

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of ) Case No.: **08-O-12538-PEM**  
)  
**TROY ALEXANDER BENSON,** )  
) **DECISION**  
)  
**Member No. 180543,** )  
)  
A Member of the State Bar. )

**Introduction**<sup>1</sup>

In 2006, respondent Deputy District Attorney Troy Alexander Benson prosecuted and convicted Agustin<sup>2</sup> Santillah Uribe for raping, sexually assaulting and committing lewd acts on his young granddaughter, Anna Doe. The appellate court reversed and remanded the case because the prosecution team’s nondisclosure of a videotape constituted *Brady*<sup>3</sup> error that was prejudicial to the defense. Later, the trial court dismissed the case based on the finding that respondent committed egregious prosecutorial misconduct in a peripheral hearing. But in 2011, the appellate court again reversed and remanded the *Uribe* case because it found respondent's conduct in the peripheral hearing did not prejudice defendant’s right to a fair trial.

Consequently, respondent Benson, a career prosecutor for Santa Clara County, is here before this court in a contested disciplinary proceeding for having committed multiple acts of

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

<sup>2</sup> Defendant’s first name has been spelled “Agustin” and “Augustin” on the record.

<sup>3</sup> *Brady v. Maryland* (1963) 373 U.S. 83.

alleged professional misconduct in the *Uribe* case. The charged prosecutorial misconduct includes (1) suppressing evidence contrary to legal obligation; (2) failing to comply with California law; (3) failing to perform with competence; (4) committing acts of moral turpitude; and (5) seeking to mislead a judge.

Of the five charged counts of misconduct, this court finds by clear and convincing evidence that respondent is culpable of one count of failing to disclose exculpatory evidence to the defense.

Due to the lack of clear and convincing evidence, in the interests of justice, and after considering all the issues and evidence set forth during the seven-day trial, including the compelling mitigation – respondent’s 10 years of practice without prior discipline, cooperation with the State Bar, and extraordinary demonstration of good character, the court has determined that a public reproof would be an appropriate disposition of this matter. Any imposition of increased discipline would not further the objectives of attorney discipline and would be punitive in nature.

#### **Significant Procedural History**

On May 15, 2012, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC). Respondent filed a response on June 15, 2012. The State Bar filed an amended NDC on October 16, 2012. The amended NDC did not change respondent’s response to the NDC.

On October 17, 2012, the parties entered into a stipulation as to facts. A seven-day trial was held on October 17-19, and 23-26, 2012. Senior Trial Counsel Manuel Jimenez represented the State Bar. Attorney Jonathan I. Arons represented respondent.

Following receipt of closing briefs from the parties, the court took this proceeding under submission on November 5, 2012.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 7, 1995, and has been a member of the State Bar of California at all times since that date.

The court finds the testimony of all the witnesses, including respondent, to be very credible. There lies the conundrum. They each testified truthfully about their own recollection of events that occurred several years ago. Rather than wrestling with the philosophical issue of objective truth versus subjective truth, this court gives great weight to the credibility of respondent. Reasonable doubts in proving a charge of professional misconduct must be resolved in the accused attorney's favor. (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 291.)

And because this is such a fact-intensive case with so many details and different versions of events, this court will narrow the findings of fact based on relevancy and importance. Those alleged facts that are in conflict, unreliable, and hence, not proven clearly and convincingly, will be either discussed briefly or not at all.

#### **The Uribe Matter**

##### **Facts**

##### ***Background; Pretrial; Trial***

Respondent has been a prosecutor in the Santa Clara County District Attorney's Office since 1996. He was with the Felony Gang Task Force prosecution team until 2005. With no previous experience with sexual assault cases, he was then assigned to the Sexual Assault Unit where he was given a caseload of 20-30 serious sexual assault cases along with a carryover of his gang task force assignments. Two of the cases included *People v. Zeledon* and *People v. Uribe*.

Respondent inherited the *Zeledon* case from Deputy District Attorney (DDA) James Gibbons-Shapiro (Shapiro). On June 23, 2005, Zeledon's defense attorney, Richard P. Pointer, made a pretrial discovery request pursuant to Penal Code section 1054 et seq. that included

copies of any photographs or videotapes made during the course of the investigation. Shapiro signed off on all the requests with an “OK.” As was customary with the district attorney’s (DA) office when a discovery request came in, it was given to the paralegal, Ivonne Zelaya (Zelaya), after the assigned DDA had given an OK to all requests.

On August 1, 2005, Zelaya sent Pointer a letter informing him that she had requested copies of all video/audio-recorded statements/interviews from the San Jose Police Department and all reports by the Santa Clara Valley Medical Center’s (Valley Medical) Pediatric Sexual Assault Response Team (SART).

For many years before 2006, the Valley Medical’s SART videotaped its medical examinations of victims. However, SART customarily did not turn these videotapes over to the DA or to defense counsel. With few exceptions, the existence of these videotapes was not widely known by the Santa Clara DA’s Office staff or by defense counsel.

On January 12, 2006, Mary Ritter, clinic coordinator at the Center for Child Protection (Center) in the Department of Pediatrics at Valley Medical, sent respondent the video and DVD copies of the SART exam in the *Zeledon* matter. Thus, by January 2006, respondent became aware that SART had, in addition to still photos, videotapes in the *Zeledon* matter. In response to the discovery request, respondent sent those videotapes to Pointer.

By February 3, 2006, notwithstanding what Pointer’s expert thought about the videotapes, the videotapes did not alter Ritter’s or the other prosecution expert’s opinion about the case – that there was a sexual assault based on the photographs and videos. Once the videotapes were turned over to Pointer and his expert, respondent never heard from Pointer regarding the videotapes.<sup>4</sup>

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<sup>4</sup> Pointer has been a criminal defense attorney for 30 years and has been doing sexual assault cases for the last 20 years. Of his criminal defense caseload, 30% are sexual assault and 99% of those involve sexual assaults against children. Pointer testified that in all his years of

At about the same time respondent was assigned the *Zeledon* case, he was assigned to prosecute the felony child molestation/sexual assault case against Agustin Uribe in the Santa Clara County Superior Court, case number CC598686. (The *Zeledon* case went to trial in July 2006.) The *Uribe* case is the subject of this disciplinary hearing. The Honorable Paul Bernal, Judge of the Superior Court, presided over the case.

The *Uribe* trial began on February 1, 2006, and ended on March 3, 2006. Following a jury trial, Uribe was convicted of committing sex crimes against his granddaughter, Anna Doe: (1) two counts of aggravated sexual assault of a child (Pen. Code §§ 269, 261, subd. (a)(2)); and (2) two counts of lewd or lascivious acts on a child (Pen. Code § 288, subd. (a)).

***Posttrial; SART Video***

After Uribe was convicted, the existence of a SART tape of Anna's examination surfaced.

Judge Bernal testified that the first time he heard there was a videotape in *Uribe* was after the verdict, but before the sentencing. He heard it from his clerk who told him that respondent had dropped by on either a Friday or Monday (March 31 or April 3) and said that there was a videotape in the matter. To this date, he testified that he has no idea of how the videotape was found. He recalls that on April 7, 2006, he, defense attorney Alfonso Lopez, and respondent met in his office to discuss the impact that the newly discovered videotape might have on the case.<sup>5</sup> At that time, respondent told the court he had no objection to Lopez getting copies of the videotape. Judge Bernal ordered the production of the videotape as he understood Valley Medical had a policy of not producing videotapes unless there was a court order.

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practice, the *Zeledon* matter was the first sexual assault case where he had videotape evidence. Videotapes were not the definitive evidence in the *Zeledon* matter.

<sup>5</sup> There was no discussion at that time as to who first discovered the videotape.

Lopez who believed that his client was innocent filed a motion for a continuance of the sentencing on March 30, 2006. Thereafter, he filed a motion for a new trial based on the videotape and a claim of newly discovered evidence. Lopez contended that his first new trial motion should have been granted because respondent's nondisclosure of videotape of a medical examination by SART constituted prejudicial *Brady* error. Respondent had a legal obligation to reveal the existence of and produce the videotape before trial and at the end of trial.

Judge Bernal viewed the videotape and made a finding that the videotape was not exculpatory and presented no new evidence. Therefore, the court denied Uribe's two separate motions for a new trial and sentenced him to a term of 30 years to life, consecutive to eight years in prison.

#### ***Appeal; Brady Violation***

Uribe appealed the decision. In April 2008, the Sixth Appellate District Court reversed the judgment and remanded the matter for a new trial, finding that the SART video was favorable to the defense, that the SART unit was part of the prosecution team, and that therefore its nondisclosure of the videotape constituted *Brady* error that was prejudicial to the defense.

#### ***Proceedings on Remand; Evidence Presented at Hearing***

On remand, Lopez filed a motion to recuse the Santa Clara County District Attorney's Office, claiming that respondent, members of his office, and the SART unit had conspired to violate state law and Uribe's right to due process between 1991 and 2006 by not documenting that SART had videotaped its examinations of alleged victims of sexual assault, thereby preventing members of the defense bar from obtaining critical information in sexual assault cases.

Thus, Lopez concluded that institutional prosecutorial misconduct was so severe that dismissal of the information was warranted.

Lopez also filed a nonstatutory motion to dismiss based upon the alternative grounds of double jeopardy and outrageous prosecutorial misconduct in violation of Uribe's due process rights. The hearing on these motions was held before the Honorable Judge Andrea Bryan in the Santa Clara County Superior Court.

The court conducted an evidentiary hearing in the course of 13 days spanning from March 2009 to January 2010. Substantial evidence was presented to the parties in six court sessions. In October 2009, after the submission of the bulk of the evidence, the court denied the recusal motion finding no support for Lopez's claim of an office-wide conspiracy to purposefully withhold evidence of videotapes of SART examinations conducted by the Valley Medical Center staff.

This finding may have been based on the fact that for many years prior to 2006, the Valley Medical's Pediatric SART videotaped its medical examinations of victims. However, SART customarily failed to turn these videotapes over to the DA and failed to turn the tapes over to defense counsel. It is clear that SART did not turn over any tapes without a subpoena duces tecum to either the DA or the defense bar.

There is conflicting testimony as to whether these videotapes were known to defense counsel. Javier Rios, an attorney with the Alternate Public Defender's Office of Santa Clara testified that although he has no specific memory or knowledge that the SART videotaped its medical exams prior to the *Uribe* case, he admits that he authored an email as far back as 2001 informing deputy public defenders that SART exams of the complaining witnesses may be on videotape.

Likewise, there is conflicting testimony as to whether there was widespread knowledge of the existence of these videotapes by the Santa Clara DA's Office staff. It appears that there may have been knowledge of the existence of the videotapes by the DA's office staff, but for the

most part, the DA's office thought the tapes were useless. Ritter at the Valley Medical testified that the videos were back-ups to photos in the event the camera failed. She also said she never used the videos to assist her in reaching an opinion in a SART examination. Her testimony is consistent with the email that Rios sent out to the public defenders in 2001.

It is clear that until the *Uribe* and *Zeledon* cases, which were both handled by respondent, the Alternate Public Defender's Office, defense attorneys, the SART team, and the Santa Clara DA's Office did not consider the videotapes were of much value in evaluating a sexual assault case. The DA's office described them as low-quality analog videotapes that served as a training aid and a "back up" in case the still photos failed to come out. It is equally clear that even if the videotapes had any value, it was the official position of the Santa Clara's DA Office that it was not its responsibility under *Brady* to produce the videotapes as SART was not a member of the prosecution team for purposes of *Brady*.

#### ***Conflicting Testimony Regarding Discovery of the SART Videotape***

Respondent and Lopez told conflicting narratives about the facts surrounding the discovery of the SART videotape in the *Uribe* matter. This court is mindful that the conflicting narratives are based on recollections three years after the event and during the intervening time, both counsel had carried heavy caseloads and that the Santa Clara County DA's Office has been rightfully subjected to close scrutiny for claims of institutional prosecutorial misconduct.

#### ***Respondent's Testimony***

Respondent acknowledges that he has no actual knowledge as to when Lopez first learned of the videotape in the *Uribe* matter. However, he believes that he told Lopez of his discovery of the videotapes soon after learning of the existence of the videotapes from Ritter. He testified that he first learned of the videotape at the end of the trial in phone conversation with Ritter in which he explained what he thought was incredible testimony by the defense's expert



witness, Dr. Theodore Hariton. He said during that phone conversation, Ritter told him that she had a video to refute the expert's testimony.

Ritter testified that she has no independent recollection of any conversation with respondent regarding a videotape in the *Uribe* case. However, she does remember having a conversation prior to January with respondent in the *Zeledon* matter where she suggested that the videotape would only bolster the prosecution case.

Respondent stated that after his phone conversation with Ritter, he spoke to his supervising attorney Victoria Brown (Brown) and informed her of the videotape. Brown testified that as soon as she learned of the videotapes from respondent, she called Ritter and confirmed that there was a videotape. After that confirmation, she immediately sent out an email to the unit advising them of the videotaping. She also said that she advised respondent to contact Lopez and Judge Bernal about the videotape. Respondent and Brown agree that he did not tell her about videotapes in the *Zeledon* case.

Respondent further testified that in February 2008, respondent confirmed with Lopez that he had first informed Lopez about the existence of the SART video back in March 2006. And respondent testified that in a follow-up conversation, Lopez had confirmed with respondent that he told Lopez of the existence of the videotape.

Consequently, on or about February 7, 2008, respondent made a note in the District Attorney's "CRIMES" data files that he spoke with Lopez via telephone and that Lopez confirmed respondent's recollection that respondent had learned of the *Uribe* videotape after trial and informed Lopez and the court. Because he truly believed that he was the first one who discovered the existence of the videotape, he noted: "[I]t was I that learned about the existence of the videotapes after trial and informed the defense and the court."

After the appellate court reversed the *Uribe* judgment, respondent sent an email to Judge Bernal, copied to Lopez, stating that due to the reversal in the *Uribe* matter, he found himself “in the unique position of having to self-report unethical conduct to the State Bar for discovering and disclosing evidence.” Lopez agreed to provide a declaration for respondent. On June 4, 2008, respondent sent an email to Lopez with a draft declaration for Lopez’s signature. Lopez sent an email in response on June 5, stating that he was not going to sign a declaration that he believed was incorrect as to who discovered the SART video first.

#### Lopez’s Testimony

Lopez testified that he was convinced that his client was innocent. Upon Uribe’s conviction, Lopez was venting in his office when another attorney told him that he should contact Dr. James Crawford (Crawford) from Alameda County, who was an expert witness in the *Zeledon* matter. He left Crawford several messages, finally reaching him on March 22, 2006. The first thing Crawford brought up was videotapes and told him to contact Ritter at Valley Medical.

Lopez contacted Ritter on March 28, 2006, and she confirmed there were videotapes in *Uribe*. Ritter expressed her belief that he was not entitled to the videotapes because it was a training tape. So Lopez drafted a subpoena duces tecum and served it on Ritter on March 29, 2006. Lopez filed a motion for a continuance of the sentencing. On April 7, 2006, Lopez and respondent met in Judge Bernal’s chambers to discuss the impact that the newly discovered videotape might have on the case. At that time respondent told the court he had no objection to Lopez getting copies of the videotape. The court ordered SART to release the videotapes to the defense.

Lopez testified that he had no conversations with respondent about *Uribe* between the time he spoke with Crawford and when he spoke with Ritter about the existence of the video.

Lopez believed he called respondent sometime after the motion was filed and before April 7, 2006, but he does not recall speaking to him. Lopez testified that the first time that he spoke with respondent about the videotapes was immediately before meeting with Judge Bernal in chambers on April 7, 2006. Lopez believes that during in-chambers discussions he advised the court that he had discovered the existence of the SART video from talking with Ritter.

In February 2008, respondent approached Lopez and asked him whether he could provide respondent with a declaration regarding the *Uribe* matter. In asking for the declaration there was no mention of who first discovered the *Uribe* videotape.

The declaration would state that respondent first discovered the *Uribe* videotape and disclosed that fact to Lopez. Lopez refused to sign a declaration to that effect as he believed that he had discovered the videotape on his own and that he disclosed that fact to respondent.

#### *Judge Bernal's Testimony*

As discussed above, Judge Bernal testified that the first time he heard there was a videotape in *Uribe* was after the verdict but before the sentencing. Who found the videotape at that time was not discussed as it was not an issue in the case. To this date, he testified he has no idea of how the videotape was found.

In May 2008, respondent sent an email to Judge Bernal requesting a declaration from him. In response to the email, Judge Bernal suggested that the parties send a joint settled statement of facts. After respondent sent his draft of the joint settled statement of facts and Lopez rejected respondent's draft of the declaration, Judge Bernal sent an email stating that he was not at the end of what happened in the discovery of the videotapes and that he only knew what his clerk had told him regarding the discovery of the videotape.

***Dismissal; Judge Andrea Y. Bryan's Order Re: Outrageous Prosecutorial Misconduct***

On January 6, 2010, Judge Bryan ruled in favor of the defense on its motion to dismiss the case based on outrageous prosecutorial misconduct. The court made its findings after a great deal of thought and consideration. She found that when contrasting the testimonies of respondent and Lopez, the differences were striking. Lopez's affect was relaxed and he answered the questions that were posed to him clearly and directly. In contrast, respondent's affect was extremely nervous and he perspired profusely. When he responded to questions that were posed to him, the court found him to be defensive and equivocal. She also found that there were numerous inconsistencies in respondent's testimony. She, therefore, found Lopez to be credible and respondent's testimony untruthful.

***Reversed and Remanded Again***

The Santa Clara DA's Office appealed Judge Bryan's dismissal order. On September 30, 2011, the appellate court found that the trial court gave no consideration to societal interests in having those who have committed serious crimes being brought to justice. It concluded that the prosecutorial misconduct occurred in a peripheral hearing and was not shown to prejudice Uribe's right to a fair trial. Consequently, the appellate court reversed the dismissal order and the matter now remains set for trial.<sup>6</sup>

**Conclusions**

***Count 1 - (Rule 5-220 [Suppression of Evidence])***

Rule -5-220 provides that an attorney must not suppress any evidence that the attorney or the attorney's client has a legal obligation to reveal or to produce.

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<sup>6</sup> Uribe was released and has left the country for Mexico. Currently, there is a bench warrant out for his arrest.

The State Bar alleges that by failing to reveal SART's practice of videotaping examinations and by failing to produce the *Uribe* videotape, respondent suppressed evidence that he and the Santa Clara District Attorney's Office had a legal obligation to reveal or to produce.

The court finds that respondent willfully violated rule 5-220 by failing to reveal the SART tape in the *Uribe* matter. However, because the same facts underlie both section 6068, subdivision (a), (count 2) and the rule 5-220 violations, it is not necessary to find him culpable of both violations. Therefore, the court dismisses count 1 with prejudice. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

***Count 2 - (§ 6068, subd. (a) [Attorney's Duty to Support Constitution and Laws of United States and California])***

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California.

The State Bar charges that respondent violated section 6068, subdivision (a), by violating California Penal Code sections 1054.1, subdivisions (c) and (e), and 1054.7.

California Penal Code section 1054.1 provides, in part, that the prosecuting attorney must disclose to the defendant all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of its investigating agencies:

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(e) Any exculpatory evidence.

California Penal Code section 1054.7 requires that the prosecutor disclose exculpatory evidence and relevant written or recorded statements of witnesses whom the prosecutor intends to call at trial at least 30 days prior to the trial.

One of the purposes of the discovery statutes is to promote the ascertainment of truth in trials by requiring timely pretrial discovery. (Pen. Code, § 1054.)

Prosecutors have a constitutional mandate to disclose material, exculpatory evidence to defendants in criminal cases. *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady* require prosecutors to disclose, prior to trial, impeaching evidence and evidence favorable to the defense. “[T]he 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 prosecutor.” (*Id.* at p. 87.)

The *Brady* due process rule has four components: (1) information must be evidence; (2) evidence must be favorable to an accused; (3) favorable evidence must be material; and (4) favorable, material evidence must be disclosed. In short, *Brady* requires a prosecutor to voluntarily disclose to the defense all exculpatory evidence in the possession of the prosecution team.

Similarly, in *People v. Ruthford* (1975) 14 Cal.3d 399, 406, the California Supreme Court summarized the duty of the prosecutor as follows: there is a “duty on the part of the prosecution, even in the absence of a request therefor, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness” (emphasis in original).

Here, in April 2008, the Sixth Appellate District Court remanded the *Uribe* case, stating that it could not reach the conclusion that the trial court did – that the SART video had no value to the defense. The appellate court evaluated the potential impact of the omitted SART video in

light of the entire record and in so doing came to the conclusion that the suppressed evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”

Specifically, the appellate court found that the SART video was favorable to the defense. It concluded that Uribe had established the materiality of the SART video under *Brady*. The determination was “largely based upon the relative weakness (*sans* medical evidence) of the prosecution’s case, coupled with the unfairness to defendant in his being required to respond to medical testimony with limited and inferior photos when far superior and numerous photographic evidence in the form of the SART video should have been made available to him.” Finally, the appellate court found the SART unit was part of the prosecution team, and therefore, its nondisclosure of the videotape constituted *Brady* error.

Two courts in the *Uribe* matter viewed the videotape in different ways: the trial court saw no *Brady* error but the Sixth Appellate District Court did. This court agrees with the appellate court. The videotape was material evidence favorable to the defense; it constituted suppressed evidence under *Brady* because the Valley Medical Center was part of the “prosecution team.”

Respondent had an obligation to disclose to the defense the SART videotapes. When he learned of the SART tape in the *Zeledon* matter in January 2006, he should have ascertained whether there was also a SART tape in the *Uribe* matter. He negligently failed to do so and ignored his duty as a prosecutor. His belief that the *Zeledon* tape was an isolated incident may be reasonable but not excusable. Therefore, by clear and convincing evidence, respondent willfully violated section 6068, subdivision (a), by failing to obey the law, as mandated by Penal Code sections 1054.1, subdivisions (c) and (e), and 1054.7.

***Count 3 - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])***

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

The State Bar alleges that respondent violated rule 3-110(A) by failing to reveal to Lopez SART's practice of videotaping examinations and by failing to produce the *Uribe* videotape.

Because respondent's failure to disclose exculpatory evidence is not a question of incompetence but an issue of prosecutorial misconduct, the court had dismissed count 3 at trial.

***Count 4 - (§ 6106 [Moral Turpitude])***

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

First, the State Bar alleges that respondent engaged in a series of actions intended to falsely convince the superior court and the State Bar that: (1) respondent, not Lopez, had been the person who discovered the existence of the *Uribe* videotape; and (2) respondent had been the person who revealed the existence of the *Uribe* videotape to Lopez and to the superior court.

Second, the State Bar alleges that respondent attempted to secure false information from Judge Bernal and Lopez in the form of declarations stating to the effect that respondent was the discoverer of the *Uribe* videotape.

Because the witnesses were all credible and their testimonies were in conflict, there is no clear and convincing evidence demonstrating that respondent had engaged in acts of moral turpitude or dishonesty in willful violation of section 6106.

Supervising District Attorney Cindy Hendrickson's testimony was particularly noteworthy. She believes that nobody lied. She testified that two years after the fact trying to reconstruct what happened, she thinks that the two men, respondent and Lopez, discovered the videotape independently of each other. One may have discovered it earlier and it was within his



right not to say anything. The second man discovered it later and had an obligation to say something about it and did.

Hendrickson further testified that when respondent discovered the videotape, he called the court and Lopez. After Victoria Brown sent an email to Mary Ritter, it might have taken Ritter a day or two to return Brown's call because Ritter is very busy. To the extent that respondent had the impression that he told Lopez, it is not a lie because he truly believed it. Hendrickson further testified that she knows respondent did not lie and that it is so unfair to make him the perfect person that no one is.

Furthermore, Hendrickson testified that although Judge Bryan found that respondent engaged in an elaborate scheme of deception to prove that he had not engaged in any unethical behavior, she questions Judge Bryan's credibility determinations. Judge Bryan's belief that respondent was lying was based on, in part, his profuse perspiration when he was testifying. But the air conditioning was not working and the temperature in the courtroom was hot.

Finally, there is no clear and convincing evidence that respondent attempted to secure false declarations from Judge Bernal and Lopez. His communications with them did not ask for anything other than their independent recollections.

In light of the various testimonies, there is no clear and convincing evidence that respondent engaged in a series of actions intended to mislead the superior court and the State Bar or that respondent attempted to secure false evidence. Thus, respondent did not willfully violate section 6106.

***Count 5 - (§ 6068, subd. (d) [Attorney's Duty to Employ Means Consistent with Truth])***

Section 6068, subdivision (d), provides that an attorney has a duty to employ those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact.

The State Bar alleges that respondent made misleading statements to Judge Bernal about who first discovered the videotapes and then sought false declarations from him and in so doing attempted to mislead Judge Bernal. The State Bar also alleges that respondent falsely testified in a hearing before Judge Bryan.

Judge Bernal testified that he did not think respondent made any false or misleading statements to him and that respondent never sought false declarations from him.

Judge Bryan issued an Order Re: Outrageous Prosecutorial Misconduct in the post conviction hearing of the *Uribe* matter, finding that respondent had engaged in numerous acts of misconduct, “culminating in his false testimony in this proceeding.” But she did not testify at this trial, specify the numerous acts of misconduct in her order or elaborate on her finding of the respondent's untruthfulness. Thus, absent clear and convincing evidence that is the standard of proof applicable to this disciplinary proceeding, this court cannot find that respondent clearly and convincingly falsely testified in a hearing before Judge Bryan as alleged in the NDC.

Therefore, respondent did not willfully violate section 6068, subdivision (d), by clear and convincing evidence.

### **Aggravation<sup>7</sup>**

#### **Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)**

Respondent (and the Santa Clara County District Attorney's Office) significantly harmed the public and the administration of justice by failing to uphold his/its duties as a prosecutor to reveal exculpatory evidence and to produce the SART videotape.

However, the court does not find that there is additional clear and convincing aggravating evidence to support a finding of other aggravating factors under (1) standard 1.2(b)(ii) –

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<sup>7</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

respondent's *Brady* violation did not constitute multiple acts of misconduct; (2) standard 1.2(b)(iii) – respondent's misconduct was not surrounded by dishonesty and concealment because as soon as he discovered about the videotape, he notified the court and opposing counsel; and (3) standard 1.2(b)(v) – respondent did not demonstrate indifference toward rectification of or atonement for the consequences of his misconduct since he has admitted and recognized the *Brady* violation and self-reported the violation to the State Bar.

### **Mitigation**

#### **No Prior Record (Std. 1.2(e)(i).)**

Respondent was admitted to the practice of law in December 1995 and has no prior record of discipline. Respondent's 10 years of discipline-free practice at the time of his misconduct in 2006 is a strong mitigating factor. (Standard 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.) In addition, the court notes that the misconduct occurred more than six years ago and there is no evidence of further misconduct.

#### **Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)**

Respondent was candid and cooperative to the State Bar throughout the investigations and during these proceedings. In particular, he self-reported the *Brady* violation to the State Bar.

#### **Good Character (Std. 1.2(e)(vi).)**

Respondent presented substantial evidence of his community work and compelling evidence of good character. Nineteen witnesses testified and nine declarations attested to his good character, including 5 judges, 11 criminal defense attorneys, 6 deputy district attorneys, community leaders, law enforcement personnel, and friends. (Standard 1.2(e)(vi).) Favorable character testimony from employers and attorneys are entitled to considerable weight. (*Feinstein*

*v. State Bar* (1952) 39 Cal.2d 541, 547.) Because judges and attorneys have a “strong interest in maintaining the honest administration of justice” (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), “[t]estimony of members of the bar . . . is entitled to great consideration.” (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

The witnesses all attested to his good moral character, integrity, honesty, trustworthiness, and dedication. They have known respondent for many years and believe the alleged misconduct is incongruous and out of character with respondent's reputation in and out of the courts. They opined that respondent is one of the most ethical and honest people. Respondent is conscientious and has high regard for the integrity of the judicial system. Many have worked with respondent and praised him to be a man of exceptional integrity and honor and do not believe that he would ever lie. They testified that he is respectful, professional, cooperative, helpful, and compassionate. They have never known him to be dishonest, unethical or manipulative. He would not deceive anyone in the criminal justice system. Moreover, they attested to respondent's commitment to the community and involvement in various community organizations.

Some of the witnesses attested to his good character as follows:

Judge Ron M. DelPozzo testified that respondent is an absolute delight to work with because he is not a prosecutor who wants to win at all costs and he will be absolutely candid about his case.

Judge Griffin Bonini testified that he has the highest opinion of respondent's character and that respondent does not have a reputation of pushing the envelope in terms of discovery.

Judge Ray E. Cunningham, retired, testified that respondent would go out of his way to make sure that discovery was provided. Respondent is a straight shooter.

Javier Rios, a public defender, testified that respondent would never conceal, hide the ball, or try to be slick with discovery.

Tim Fukai, a retired public defender, testified that he trusted respondent's word and never doubted respondent's integrity as a person or as a lawyer.

Cindy Hendrickson, supervising DDA, testified that she has never known respondent to lie or even exaggerate. She stated that there is a profound amount of respect between him and other defense counsel and that many believe respondent is one of the best that the DA's office has.

James E. Leininger, a criminal defense attorney for more than 43 years, wrote movingly and convincingly of respondent : "I have never heard a disparaging remark or a serious criticism other than he works very hard at what he does....To state or even imply that Troy Benson intended to harm the defendant [is] not only a serious moral judgment error but is an unconscionable ablation of all that he stands for and has worked for the members of this community....I urge you to allow Troy Benson to continue his work for the community. Lessons are generally learned but through stress and pain. Troy Benson has suffered enough."

James P. Gleason, Director of the Independent Defense Counsel Office in Santa Clara County, declared that respondent was uniformly respected and well-regarded and that "Mr. Benson's singular reputation for fairness and honesty is a remarkable achievement."

The fact that so many judges and attorneys hold such high opinion of respondent is indeed a remarkable achievement. Particularly impressive is that so many defense counsel stepped forward and attested to respondent's good character.

The court finds that these 28 character witnesses represent an extraordinary demonstration of respondent's good character attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct.

The State Bar has also acknowledged that respondent made a sufficient showing of extraordinary demonstration of good character.

Respondent has always devoted much time doing valuable community and legal work. He coached the Santa Clara County High School mock trial team, assisted in teaching a trial techniques class at Santa Clara Law School, graded bar exams, was elected president of the Black Lawyers Association, is a member of the Santa Clara County Bar Association, and was on the board of Movimiento de Arte y Cultura Latino Americana (a nonprofit organization that supports and promotes contemporary Latino art in the south bay area). He also used to teach police officers how to investigate and what not to do in gang cases. Such civil service deserves recognition as a mitigating circumstance. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.)

Therefore, testimony of many highly reputable character witnesses attesting to respondent's high standing in the legal community and high ethical standards and demonstration of diligence on behalf of clients, as well as substantial community service and pro bono activities are given significant weight in mitigation. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456.)

**Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)**

Respondent is fully aware of his responsibilities as a prosecutor and admits that he has inadvertently committed a *Brady* violation for failing to disclose exculpatory evidence.

**Discussion**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6(b) provides, in pertinent part, that the specific sanction for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

Standard 2.6 provides that violation of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim, with due regard for the purposes of discipline.

The State Bar urges two years of actual suspension based on the contention that respondent committed acts of moral turpitude by intentionally suppressing evidence and making misrepresentations to the court. In support of its recommended level of discipline, the State Bar cited *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171 [four years' actual suspension for prosecutorial misconduct in four criminal matters over a ten-year period]; and *Price v. State Bar* (1982) 30 Cal.3d 537 [two years' actual suspension for altering evidence at a murder trial in order to obtain a conviction].

In *Price*, a prosecutor altered evidence in a criminal trial and attempted to prevent discovery of his misconduct by discussing the alteration with the judge in the absence of opposing counsel and communicating to the defendant – after conviction but before sentencing – an offer to seek favorable sentencing in exchange for defendant's agreement not to appeal the conviction. Because the attorney had no prior record of discipline in 11 years of practice, he was under mental and emotional stress, he was cooperative and remorseful throughout the proceedings, and witnesses testified to his good reputation as lawyer and his active involvement in civic affairs, the Supreme Court found that the mitigating evidence militate against disbarment. Thus, he was suspended for five years, stayed, placed on probation for five years, and actually suspended for two years.

In *Field*, an overzealous deputy district attorney abused his prosecutorial power, concealed evidence and violated the constitutional rights of defendants in favor of winning cases. Because of his compelling mitigation, he was not disbarred but was actually suspended for four years with five years' probation and five years' stayed suspension, which is basically the longest period of suspension short of disbarment.

In this matter, respondent's misconduct is far less serious than that of *Field* or *Price* and is therefore distinguishable, particularly since respondent did not commit any act of moral turpitude, dishonesty or corruption. Respondent did not lie about the facts and circumstances surrounding the discovery of the SART tape. The State Bar's recommended two years' actual suspension would be unduly harsh.

Upon analyzing the evidence, this court agrees with the appellate court that respondent himself did not know that the tape existed until after the *Uribe* trial. When he discovered its existence, respondent instantly notified the trial court and opposing counsel in an attempt to remedy the *Brady* mistake, albeit too late. Such action reflects that as a prosecutor, he fully recognized the heavy burden of his job and his responsibility to ensure that "justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) His candor and truthfulness in his dealings with the court and opposing counsel demonstrate that he understood his special duty as a prosecutor to promote justice and seek the truth.

Although the trial court found respondent committed outrageous prosecutorial misconduct, the standard of proof in these disciplinary proceedings is clear and convincing evidence. And as such, the State Bar has not shown with clear and convincing evidence that respondent tried to cover his tracks and mislead Judge Bryan at the evidentiary hearings. Moreover, this court believes that respondent might have been extremely nervous before Judge



Bryan and was perspiring due to the hot courtroom whose air conditioning was broken; but he did not intentionally make any misrepresentations to her.

It appears that respondent might have been the fall guy for the Santa Clara County DA's Office's malfeasance and incompetence. At the time when he was assigned the *Uribe* case, respondent had no previous experience with sexual assault cases. The appellate court found that the "prosecution team" for purposes of *Brady* includes both investigative and prosecutorial agencies and personnel. Accordingly, the appellate court found that the SART unit was part of the prosecution team and that its nondisclosure of the videotape constituted *Brady* violation. Thus, this court would note that the SART unit's knowledge of the existence of the videotape and culpability of failing to reveal exculpatory evidence are imputed to not only respondent but also to the entire Santa Clara County DA's Office, as part of the prosecution team. But the DA's Office is beyond this court's jurisdiction. Respondent's inexperience caught him off guard and consequently, he unknowingly committed a *Brady* error.

Respondent urges a dismissal or admonition, arguing that he should not be held accountable for years of failed oversight in Santa Clara County and that no one's account is entirely accurate and yet no one lied.

The court is mindful that the proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are "protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

The *Brady* offense may not have been intentional but nevertheless, the public and the administration of justice were significantly harmed. Such a violation is serious. The Santa Clara County DA's Office, the prosecution team and respondent have negatively impacted the public trust in the justice system. The *Uribe* case is still pending and defendant has left the country.

Because respondent willfully violated the discovery law, where subjective intent is not an element, and significant harm resulted from his misconduct, dismissal of this matter cannot be justified. Respondent should have risen to the occasion and taken a step to ascertain whether a similar SART tape existed in the *Uribe* matter when he learned in January 2006 of a SART tape in another matter, the *Zeledon* case. But he did not. At the time, he might have been overwhelmed with a heavy caseload of sexual assault cases and was not so experienced in this type of cases.

Yet, prosecutors are held to an elevated standard of conduct because of their “unique function . . . in representing the interests, and in exercising the sovereign power, of the state.” (*People v. Hill* (1998) 17 Cal.4th 800, 820.) “The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial . . . In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth.” (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

In light of the presence of compelling mitigation, including respondent's 10 years of practice without prior discipline, cooperation with the State Bar, and demonstration of excellent character, any period of actual suspension would not further the objectives of attorney discipline and would be punitive in nature. Accordingly, the court concludes that a public reproof is an appropriate disposition of this matter.

#### **Disposition**

It is ordered that respondent Troy Alexander Benson, State Bar Number 180543, is publicly reproofed. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the

State Bar, the public reproof will be effective when this decision becomes final. Furthermore, pursuant to the California Rules of Court, rule 9.19(a), and rule 5.128 of the Rules of Procedure, the court finds that the interest of respondent and the protection of the public will be served by the following specified condition being attached to the public reproof imposed in this matter. Failure to comply with any condition(s) attached to the public reproof may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct.

**Multistate Professional Responsibility Examination**

Respondent is ordered to comply with the following condition attached to his public reproof: Respondent must take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of this order and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

**Costs**

Costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: January \_\_\_\_\_, 2013

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PAT McELROY  
Judge of the State Bar Court