. Kidd*, 75 S.W.3d 804 (Mo. App. 2002).

of interest. She knew that the Goodspeeds always said they were with Mr. Merrill on the day of the murders and never put themselves with Mr. Kidd.

Under these circumstances, Rule 4-3.8(d) required Respondent to disclose to Ricky Kidd's lawyer that these individuals, who she knew could possess information that would tend to negate Kidd's guilt or mitigate the offense, were in town and sitting for depositions. Recitation of the foregoing information tying the Goodspeeds to the murders is not offered to resolve the question of who murdered Mr. Bryant and Mr. Bridges on February 6, 1996. The information is recited to substantiate the fact that Respondent McGowan possessed information, i.e., that two elusive witnesses connected to the homicides by substantial evidence, were in Kansas City and sitting for depositions, information that could have helped Ricky Kidd's lawyer, Teresa Anderson defend him against the charge of first-degree murder.

Ms. McGowan had an ethical obligation under Rule 4-3.8(d) to disclose to Ms. Anderson that the depositions were taking place on March 14, 1997. Missouri's Rule 4-3.8(d) is indistinguishable from the American Bar Association's Model Rule 3.8(d). The ABA, in Formal Opinion 09-454 (2009), confirmed the plain meaning of the language in the Model Rule. The Formal Opinion recognizes that a prosecutor has an:

> [E]thical duty . . . separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence or information favorable to the defense to disclose it as soon as reasonably practicable so that the

> defense can make meaningful use of it in making such decisions as . . . how to conduct its investigation.

Id. As is emphasized in Comment [1] to Rule 4-3.8, a prosecutor "has the responsibility of a minister of justice and not simply that of an advocate."

The ABA Formal Opinion explains that rule requires the disclosure of information that would tend to negate the guilt of the defendant "without regard to the anticipated impact of the evidence or information on a trial's outcome." In other words, the rule does not impose a materiality requirement on the information required to be disclosed – like *Brady* – so it is not a mere codification of the constitutional case law evolving from *Brady.* "[T]he duty of candor established by Rule 3.8(d) rises out of the prosecutor's obligation to 'see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and most importantly, that special precautions are taken to prevent . . . the conviction of innocent persons.'" ABA Formal Op. 09-454 (2009) (citing Comment [1]).

Rule 4-3.8(d) requires disclosure of not only evidence,[10] but also information, as favorable information may lead to other evidence or testimony that could have negated Ricky Kidd's guilt or otherwise assisted his attorney in preparing his defense.

[10] Missouri's predecessor Code provision, DR7-103(B), required disclosure of evidence without mention of "information." Rule 4-3.8(d), adopted in 1986, expanded the ethical obligation to include evidence and information.

> In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

ABA Formal Opinion 09-454 (2009).

In criminal proceedings, where the defense ordinarily has "limited access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions." *Id.* Here, the public defenders all testified that they tried, unsuccessfully and for a long time, to find the Goodspeeds in order to interview them. These efforts were hampered by the fact the Goodspeeds lived in Georgia. In the end, only Mr. Merrill's attorneys were accorded the advantage of deposing them when they were in Respondent McGowan's office just before the start of the criminal trial.

During the hearing of this disciplinary matter, Respondent McGowan offered many explanations for why she had no obligation to disclose to Ms. Anderson that the Goodspeeds were being deposed on March 14, 1997. She testified that they were not her depositions, that they were Mr. Merrill's attorneys' depositions, that Ms. Anderson had never identified the Goodspeeds on a witness list (which Respondent noted was not timely

filed anyway), that Ms. Anderson had never expressly asked for help in locating the Goodspeeds, and that Mr. Kidd's counsel had phone and pager numbers for the Goodspeeds on police investigative reports. The clear and plain language of Rule 4-3.8(d) put Respondent McGowan on notice that she had an ethical obligation to disclose that the depositions were taking place without the necessity of any of those procedural steps by Mr. Kidd's attorney and despite Respondent McGowan's suggestions that Ms. Anderson just did not try hard enough to locate the Goodspeeds on her own.

Many of the details surrounding the Goodspeed depositions are lost to history, because these events took place quite some time ago. That said, there is evidence from which a reasonable inference could be drawn that the State, represented by Respondent McGowan, arranged – or at least participated in the arrangement of – the Goodspeed depositions. Both Ms. Ladesh and Ms. Spencer, Mr. Merrill's public defenders, testified they never successfully contacted the Goodspeeds through their own efforts. Neither arranged for the Goodspeeds' travel to Kansas City in March of 1997. Neither arranged for police detectives to be present for the duration of the depositions nor did they want police detectives present. Ms. Ladesh suggested the depositions came about without much notice, or she would have arranged to take the depositions herself and not imposed that duty on her second chair, Ms. Spencer. Respondent McGowan, who was not allowed under Supreme Court rule at the time to notice up witness depositions, asked far more questions of the Goodspeeds than did Ms. Spencer. Curiously, the transcripts contain absolutely no reference to Ms. Anderson or to her absence.

Having failed to disclose to Ms. Anderson, before the depositions occurred, that the Goodspeeds were in Kansas City to be deposed, Respondent McGowan had a continuing ethical obligation to disclose to Mr. Kidd's attorney that the depositions had occurred and to provide her with the transcripts. Respondent points to her use of the words "testified" and "deposition" relative to the Goodspeeds on the first and third days of the murder trial as proof that Ms. Anderson should have learned about the Goodspeed depositions from those oblique references. But Ms. Anderson testified at the disciplinary hearing that those words did not trigger her to ask any follow-up questions of Ms. McGowan, questions that might have led to her realization that the Goodspeeds had recently been deposed. Respondent McGowan's argument, in short, wrongly suggests that these brief and passive references – during a six-day first degree murder trial – are sufficient to satisfy Rule 4-3.8(d)'s affirmative duty to disclose.

Further, Ms. Anderson never deviated from her testimony that Respondent did not provide her with the deposition transcripts. She consistently testified that she did not even know the Goodspeeds had been deposed until the state habeas proceedings, some 20 years after her client was found guilty.

The Goodspeeds were in Respondent's offices in Kansas City on March 14, 1997. Ms. McGowan herself considered one of them present at the murders and an uncharged suspect, and Goodspeed, Jr. put himself with Mr. Kidd's codefendant and not Ricky Kidd on February 6, 1996. Rule 4-3.8(d), rules of criminal procedure, the discovery request, and Supreme Court precedent regarding a prosecutor's duty of disclosure, all imposed on Ms. McGowan the duty to disclose to Mr. Kidd's attorney that the Goodspeed depositions were

occurring. Likewise, she had a duty to provide the deposition transcripts to Ms. Anderson even if those transcripts were not available until after the start of the criminal trial.

Respondent McGowan also violated Rule 4-8.4(d) because her failure to disclose information was conduct prejudicial to the administration of justice.

Rule 4-8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice[.]" The District of Columbia has developed the following test to establish a violation of Rule 4-8.4(d):

> (1) That the attorney acted improperly in that [s]he either took improper action or failed to take action when . . . she should have acted; (2) that the conduct involved bears directly upon the judicial process (*i.e.*, the "administration of justice") with respect to an identifiable case or tribunal and (3) that the conduct tainted the judicial process in more than a *de minimis* way, meaning that it at least potentially impacted upon the process to a serious and adverse degree.

In re Owusu, 886 A.2d 536, 541 (D.C. 2005) (internal quotes and citations omitted). Applying that test to this case, it is clear that Respondent McGowan's violation of Rule 4-3.8(d) establishes a violation of Rule 4-8.4(d).

Ms. McGowan's belief that she had no obligation to make Ricky Kidd's attorney aware of the depositions is refuted not only by the language of Rule 4-3.8(d), but also by Missouri Supreme Court decision, by the Pretrial Order, by Mr. Kidd's Request for

Discovery, and Rules 25.03(A)(9) and 25.08.[11] In *State v. Robinson*, this Court noted: "Prosecutors must disclose, even without a request, exculpatory evidence[.]" 835 S.W.2d 303, 306 (Mo. banc 1992). The standard Pretrial Order that was issued in Mr. Kidd's criminal case expressly obliged Ms. McGowan to disclose all information contemplated by Rule 25.03 "without either side being required to file or serve a formal request." Rule 25.03 incorporates the language from Rule 4-3.8(d) and therefore required Respondent to disclose any "information, within the possession or control of the state, which tends to negate the guilty of the Defendant." Similarly, Rule 25.08 imposed on Respondent McGowan a continuing obligation to disclose such information. And, Mr. Kidd's Request for Discovery asked for "Any material or information, within the possession or control of the State, which tends to negate the guilt of the defendant."

All of these sources reiterate Respondent McGowan's obligation to notify Ms. Anderson regarding the Goodspeed depositions. Her failure to do so denied Ricky Kidd's counsel the opportunity to question the Goodspeeds and possibly develop the secondary defense that Mr. Kidd asked her to pursue. As the court in the habeas proceeding noted, with respect to Ms. McGowan's failure to disclose information to Mr. Kidd's attorney:

> Even more compelling is the evidence of the Goodspeed depositions that would support a defense that the true killers of George Bryant are Marcus

[11] See Comment [1] to Rule 4-3.8: "Applicable law may require other measures by the prosecutor and knowing disregard of those obligations . . . could constitute a violation of Rule 4-8.4.".

> Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr. The Court is persuaded by Ms. Anderson's testimony that if these materials had been disclosed, she would have made effective use of them in Kidd's defense.

App. 479. Ms. Anderson provided the same testimony in this disciplinary case. Mr. Kidd asked her to pursue an alternative defense based upon the idea that the Goodspeeds were the actual killers. However, she was never able to develop this theory, because she had no opportunity to interview the Goodspeeds.

Respondent McGowan failed to comply with the rules. Her failure had a direct bearing on Mr. Kidd's criminal trial, because it potentially deprived him of a viable defense. Further, this failure tainted the judicial process to a serious and adverse degree, as is evidenced by the fact Mr. Kidd was ultimately successful in his efforts to obtain post-conviction relief due – at least in part – to Ms. McGowan's conduct.

This Court should suspend Ms. McGowan's law license.

Since this Court's decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), it has consistently turned to the ABA Standards for Imposing Lawyer Sanctions (1991) (ABA Standards) for guidance in deciding what discipline to impose. The ABA Standards direct courts to consider four factors:

(1) The ethical duty violated by the lawyer;

(2) The lawyer's mental state;

(3) The actual or potential injury resulting from the misconduct; and

(4) The existence of aggravating and mitigating circumstances.

ABA Standards, Theoretical Framework.

Regarding the first factor, as had been discussed throughout this brief, Respondent McGowan had, as a prosecutor, specific duties related to the pursuit of justice. "[C]ourts generally recognize that the ethical rules impose high ethical standards on prosecutors." *In re Peasley*, 90 P.3d 764, 772-73 (Ariz. 2004) (citing *In re Doe*, 801 F.Supp. 478, 480 (D.N.M. 1992) ("Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any *right* of the Government, but from *power* entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice.")); *see also*, *Walker v. State*, 818 A.2d 1078, 1098 (Md. 2003) ("Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice. The special duty of the prosecutor to seek justice is said to exist because the State's Attorney has broad discretion in determining whether to initiate criminal proceedings."); *In re Jordan*, 913 So.2d 775, 781 (La. 2005) ("In our system of justice we entrust vast discretion to a prosecutor. Because a prosecutor is given such great power and discretion, he is also charged with a high ethical standard."); *People v. Reichman*, 819 P.2d 1035, 1038-39 (Co. 1991) ("District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices.").

The second factor to consider is whether the lawyer acted intentionally, knowingly, or negligently.

> The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next must culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

ABA Standards, Theoretical Framework. Informant alleges that these were knowing violations. Respondent McGowan knew that Gary Goodspeed, Sr. and Gary Goodspeed, Jr. were in Kansas City. They were there to sit for depositions, and those depositions took place at the Prosecuting Attorney's office. Ms. McGowan participated by asking many questions of both deponents. More to the point, she knew that Mr. Kidd's attorney, Teresa Anderson, was not there.

Turning to the third fact, "The extent of the *injury* is defined by the type of duty violated and the extent of actual or potential injury." ABA Standards, Theoretical Framework. The injury or potential injury resulting from Respondent's McGowan's disclosure failures is perhaps best illustrated by the fact that Ricky Kidd consistently maintained his innocence and was eventually successful in obtaining post-conviction relief. Nevertheless, he did spend roughly 23 years in prison. He asked his attorney to pursue a defense based on the theory that the murders had been committed by the Goodspeeds, but

Ms. Anderson was deprived of the opportunity to question the Goodspeeds in an effort to evaluate the effectiveness of such a defense. As the Chief Justice of the Supreme Court of Louisiana recently observed:

> Our court has never hesitated to impose discipline on attorneys who are guilty of misconduct involving financial or trust account issues. Yet, the actual injury caused by prosecutorial misconduct is much greater. A loss of liberty interest is undoubtedly more valuable than financial loss.

In re Phillips, 289 So.3d 1023, 1024 (La. 2020) (Johnson, C.J., issuing an opinion and assigning reasons as to why he would remand the matter back to the disciplinary board).

Additionally, Respondent's conduct harmed the legal system. As an officer of the court, she was obliged to "abide by the rules of substance and procedure which shape the administration of justice." ABA Standards, Theoretical Framework. Similarly, there was injury to the legal profession because her disclosure failures harmed the integrity of the profession.

In light of the forgoing, ABA Standard 5.2, addressing a failure to maintain the public trust, is the most applicable to this case. This standard is "appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice." *In re Abrams*, 257 P.3d 167, 170 (Ariz. 2011); *see also In re Schuessler*, 578 S.W.3d 762 (Mo banc 2019) (applying this standard to prosecutorial misconduct). Under this standard, suspension is appropriate when, as here, "a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes

injury or potential injury to a party or to the integrity of the legal process." ABA Standard 5.22.

Finally, the Court should then consider whether there are any aggravating and mitigating circumstances in deciding what sanction to impose. The relevant aggravating factors are as follows. First, Ms. McGowan had, at the time of these violations, substantial experience in the practice of law. She was licensed to practice in Missouri in 1985. She started working in the Jackson County Prosecuting Attorney's office in 1988, and she was assigned to the criminal division in 1989. She began handling murder cases in 1990. Second, the Court should also consider the vulnerability of Mr. Kidd as an indigent defendant in the criminal justice system. The final aggravating factor is Respondent McGowan's refusal to acknowledge that she did anything wrong. With respect to mitigating factors, Respondent has no prior disciplinary history in Missouri. Additionally, there is no evidence to suggest that Ms. McGowan's failure to act in this case was premised on a dishonest or selfish motive.

CONCLUSION

For the reasons set forth above, this Court should find that Respondent knowingly violated Rule 4-3.8(d) and violated Rule 4-8.4(d), suspend Respondent's law license indefinitely with no leave to apply for reinstatement for at least one year, and impose on Respondent the $1,000 fee and costs provided for by Rule 5.19(h).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2022, a copy of Informant's Brief is being served upon Respondent and Respondent's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Was served on Respondent through the Missouri electronic filing system pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b); and
4. Contains 11,321 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

Laura E. Elsbury