

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 05-O-00815-PEM (06-O-11153;
)	06-O-12173); 06-O-12344 (Cons.)
BENJAMIN T. FIELD,)	
)	
Member No. 168197,)	DECISION
)	
A Member of the State Bar.)	

I. Introduction

“[A]ll the interests of man that are comprised under the constitutional guarantees given to ‘life, liberty and property’ are in the professional keeping of lawyers . . . [who must stand] ‘as a shield’ . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility.” (*Schware v. Board of Bar Examiners of the State of New Mexico* (1957) 353 U.S. 232, 247.)

In this contested disciplinary proceeding, an overzealous deputy district attorney is charged with multiple acts of serious professional misconduct in four criminal matters. Contrary to the “professional keeping of lawyers,” respondent **Benjamin T. Field** abused his prosecutorial power, concealed relevant and material evidence and violated the constitutional rights of defendants.

The court finds, by clear and convincing evidence, that respondent is culpable of most of the charged acts of misconduct, including failing to maintain respect to the court; failing to disclose exculpatory evidence; misleading a judge; failing to obey court orders; committing acts of moral turpitude and dishonesty; making misrepresentations; and failing to comply with laws of the United States and of this state.

Based upon the serious nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for five years, that execution of suspension be stayed, and that he be placed on probation for five years with conditions, including an actual suspension of four years from the practice of law and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges

On October 10, 2007, 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). On November 5, 2007, respondent filed a response. On May 13, 2008, the State Bar filed an amended NDC. On May 19, 2008, the parties filed the First Stipulation as to Facts and trial commenced on May 20, 2008 through May 23, 2008.

B. Second Notice of Disciplinary Charges

On June 11, 2008, the State Bar filed a second NDC and respondent filed his response on June 27, 2008. The two NDCs were consolidated and the matter was continued for trial on August 12, 13, 15, 19, 20, 21, 22 and September 4, 2008.

Deputy Trial Counsel Cydney Batchelor and Donald R. Steedman represented the State Bar. Attorney Allen J. Ruby represented respondent.

Following receipts of closing briefs from the parties, the court took this proceeding under submission on November 21, 2008.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at the proceeding and on the parties' stipulation, which was admitted into evidence.

Shortly after respondent was admitted to the practice of law in 1993, he began his legal career as a deputy district attorney with the Santa Clara County District Attorney's Office and has been employed there in the past 15 years.

This case involves respondent's serious prosecutorial misconduct in four criminal matters.

- In the **Minor A.** matter, respondent unlawfully obtained evidence in violation of a court order by subjecting a minor to a dental exam in 1995;
- In the **Auguste** matter, respondent failed to disclose exculpatory evidence (secret interview with a witness who challenged the credibility of the alleged victim), submitted a false search warrant affidavit, sought improper search warrants and made misrepresentations to the court in a habeas corpus matter in 2003;
- In the **Ballard** matter, respondent again failed to disclose exculpatory evidence to the defense (secret interview with a co-defendant who pointed the finger at another co-defendant as the shooter in a murder/robbery) in 2003; and
- In the **Shazier** matter, respondent disobeyed court orders in his rebuttal closing argument at trial in 2005, which the appellate court later found his action to constitute prosecutorial misconduct.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 14, 1993, and has been a member of the State Bar of California at all times since that date.

FIRST NOTICE OF DISCIPLINARY CHARGES

B. The Auguste Matter

1. Habeas Corpus Proceedings

In 1998, respondent prosecuted Damon Auguste (Auguste) and Kamani Hendricks (Hendricks) on multiple counts of sexual assault on a 15-year old girl named Monique. On August 7, 1998, a jury found them guilty. In October 1998, Auguste was sentenced to state prison for 18 years 8 months and Hendricks was sentenced to state prison for 37 years 4 months.

Auguste and Hendricks appealed and on August 22, 2000, the appellate court upheld the convictions. On September 27, 2000, they filed a petition for review with the California Supreme Court but were denied.

On June 14, 2001, Auguste and Hendricks filed a petition for writ of habeas corpus¹ with the Santa Clara County Superior Court in *In re Auguste and Hendricks*, Santa Clara County Superior Court, case number 204631.

Respondent was assigned to the habeas matter and Judge James C. Emerson² presided over the case.

¹ Penal Code section 1473, subdivision (a), provides that “Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.” The writ of habeas corpus is mainly designed to test the validity of imprisonment or other restraint of liberty. It does not come within the definition of a criminal action but its most common use is by persons charged with or convicted of crimes, and it is classified with “special proceeding of a criminal nature.” (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 73, p. 146.) Moreover, the petition is largely procedural; it does not decide issues and cannot in itself require release of the prisoner. It serves primarily to launch a judicial inquiry into the legality of restraint on the prisoner’s liberty. (See *People v. Romero* (1994) 8 Cal.4th 728, 738.)

Auguste's petition was based upon a claim that respondent failed to disclose exculpatory laboratory notes. It also included declarations from more than 20 of Monique's acquaintances which contained statements that contradicted Monique's trial testimony, including claims that Monique falsely accused Auguste and Hendricks of rape.

On July 18, 2001, Judge Emerson issued an order to show cause in the habeas proceeding.

On January 7, 2002, Auguste filed an amended petition in the habeas proceeding. On January 31, 2002, he filed a Notice of Additional Evidence Supporting Claim of Habeas Petition.

One of the declarations Auguste presented in support of his amended petition was made by Stephen Smith. Smith claimed he had been in a sexual relationship with Monique after her encounter with Auguste and Hendricks in 1998. Smith stated that Monique admitted to him that she had fabricated the sexual assault claims against Auguste and Hendricks because she had stayed out beyond her curfew. She was fearful that if her parents caught her out after her curfew without a valid reason they would send her away, as they had done once before. At the time Smith executed the declaration on or about January 27, 2002, he was in the military, stationed in Fort Knox, Kentucky. Smith subsequently relocated to San Diego but, for a time, his whereabouts were unknown to the parties.

On February 6, 2002, Judge Emerson issued another order to show cause to evaluate the following: (1) whether respondent improperly withheld laboratory notes for DNA testing reports; (2) whether there was newly discovered evidence that impeached the verdict; (3)

² The superior court is the independent arbiter and fact finder in habeas proceedings. As such, the court must proceed in a summary way to hear any proof that may be produced against or in favor of imprisonment or detention, and to dispose of the party as the justice of the case may require. (Pen. Code, § 1484.) Moreover, the court has authority to compel attendance of witnesses and to “perform all other acts and things necessary to a full and fair hearing and determination of the case.” (Pen. Code, § 1484.)

whether there was prejudicial ineffective assistance of counsel regarding exculpatory witnesses; and (4) whether these errors resulted in prejudicial cumulative error.

Under Penal Code section 1483, the judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return, and such other matters as may be properly submitted to their hearing and consideration. To this end, in December 2002, Judge Emerson ordered an evidentiary hearing and the parties commenced discovery.

2. *Six Search Warrants*

During this discovery period, respondent carried out six search warrants between February and July 2003 to search the following:

- AT&T's telephone records of Stephen Smith's girlfriend;
- Smith's residence;
- Smith's mother's residence;
- Auguste's and Hendricks's jail cells;
- Auguste's mother's residence; and
- Auguste's aunt's residence in Colorado.

The practice and policy in the Santa Clara County District Attorney's sexual assault unit is that the district attorney handling the case prepares and writes the search warrant.

Respondent requested his investigator Tom Wilson, as part of his prosecution team, to prepare the declarations in support of these six search warrants. Working closely together, Wilson sought respondent's advice. Other than the Colorado search warrant affidavit, respondent reviewed and approved each of the five California search warrant affidavits before submitting them to the court.

On the first page of the affidavit it is stated that there was probable cause to believe that there is evidence of felonies to wit: violations of California Penal Code sections 288a (oral

copulation in concert); 264.1 (rape in concert) and 286, subdivision (d) (sodomy in concert). The felonies referenced were felonies for which Auguste and Hendricks had been convicted in 1998. In the affidavit, it is clear that the felonies took place in 1998. It is also clear that the warrant was being sought in a pending habeas petition as it stated that petitioner filed a petition for writ of habeas corpus with the Santa Clara County Superior Court and the court issued an order to show cause why relief should not be granted. It further stated that “the basis for said OSC was in part the declaration of Stephen Patrick Smith, who claimed that the victim in this case recanted her allegations of sexual assault. As a result, the credibility of Stephen Patrick Smith is at issue in the above-entitled proceedings.”

Although Judge Emerson was the assigned arbiter and factfinder in the habeas proceedings and had the authority to perform all acts necessary to a full and fair hearing, respondent did not apply to Judge Emerson for the search warrants nor did he inform the court or the habeas petitioners that he had obtained those six search warrants.

3. *Stephen Smith’s Whereabouts and Statement*

From the beginning of this habeas matter, respondent focused his discovery efforts on Stephen Smith. Based on Smith’s January 2002 declaration, respondent knew that Smith’s testimony, if substantiated, would indicate that the victim had committed perjury and may result in a court order granting Auguste's and Hendricks’ petitions.³ Respondent decided that he would attempt to gather all the information possible to impeach Smith. Thus, it was imperative that Smith be found.

³ In respondent’s investigation request, he stated “that preparing for the hearing will require a very substantial commitment of investigative resources. Unfortunately, the convictions of two very violent sex offenders depend on it.”

On February 26, 2003, respondent obtained a search warrant for the telephone records of Smith's girlfriend in order to locate Smith. Respondent requested Wilson to have this search warrant sealed.

As a result of the AT&T search warrant, respondent learned that Smith was living in San Diego. He immediately directed Wilson to go interview Smith. On March 2, 2003, Wilson interviewed Smith and tape recorded it. Smith provided Wilson with very detailed information regarding Smith's claim that Monique had fabricated the sexual assault charges. It included substantially more information than set forth in Smith's January 2002 declaration. Smith's interview statements impeached Monique's claim that she was sexually assaulted. Wilson informed respondent of the interview soon afterwards.

In a further effort to discover anything that would impeach Smith's credibility, respondent decided to search Smith's home and his mother's home. In April 2003, respondent requested Wilson to obtain search warrants for the two residences.

As a result of this search, authorities found two tablets of the drug Ecstasy. Smith, who had no prior criminal record, pled guilty to this offense on June 11, 2003.

Meanwhile, on April 18, 2003, Cliff Gardner (Gardner), the attorney representing Auguste in the habeas matter, sent respondent a list of his witnesses, along with their addresses and statements. Attorney Gardner further requested: "At your convenience, please send me a list of your witnesses along with their addresses along with any witness statements. Please include any reports your investigators have generated of interviews with any of the witnesses on either of our lists." Because Gardner had not received anything from respondent, on June 20, 2003, he sent respondent another request for the same.

Although Smith's location would provide the defense with access to Smith, respondent had no intention of disclosing Smith's interview statements or Smith's location to attorney

Gardner. He knew that Smith's testimony would be damaging to his defense of the habeas petition.

4. Search Warrants for Jail Cells and Auguste's Mother's Residence

Respondent also focused his discovery efforts on Auguste and Hendricks. In April 2003, respondent requested that the jail cells of Hendricks and Auguste be searched. Respondent did not apply to Judge Emerson for permission to conduct the searches and did not inform Judge Emerson that the jail cells of Hendricks and Auguste were searched.

On July 16, 2003, respondent requested Wilson to obtain a search warrant for the El Cerrito residence of Auguste's mother, Karen Auguste. Wilson's affidavit was similar to the one he submitted for Smith's search warrant.

5. Respondent's Concealment Regarding Smith

On or about May 15, 2003, respondent sent Wilson an email as follows:

"Please prepare a declaration indicating the accuracy of the defense address list. It should state when you checked out each address and when you discovered it to be outdated. *You need not include information about your further efforts to locate defense witnesses.* Simply show that the addresses on the defense witness list are no good." (Emphasis added.)

On or about June 11, 2003, a further email exchange occurred wherein Wilson asked:

"[T]he address for Stephen Smith on the defense list was his army address in Kentucky. What, if anything, do you want me to include on my attempts to locate him?"

Respondent answered in a return email:

"I don't want you to include anything about your attempts to locate him, except that you found out he is no longer with the Army and that he hasn't been for a long time."

On July 15, 2003, Auguste filed a status conference statement which indicated that he had not received any witness interview statements from respondent.

On July 18, 2003, respondent filed a status conference brief indicating that Auguste and Hendricks had provided him with invalid addresses for some of their witnesses. Accompanying the brief, respondent submitted a July 15, 2003 declaration from Wilson in which he stated that he had made an "unsuccessful attempt to locate" Smith at the Fort Knox address Auguste and Hendricks had provided.

Both Wilson's declaration and respondent's brief omitted the fact that Wilson had located Smith through his own investigative efforts, had interviewed Smith on March 2, 2003, and had obtained and executed three search warrants involving Smith. At respondent's request, Wilson made these omissions, which were material exculpatory evidence.

Moreover, in the brief, respondent stated that Smith was the only witness who would impeach Monique's testimony. He further stated that because Auguste's witness list provided an outdated address, and assuming Auguste and Hendricks could not locate Smith, then respondent had nothing to rebut.

In truth and in fact, respondent knew Smith's current address and that Smith had been interviewed, and knew or should have known that he had an obligation to provide that information to Auguste and Hendricks. Respondent intentionally withheld Smith's whereabouts in an attempt to prevent Auguste and Hendricks from locating Smith.

6. Misrepresentations at the July 18, 2003 Status Conference

On July 18, 2003, Judge Emerson conducted an in-chambers status conference hearing prior to the evidentiary hearing on the habeas petition set for July 28, 2003.

At the hearing, attorney Gardner told the court and respondent that he had lost contact with Smith. Therefore, he would not likely be ready for the July 28th evidentiary hearing.

After learning this information, respondent still did not disclose that he had located Smith and had interviewed him in March. Instead, respondent repeatedly and emphatically stated that

he was ready to go forward with the evidentiary hearing and that if Gardner did not have Smith, then there was nothing to rebut.

Based upon Auguste's and Hendrick's inability to locate Smith and a few other witnesses, the court continued the evidentiary hearing.

Attorney Gardner also brought to the court's attention that respondent had a search warrant executed on his client's mother's home a couple of days before the status conference. Respondent conceded that he had done a search warrant to get handwriting exemplars of Hendricks. There was a heated discussion in chambers regarding the propriety of search warrants in habeas proceedings. Attorney Gardner's position was that a habeas was a civil matter and that if search warrants were permissible, then parties were entitled to notice. Respondent's position was that he had an absolute right to obtain search warrants as there was nothing in California law that prohibited prosecutors from using search warrants to obtain evidence to defend against habeas proceedings. Respondent did not convince the court of his position.⁴

Judge Emerson then clearly instructed respondent that he was not to execute any more search warrants and that if he did, he must come back to the court to get permission.

7. *Judge Emerson's Directive*

In fact, Judge Emerson testified he told respondent the following words: "Ben just don't do it." Judge Emerson did not issue a written order because it was clear that he had specifically directed respondent not to seek any more search warrants unless he came back to the court. At

⁴ Judge Emerson testified that he was of the opinion that search warrants dealt with exigent circumstances and new information. In this habeas proceeding, there was nothing new and all the information was stale and stale information should not be used in a search warrant. He said he was incredulous regarding respondent's position.

no time during the in-chambers discussion did respondent indicate that he was in the process of seeking a sixth search warrant in Colorado.

Attorney Gardner understood that if respondent was to execute any more search warrants, respondent had to come before Judge Emerson and that Judge Emerson would then conduct a search warrant hearing. Hendricks's attorney, Deanna Lamb, who was also at that July 18 meeting, testified that Judge Emerson appeared to be upset that respondent was going to other judges regarding search warrants, that he indicated that respondent's conduct was improper and that all future discovery should come through his court.

8. *Defendants' Discovery of Respondent's Concealment*

Gardner and respondent were in a discovery battle. On July 21, 2003, attorney Gardner again wrote respondent requesting that respondent provide him with any reports of interview with witnesses on both of their lists. The next day Gardner again wrote respondent, confirming their July 22 conversation. In that letter, Gardner said he would be providing respondent with an updated witness list containing current address information. He again requested that respondent provide him with any reports of interview with witnesses on both of their lists.

On July 22, 2003, respondent wrote to Gardner, stating that he could not tell which people were actually available to testify because many of the addresses were not valid. Moreover, he said that only when Gardner provided him with a witness list with accurate addresses would he be able to have a much better idea of whom he was calling as a witness. Despite the repeated requests from Gardner and the many opportunities presented to respondent, respondent never disclosed that he had located and interviewed Smith nor did he mention that he was in the process of obtaining more search warrants.

On or about July 29, 2003, Auguste and Hendricks located Smith through their own investigative efforts. To their surprise, they learned from Smith that Wilson had interviewed him

in March 2003, some five months ago, and had a tape recording of the interview. Immediately, they confronted respondent.

On or about August 6, 2003, respondent provided Auguste, Hendricks and the court with a transcript of the March 2, 2003 interview.

If Auguste and Hendricks had not serendipitously discovered that respondent had Smith's current address and had interviewed him, then they would never have known about the existence of the exculpatory evidence.

Respondent did not provide the court with any explanation or justification for his failure to inform Auguste and Hendricks about Smith's location, the March 2, 2003 interview or the three search warrants involving Smith.

9. *False Colorado Search Warrant Affidavit*

A few days after the July 18 status conference, in which Judge Emerson clearly directed respondent not to issue any more search warrants without his permission, respondent ignored the court's directive.

Respondent requested Wilson to obtain a search warrant for the residence of Auguste's aunt, Donna Auguste, in Lyons, Colorado, from a Colorado court. To do so, Wilson provided James Sullivan, a Colorado deputy sheriff, with a draft declaration that included information that the crime had occurred in 1998, that the perpetrators of the crime had been convicted and had filed a writ of habeas corpus, and the court had issued an order to show cause. By email, Wilson gave the Colorado law enforcement officer permission to make any changes in the draft.

While the search warrant affidavit was based on the information provided in Wilson's draft, Sullivan eliminated many important facts. Sullivan testified that he sent the affidavit to Wilson before submitting it to the judge. The search warrant did not mention that Auguste and Hendricks were already convicted of crimes for which it sought evidence. It referred to Auguste

and Hendricks as “suspects” and stated that Auguste was soliciting jurors for his upcoming trial. The search warrant affidavit stated that respondent was gathering evidence for a criminal proceeding, when in fact respondent was gathering evidence for a habeas proceeding. More importantly, the July 22, 2003 Colorado affidavit relied upon a letter with a postmark dated September 1998 seized from Auguste’s mother’s residence in July 2003, but omitted the postmark date of the letter. Neither Wilson nor respondent corrected the misleading search warrant affidavit.

On July 22, 2003, the Colorado search warrant was issued. Wilson then arranged for the execution of the search warrant on Donna Auguste’s residence through a Colorado sheriff’s department.

Again, respondent did not apply to Judge Emerson for the search warrant and did not inform Judge Emerson or the habeas petitioners that he obtained the search warrant.

10. Exclusion of Unlawfully Seized Evidence

In late July 2003, Auguste and Hendricks discovered that respondent had obtained the six search warrants and that respondent and Wilson had actually located Smith in San Diego five months earlier.

On August 8, 2003, Auguste filed a motion alleging prosecutorial misconduct by respondent. On October 24, 2003, Auguste supplemented the August 8 motion and also filed a motion seeking that certain evidence be excluded due to illegal searches carried out by respondent.

On November 18, 2003, Judge Emerson issued an Order on Petitioners' Motions to Exclude Unlawfully Seized Evidence and Sanctions for Prosecutorial Misconduct. In its order the court granted the motion to exclude evidence seized in unlawful searches and denied the

motion for sanctions based on prosecutorial misconduct since the petitioners had not yet shown that they had suffered irreparable prejudice as a result of respondent's conduct.

In his order, Judge Emerson summarized that:

“During this discovery period, Respondent carried out at least six search warrants seeking evidence on a case that was already closed and final. Respondent located an exculpatory witness, obtained an exculpatory interview from the witness, but did not disclose any of this information to Petitioners for over six months and *after* Respondent announced ready to proceed to the hearing. Respondent executed at least one of the six search warrants in direct violation of this Court’s order to have any subsequent search warrants go through only this Court. Respondent and his investigator failed to disclose the whereabouts of a key witness to this Court and Petitioners at a pre-trial conference on July 18, 2003, despite the fact that whereabouts of the witness were known to Respondent only.”

Furthermore, Judge Emerson found, and this court agrees, that the “affidavits were based on stale information and sought probable cause not for subornation of perjury, but for the crimes already adjudicated at trial in 1998. The search warrant affidavit sworn before the Colorado magistrate was exceptionally misleading and false.”

Therefore, Judge Emerson found, and this court agrees, that:

- Respondent failed to timely disclose exculpatory evidence;
- Respondent's search warrants were improper; and
- Respondent failed to comply with the court’s directive to not seek any further search warrants through other courts.⁵

⁵ Respondent argues that Judge Emerson’s directive was not a court order. This court agrees since the instruction was not written but was orally given at the in-chambers conference. (Code Civ. Proc., §1003 [Direction of a court made in writing is an order].) But, Judge Emerson, in good faith, reasonably expected and relied on the parties to follow through with his directive without the formality of a court order.

11. Habeas Corpus Petitions Granted

On June 29, 2004, the court granted the habeas petitions. The court found that respondent committed *Brady* error by not disclosing all of the DNA testing laboratory notes and that new evidence indicated that false testimony affected the outcome of the case.

On or about August 20, 2004, Auguste pled guilty to a felony violation of Penal Code section 261.5(c) (statutory rape). On February 17, 2005, the felony conviction was reduced to a misdemeanor (Pen. Code, §§17 and 19).

Count 1: General Allegations

Count 1 provided general background of the Auguste case but did not allege any violation of a Rule of Professional Conduct or provision of the Business and Professions Code. Thus, respondent is not culpable of any Rule of Professional Conduct or provision of the Business and Professions Code in count 1 as none was charged.

Count 2: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))⁶

Respondent is charged in count 2 with a willful violation of rule 3-110(A), which provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. The State Bar alleges that respondent, by failing to properly supervise investigator Wilson by permitting him to submit affidavits that contained false and misleading information and by failing to properly oversee the execution of the Colorado search warrant, violated rule 3-110(A).

While the five California search warrant affidavits prepared by Wilson were sloppy, they were not misleading and do not rise to the level of incompetence. The affidavits stated that the felonies took place in 1998, that the warrant was being sought in a pending habeas petition with

⁶References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

the Santa Clara County Superior Court and that the court issued an order to show cause why relief should not be granted.

The Colorado search warrant affidavit, however, was misleading. But in this particular matter, whether respondent failed to properly supervise Wilson's work product is not an issue of incompetence under rule 3-110(A). The fact that the affidavits did not state that Judge Emerson issued an OSC in the habeas matter or that Judge Emerson was the judge assigned to handle all aspects of the habeas proceeding is not a matter of incompetence. The fact that the Colorado search warrant affidavit contained no mention of a pending habeas proceeding or that Auguste and Hendricks were already convicted of the crimes for which it sought evidence is also not a matter of incompetence. The Colorado search warrant affidavit's reference to Auguste and Hendricks as "suspects" and statement that Auguste was soliciting jurors for his upcoming trial are false, but not a matter of incompetence. Finally, the fact that the affidavit only mentioned that a letter was seized on July 13, 2003, but omitted its postmarked date of September 30, 1998, is not an issue of incompetence.

The multiple significant misstatements and omissions from the Colorado affidavit and the other five sloppy affidavits are not a result of respondent's failure to perform competently or his failure to supervise Wilson. In fact, respondent and Wilson worked closely together in preparing the affidavits. Respondent was fully aware of those affidavits. But rather, it is a question of whether respondent complied with his statutory duty to make sure that the search warrant is based on probable cause and that the affidavit "must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist." (Pen. Code, § 1527.) His failure to comply with his duty goes to the issue of his honesty, as discussed below, in count 3 and not to the issue of respondent's competence or his alleged failure to supervise Wilson.

Therefore, the court does not find respondent culpable, by clear and convincing evidence, of a willful violation of rule 3-110(A).

Count 3: Misrepresentations (Bus. & Prof. Code, § 6106)⁷

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

The State Bar alleges that by either intentionally, or through gross negligence, authorizing and permitting Wilson to present false and misleading information to the California courts from whom Wilson obtained search warrants, and to the Colorado sheriff's department which obtained and executed a search on Donna Auguste's home, respondent committed acts of moral turpitude, dishonesty and corruption.

In every criminal prosecution there exists an entity which the courts call the "prosecution team." "Courts have thus consistently 'decline[d] to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel." (*In re Brown* (19198) 17 Cal.4th 873, 879.) The prosecution team has four component parts:

- The prosecutor's office;
- The investigating agency or agencies;
- Assisting agencies and persons; and
- Agencies closely tied to the prosecution. (See Pen. Code, § 1054.5.)

The prosecution team also includes law enforcement agencies located in other jurisdictions which have jointly participated in the investigation. (See *Strickler v. Greene* (1999) 527 U.S. 263.) Therefore, in this habeas matter, both investigator Wilson and deputy sheriff Sullivan are part of respondent's prosecution team.

⁷References to section are to the provisions of the Business and Professions Code.

It is well settled that a district attorney must perform his functions with the highest degree of integrity and impartiality. At the same time, respondent must also see to it that the investigators, as part of his prosecution team, perform their duties with integrity while assisting him in the habeas corpus proceeding. Moreover, since it is the practice and policy of the Santa Clara D.A.'s Office that the district attorney handling the case prepares and writes the search warrant, respondent cannot now shift his duty to the investigators and blame them for any inaccuracies or omissions.

Respondent argues that he never saw the Colorado affidavit and thus, is not responsible for its misleading content and omissions. The court rejects his argument. While respondent may have chosen strategically not to review the actual search warrant affidavit itself, such action does not excuse his professional obligation as part of the prosecution team to ensure that the affidavit is accurate and truthful.

Based on the constructive knowledge doctrine, information known by the investigating agency is deemed to be known by the prosecuting attorney. (See Pipes & Gagen, Jr., Cal. Criminal Discovery (4th ed. 2008) § 1:71.2, p. 216.) Therefore, by analogy, respondent is charged with constructive knowledge possessed by these investigative agencies, even if respondent had no actual knowledge of the content of the affidavit before the issuance of the search warrant. Nevertheless, after the search was executed and evidence was seized, respondent knew or should have known about the misleading affidavit on which the search was based.

By then, respondent's previous lack of personal knowledge clearly does not excuse his failure to correct the false and misleading affidavit to the Colorado court. For example, the search warrant affidavit indicated that there was probable cause to believe that a crime had been committed when Auguste and Hendricks had already been convicted for the crime in 1998.

Another example is stating that respondent was gathering evidence for an upcoming trial when respondent was actually gathering evidence for a habeas proceeding.

There were no exigent circumstances. The affidavit was not drafted in the midst and haste of a criminal investigation. Under Penal Code section 1534, respondent had 10 days after date of issuance to execute the warrant. Respondent had ample time to review the search warrant affidavit before or after the issuance of the search warrant. But instead, he intentionally chose not to do so.

An attorney has a duty never to seek to mislead a judge and “[a]cting otherwise constitutes moral turpitude and warrants discipline.” (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855.) Acts of moral turpitude include concealment as well as affirmative misrepresentations. (See *Grove v. State Bar* (1965) 63 Cal.2d 312; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266; and *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166.)

In conclusion, there is clear and convincing evidence that respondent committed acts of moral turpitude and dishonesty, in willful violation of section 6106, in presenting a false and misleading search warrant affidavit to the Colorado court through gross negligence and reckless disregard for the truth. (See *Franks v. Delaware* (1978) 438 U.S. 154 [To challenge the veracity of the factual statements in search warrant affidavits, defendant must make a substantial preliminary showing that material in an affidavit was either knowingly and intentionally false or made with reckless disregard for the truth by the affiant]; 4 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) *Illegally Obtained Evidence*, §107.) As a result of respondent's reckless disregard for the truth, Auguste and Hendricks successfully challenged the veracity of the factual statements in the six search warrant affidavits and Judge Emerson excluded evidence that

respondent obtained through those search warrants. In fact, Judge Emerson found the Colorado search warrant affidavit “exceptionally misleading and false.”

However, there is no clear and convincing evidence that respondent violated section 6106 regarding the other five search warrants in California. The affidavits went into great lengths setting forth the facts underlying Auguste’s and Hendricks’ 1998 convictions and indicating that the defendants had petitioned for a writ of habeas corpus. Respondent did not present false and misleading information to the California courts from which Wilson obtained the search warrants.

Count 4: Failure to Maintain Respect to the Courts (§ 6068, Subd. (b))

Section 6068, subdivision (b), provides that it is the duty of an attorney to maintain the respect due to the courts of justice and judicial officers.

“Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system.” (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403.)

After both parties presented their arguments at the July 18, 2003 in-chambers status conference regarding the propriety of search warrants, Judge Emerson told respondent that he was to go through his court exclusively for any further search warrants. In fact, Judge Emerson testified that he told respondent with respect to the search warrants, “ Ben just don’t do it.” At the end of the status conference, Judge Emerson was left with the impression that respondent would go through him exclusively for all future search warrants.

But despite the court’s directive, four days later, on July 22, 2003, respondent and his investigator had a Colorado judge allow the execution of a search warrant on Auguste’s aunt’s residence. Respondent did not present the search warrant request to Judge Emerson for Donna Auguste's residence and did not obtain permission from Judge Emerson to obtain or execute the search warrant.

Thus, there is clear and convincing evidence that respondent failed to maintain the respect due to the court by failing to comply with Judge Emerson's July 18, 2003 instruction regarding any future search warrants. By violating Judge Emerson's instruction to go through him exclusively for future search warrants, respondent's willful unexcused failure to comply constituted a violation of section 6068, subdivision (b).

Count 5: Moral Turpitude (Bus. & Prof. Code, § 6106)

The State Bar alleges that respondent, by disregarding the court orders in the manner that he did, respondent not only did not show respect for the court but that in doing so, he also committed acts of moral turpitude, dishonesty and corruption, in violation of section 6106.

Respondent represented to Judge Emerson that he would go through Judge Emerson's court for any future search warrants. Yet, within four days of such representation, respondent sought the issuance of a search warrant from a Colorado court without informing Judge Emerson.

Therefore, by representing to Judge Emerson that he would go exclusively through Judge Emerson and then intentionally violating that representation, respondent engaged in an act of dishonesty in willful violation of section 6106 in count 5.

Count 6: Failure to Comply With Laws (Bus. & Prof. Code, § 6068, Subd. (a))

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

The State Bar charges that respondent willfully violated section 6068, subdivision (a), by failing to comply with the requirements of *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady*, when he failed to disclose the statements Smith made at his interview and Smith's location immediately after respondent learned of that information.

Brady – Duty to Disclose Exculpatory Evidence

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. The obligation is on prosecution team, which includes investigative and prosecutorial personnel. (*In re Brown* (1998) 17 Cal.4th 873, 879.)

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).

The issue here is whether the *Brady* rule applies after the defendant has been convicted at trial. The Supreme Court, the Ninth Circuit Court of Appeals and the California Supreme Court suggest that the correct standard is that the *Brady* rule does not apply post judgment unless a court has issued an order to show cause that creates a post judgment proceeding in which the defendant’s conviction is in issue. Unless there is a post judgment proceeding in which the defendant’s conviction is challenged, the prosecutor’s duty to disclose exculpatory evidence is an

ethical duty, not a *Brady* rule. (See *Imbler v. Pachtman* (1976) 424 U.S. 409; *People v. Gonzalez* (1990) 51 Cal.3d 1179; *Thomas v. Goldsmith* (1992, CA9 AZ.) 979 F.2d 746; Pipes & Gagen, Jr., Cal. Criminal Discovery (4th ed. 2008) § 1:94.1, pp. 302-303.)

The court in *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179, generously applied the *Brady* rule and noted that “The duty of disclosure, however, does not end when the trial is over. ‘[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.’ [Citations.]”

Accordingly, in this post judgment proceeding where Auguste’s conviction was in issue, respondent had an ethical duty and a constitutional duty under *Brady* to disclose exculpatory evidence.

“We do not refer to the state’s past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding.” (*Thomas v. Goldsmith* (1992, CA9 AZ.) 979 F.2d 746, 749-750.)

Disclosure is required only of evidence that is both favorable to the defendant and material on either guilt or punishment. Evidence is favorable if it helps the defendant or hurts the prosecution, but it is material only if, considering the totality of the circumstances, there is a reasonable probability that, had the evidence been disclosed, the result would have been different. (See *In re Sassounian* (1995) 9 Cal.4th 535, 543; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §551.)

In *People v. Salazar* (2005) 35 Cal.4th 1031, 1042, the California Supreme Court characterized the *Brady* duty as extending “even to evidence known only to police investigators and not to the prosecutor.”

Therefore, in this matter, Smith's whereabouts and his statement that Monique was not raped are favorable evidence to Auguste and Hendricks and material in that had the evidence been disclosed, Auguste's and Hendricks's convictions would have been different. Smith's interview statements were exculpatory because they impeached Monique's claim that she was sexually assaulted. Smith's location was exculpatory because it provided the defense with access to Smith, who would provide evidence that impeached Monique's claim that she was sexually assaulted.

Thus, the postjudgment discovery by respondent of exculpatory evidence which respondent did not actually or constructively possess at the time of the defendants' trial constitutes a *Brady* violation because he failed to disclose the evidence in a habeas proceeding. The court, therefore, concludes that respondent willfully violated section 6068, subdivision (a), by failing to comply with the requirements of *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady*, when he failed to disclose Smith's location and statement regarding the victim's credibility.

Count 7: Moral Turpitude – Intentional Suppression of Evidence (Bus. & Prof. Code, § 6106)

The State Bar charges that respondent committed acts of moral turpitude by intentionally suppressing evidence that he knew or should have known he had an ethical duty to disclose, in willful violation of section 6106.

Respondent contends that he had no ethical obligation to disclose the evidence to the defense in a habeas proceeding and that the evidence did not come within the *Brady* rule. He further argues that attorney Gardner knew of Smith's whereabouts so he did not have to disclose it. The court rejects the arguments.

A violation of the *Brady* rule does not require that the prosecutor had acted in bad faith. The Supreme Court summarized the "no fault" principle of the *Brady* rule best in the *United*

States v. Agurs (1976) 427 U.S. 97, 110, where the Court stated: “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”

Moral turpitude has been described as “an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” (*In re Craig* (1938) 12 Cal.2d 93, 97.) It has been described as any crime or misconduct without excuse (*In re Hallinan* (1954) 43 Cal.2d 243, 251) or any dishonest or immoral act. Crimes which necessarily involve an intent to defraud, or dishonesty for personal gain, such as perjury (*In re Kristovich* (1976) 18 Cal.3d 468, 472); grand theft (*In re Basinger* (1988) 45 Cal.3d 1348, 1358); and embezzlement (*In re Ford* (1988) 44 Cal.3d 810) may establish moral turpitude. Although an evil intent is not necessary for moral turpitude, at least gross negligence of some level of guilty knowledge is required. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363.)

Here, there is clear and convincing evidence that respondent knew or should have known that he had an ethical duty to disclose Smith's witness statement and Smith's location to Auguste and Hendricks but intentionally failed to disclose the evidence. The discovery of such evidence should trigger his ethical obligation to disclose that evidence to the defense, so that the defense might utilize the evidence in the habeas matter on the grounds of newly-discovered evidence supporting the defendants' innocence. Yet, he intentionally suppressed the exculpatory evidence under *Brady*, which is favorable and material to the defense. In fact, respondent's suppression of evidence is not only a constitutional error, but it also goes to the heart of his honesty and integrity.

Therefore, respondent's intentional failure to reveal the evidence constitutes an act of moral turpitude and dishonesty in willful violation of section 6106.

Count 8: Suppression of Evidence (Rules of Prof. Conduct, Rule 5-220)

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.

The State Bar alleges that respondent, by failing to produce Smith's witness statement and the information regarding Smith's location, suppressed evidence that he had a legal obligation to produce in violation of rule 5-220. Recognizing that the charge is duplicative of counts 6 and 7, the State Bar indicates that rule 5-220 should only be considered if the court declines to find culpability under either count 6 or 7.

Accordingly, respondent willfully violated rule 5-220 by suppressing Smith's statement and whereabouts. However, because the same facts underlie both section 6068, subdivision (a), and rule 5-220 violations, it is not necessary to find him culpable of both violations. Therefore, the court hereby dismisses count 8 with prejudice. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

Count 9: Misrepresentations (Bus. & Prof. Code, § 6106)

The State Bar charges that respondent willfully violated section 6106 by making misrepresentations, by making misleading, incomplete and inaccurate statements to the court and by concealing material information from the court.

Respondent misled the court in his July 18, 2003 status conference brief, thereby committing an act of moral turpitude, by implying that the People had been unsuccessful in locating Smith, by concealing from the court that Wilson interviewed Smith in March 2003, by concealing from the court that respondent had requested Wilson to arrange for the execution of three search warrants involving Smith, and by concealing from the court that respondent had

obtained exculpatory evidence from Smith. In conclusion, respondent's misrepresentations to the court willfully violated section 6106.

Count 10: Misleading a Judge (Bus. & Prof. Code, § 6068, Subd. (d))

Section 6068, subdivision (d), prohibits an attorney from seeking to mislead the judge or any judicial officer by artifice or false statement of fact or law.

By clear and convincing evidence, respondent willfully violated section 6068, subdivision(d), by seeking to mislead the judge when he made repeated misrepresentations to the court in presenting Wilson's July 15, 2003 declaration and his July 18, 2003 status conference brief that he had been unsuccessful in locating Smith, by concealing from the court Smith's whereabouts when respondent learned that Auguste and Hendricks could not locate him, by concealing from the court that respondent had arranged for Smith to be interviewed by Wilson on March 2, 2003, by concealing from the court that respondent had requested Wilson to arrange for the issuance and execution of three search warrants involving Smith and by concealing from the court that respondent had obtained exculpatory evidence from Smith.

By making misrepresentations, respondent sought to mislead Judge Emerson by a false statement of fact in willful violation of section 6068, subdivision (d). However, as the misconduct underlying the violations of sections 6068, subdivision (d), and 6106 is the same, the court treats it as a single violation. (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221.)

Count 11: Failure to Maintain Respect to the Court (§ 6068, Subd. (b))

The State Bar alleges that by failing to disclose to the court that respondent knew the location of Smith, had obtained three search warrants for information relating to Smith, had interviewed Smith on March 2, 2003, and had a transcript of the March 2, 2003 interview, respondent failed to maintain the respect due the court and judicial officers.

Respondent should have disclosed that information to the court since Smith's whereabouts were discussed at the July 18, 2003 status conference and since respondent previously had informed the court he did not know of Smith's current location.

Respondent should have disclosed to the court the information he had regarding Smith since the court considered that information material and relevant to the issue of whether to continue the habeas hearing.

As in count 8, recognizing that the charge is duplicative of counts 9 and 10, the State Bar indicates that section 6068, subdivision (b), should only be considered if the court declines to find culpability under either count 9 or 10.

Accordingly, respondent willfully violated section 6068, subdivision (b). But because the same facts underlie sections 6106 and 6068, subdivisions (b) and (d), violations, the court considers them as a single violation, as discussed in count 10.

C. The Ballard Matter

1. Who Shot and Killed Giardino?

On September 18, 2002, Bernard Ballard, Jaime Barrientos and Alfred Martinez (the defendants), each wearing masks and carrying guns, drove to the apartment of William Giardino (Giardino), a methamphetamine dealer known to maintain large amounts of cash, to steal Giardino's drugs and money. Angel Farfan (Farfan) and Crystle Lucchesi (Lucchesi) were in the apartment at the time the defendants arrived.

When the defendants entered the apartment, one of them shot and killed Giardino. After the defendants left the apartment, Farfan called 911 and instructed Lucchesi to dispose of the methamphetamine supplies. Farfan moved Giardino out of the apartment before the police arrived. Lucchesi fled before the police arrived because she had an outstanding warrant. When the police arrived, Giardino was dead.

During the first few months of the investigation, police questioned Farfan and Lucchesi on several occasions. They claimed they were unable to make positive identifications of the intruders because of the masks. Eventually, the three defendants were arrested. On November 14, 2002, a criminal complaint was filed.

Respondent was assigned to prosecute the matter. The complaint⁸ alleged violations of Penal Code sections 187 (murder) and 211/212.5, subdivision (a) (robbery) and that Ballard personally used a firearm (Pen. Code, § 12022.53, subd. (b)⁹) and that Barrientos personally used a deadly and dangerous weapon, a flashlight (Pen. Code, § 12022, subd. (b)(1)).

The defendants confessed their roles to the police, their friends and associates. The evidence as to who actually shot Giardino was conflicting, each pointing fingers at the other. Talton Johnson, Ballard's roommate, stated that Barrientos told him that Martinez was the shooter. Mary Palmer, Barrientos' girlfriend, said that Barrientos told her that Ballard was the shooter. Barrientos told the police that Ballard was the shooter. Ballard told the police that Martinez was the shooter. Martinez told the police that Ballard was the shooter. Lucchesi could not identify who the shooter was. Farfan stated that the shooter was African-American.¹⁰

2. February 11, 2003 Martinez Interview and Respondent's Concealment

In January 2003, Martinez's counsel, Charlie Gillan (Gillan), contacted respondent to tell him that Martinez wanted to talk to him about the case. In late January 2003, respondent entered into a written agreement wherein respondent agreed that his investigating officer would

⁸ The complaint is what one goes to a preliminary hearing on. After the preliminary hearing is held, the judge holds the defendant to answer on the charges proved at the preliminary hearing. Then a formal information is filed and the defendant goes to trial on the charges in the information.

⁹ Personal use of a firearm is a ten-year sentence enhancement under Penal Code section 12022.53, subdivision (b).

¹⁰ Ballard is African American and Barrientos and Martinez are Latinos.

interview Martinez in the presence of Gillan, that the investigating officers may conduct follow-up investigation based on information provided by Martinez, and that nothing said by Martinez during the interview would be used at trial by either party without further agreement between the parties.

On February 11, 2003, respondent and San Jose police detectives Jeff Oumet and Craig Johnson interviewed Martinez at the county jail. Respondent was aware that the interview, which lasted a couple of hours, was recorded digitally and in the form of the detectives' notes.

During the interview, Martinez implicated various parties' involvement in the killing and robbery of Giardino. He provided important new information, including, but not limited to the following: (1) Farfan was in fact a party to the robbery plan – the "inside man" who was there to make sure that Giardino was at home and that the drugs and money would be at a specific location when the robbers arrived; (2) Johnson had provided the defendants with one of the guns just before they went to Giardino's apartment, was upset that his gun was involved in the shooting, which was not part of the plan, and demanded \$100 from Martinez and Ballard as punishment for allowing his gun to be involved in a shooting rather than only a robbery; (3) Lucchesi was the one who removed the drugs and money from Giardino's apartment; (4) Lucchesi was pregnant with Martinez's baby at the time of the murder; and (5) Farfan was involved because he was in serious debt and needed the money and both Martinez and Farfan knew there was a substantial amount of money in Giardino's apartment as a result of Giardino's successful drug dealing business.

Despite this new, significant information, respondent intentionally did not disclose the interview to the defense either before the May 2003 preliminary hearing or before the initial July 2003 scheduled trial.

3. *May 2003 Preliminary Hearing*

The defendants' preliminary hearing was set for May 5 and May 6, 2003. On May 5, 2003, Martinez entered into a plea deal and was sentenced to 35 years to life. On May 5 and 6, 2003, the court conducted a preliminary hearing for charges pending against the remaining two defendants, Ballard and Barrientos.

At the preliminary hearing, respondent called Farfan, Lucchesi and Johnson to testify as witnesses. But he kept the Martinez interview to himself. Respondent knew that Lucchesi and Farfan would testify that they were unaware that anyone was going to rob Giardino, that they were extremely frightened by the sudden arrival of the robbers, that they did not know who the robbers were and that the robbers took money from a hall closet. He did not attempt to impeach the credibility of the witnesses or to determine the veracity of the interview statements.

Respondent did not ask Farfan about his prior knowledge of the plan or his role in the murder. He did not ask Lucchesi about her relationship with Martinez or about her involvement in removing drugs and cash from Giardino's apartment. And respondent did not ask Johnson any questions about his prior knowledge of the plan or his role in providing one of the weapons.

At the preliminary hearing, Farfan also testified that the intruder who shot Giardino was African American. Since Ballard was the only African American, Farfan's testimony was the only eyewitness testimony linking Ballard as the shooter.

Later, Ballard and Barrientos were held to answer the charges of homicide, residential robbery and a 10-year sentence enhancement for use of a firearm. However, at the arraignment on the information, respondent added an additional enhancement of 25 years to life to the charges against Ballard for discharge of a firearm causing great bodily injury or death. The enhancement charge was based upon Farfan's preliminary hearing testimony that Ballard was the shooter.

On June 12, 2003, Ballard's counsel, Christine Mattison (Mattison), filed a motion to dismiss on the grounds that the evidence presented at the preliminary hearing was not sufficient to justify the additional 25 years to life sentence enhancement. At the time the motion was made, Ballard's counsel was unaware of the Martinez interview.

4. *Scheduled Trial July 7, 2003*

On May 19, 2003, the court set the matter for trial on July 7, 2003. Thereafter, the trial was continued to August 18, 2003, and then to March 2004.

In preparation for the July trial, respondent requested that Martinez be transferred from San Quentin to the county jail so that Martinez could testify at the trial. In support of the motion, respondent signed a declaration, stating that he intended to call Martinez as a witness at the trial of Ballard and Barrientos. Respondent stated under penalty of perjury: "I intend to call Alfred Martinez [CDC No. P089312] as a witness at trial in this matter. The case is set for trial on July 7, 2003."

On June 19, 2003, in response to respondent's request, the court issued an order to produce Martinez not later than June 30, 2003. Martinez was then brought to the county jail. When Barrientos' counsel, Geoff Braun (Braun), learned from Barrientos that Martinez was in county jail, Braun surmised that Martinez was going to be called as a witness at the trial. On July 30, 2003, Braun interviewed Martinez. But Martinez did not tell him about the existence of his agreement to be interviewed by the investigating officers or his subsequent February 2003 interview.

On or about July 7, 2003, the court continued the trial to August 18, 2003.

5. *Defense Discovery of the Martinez Interview*

Up until now, neither Ballard nor Barrientos or their defense counsel knew about the Martinez interview. A week before the August 18, 2003 trial, attorney Mattison received a call

from the jail informing her that Martinez wanted to speak with her.¹¹ Mattison met with Martinez because he was identified by respondent as a prosecution witness. When she met with Martinez, he expressed his unhappiness with being brought to the county jail to be a witness in the upcoming August 18 trial. He told Mattison that he had had a meeting with respondent and the investigating officers and that he had told everybody everything about the case so he saw no reason why he should be called as a witness.

Martinez further informed Mattison that he had previously told respondent about Farfan and Johnson's involvement in the murder and Lucchesi's knowledge about what happened to the drugs and money that were in the apartment. When she learned of this interview for the first time, she immediately called respondent.

On August 16, 2003, respondent then informed Mattison that he had a digital recording of his interview with Martinez. Prior to being contacted by Mattison, respondent had no intention of disclosing the February 11, 2003 interview to Ballard or Barrientos.

The digital recording did not include the entire interview because, according to respondent, the recording equipment malfunctioned. Although the interview lasted approximately two hours, the digital recording only contained 25 minutes of the interview. According to Mattison, one of the reasons the Ballard and Barrientos case was continued was so that they could evaluate the information Martinez had provided respondent during the February 11, 2003 interview. On the other hand, Braun thought that prior to August 18, the parties realized that the trial would have to be rescheduled due to Barrientos' deteriorating mental health.

¹¹ She testified that she could not remember who called her but she was made aware that Martinez wanted to speak with her.

6. *Blatant Discovery Violation*

On September 15, 2003, Ballard filed a motion to dismiss under Penal Code section 995 and assignment of prosecutorial misconduct. On or about January 20, 2004, Barrientos also filed a notice of non-statutory motion to dismiss under Penal Code section 995. Both defendants argued that the case against them should be dismissed because respondent failed to provide the defense with Martinez's February 11, 2003 interview recording and detectives' notes prior to the preliminary hearing.

At the February 11, 2004 dismissal hearing, Judge Hugh F. Mullin III held that the Martinez interview was exculpatory evidence. The court reasoned that the only evidence that could link Ballard as the shooter was Farfan's observation. In light of the statements contained in the February 11, 2003 interview, Judge Mullin concluded that there was conflicting evidence and possible witness bias, that it was "nearly impossible" to determine who the shooter was and that respondent should have disclosed the interview sua sponte. The court also concluded that respondent's discovery violation was "blatant" and that respondent failed to "properly" and "timely" notify the defense of the February 11, 2003 interview.

As a result of respondent's discovery violation, the court dismissed the sentence enhancement of 25 years to life for discharge of a firearm causing great bodily injury or death that respondent filed against Ballard.

Count 12: Failure to Comply With Laws (Bus. & Prof. Code, § 6068, Subd. (a))

The State Bar alleges that respondent failed to support the laws of the United States and of California by violating *Brady* and subsequent cases interpreting *Brady* and by violating California Penal Code sections 1054.1, subdivisions (b), (e) and (f), and Penal Code section 1054.7 when he failed to timely disclose the Martinez February 11, 2003 interview to the defense.

The court agrees.

a. Defendants' Due Process Right to a Fair Trial

1. Brady Rule

As previously discussed in the Auguste matter, *Brady v. Maryland, supra*, 373 U.S. 83 and subsequent cases interpreting *Brady* require prosecutors to disclose to the defense all exculpatory evidence. In *United States v. Bagley* (1985) 473 U.S. 667, 676 the Supreme Court found that impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is favorable because it hurts the prosecution by impeaching one of its witnesses.

The California Supreme Court adopted the same reasoning in *People v. Pensinger* (1991) 52 Cal.3d 1210, stating that the duty to disclose evidence favorable to the accused extends to the disclosure of evidence relating to the credibility of witnesses. Furthermore, evidence that supports a defendant's motion becomes *Brady* evidence if the granting of the defendant's motion would weaken the prosecution's case against the defendant or reduce his or her punishment exposure. (*United States v. Gamez-Orduno* (9th Cir. 2000) 235 F.3d 453.)

Because the requirements of *Brady* are based on defendant's due process right to a fair trial (*Weatherford v. Bursey* (1977) U.S. 545, 559), the beginning date of a defendant's trial would appear to be the date that the prosecution must normally disclose *Brady* evidence that the prosecution possesses prior to trial. The federal circuit courts of appeal have adopted a general rule that *Brady* evidence must be disclosed to a defendant in "time for its effective use at trial." Although the California courts have not engaged in a lengthy discussion of the timing standard for disclosure of exculpatory evidence under *Brady*, the California Supreme Court continues to follow the same rule of timing that has been applied in the federal circuit courts. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1161.)

2. California Criminal Discovery Law

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

California Penal Code section 1054.1, subdivision (b), requires the prosecutor to disclose to the defendant the statements of all defendants. California Penal Code section 1054.1, subdivision (e), requires the prosecutor to disclose to the defendant any exculpatory evidence 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. California Penal Code section 1054.1, subdivision (f), requires the prosecutor to disclose to the defendant relevant written statements of witnesses whom the prosecutor intends to call at trial if it is in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of investigating agencies. Finally, California Penal Code section 1054.7 requires, with certain inapplicable exceptions, that the prosecutor to make the disclosures required by Penal Code section 1054.1 at least 30 days prior to trial.

b. Duty to Disclose the Martinez Interview Before the Preliminary Hearing

Under California law, a preliminary hearing is a critical stage in a California criminal prosecution. Its function is to determine whether the evidence justifies charging the suspect with an offense. A finding of no probable cause could mean that the suspect would not be tried at all.

While a preliminary hearing is not a trial, it is one of the means by which the accused can confront witnesses who will be used at a later trial. In this matter, respondent's failure to disclose the Martinez statement prior to the preliminary hearing prevented attorney Mattison from using the disclosed material effectively in her motion to dismiss the additional enhancement of 25 years to life and in preparing for Ballard's trial on the enhancement. Mattison testified that if she had been given Martinez's February 2003 statement, she would have been able to impeach the credibility of Farfan and Lucchesi. At the preliminary hearing,

respondent presented Farfan and Lucchesi as innocent, shocked and terrorized bystanders when it was clear from Martinez's statement that they were insiders and a part of the robbery scheme.

Therefore, respondent's failure to disclose the Martinez interview at the preliminary hearing violated his duty to release *Brady* material to the defense.

c. Duty to Disclose the Martinez Interview Before Trial

On May 19, 2003, the Ballard/Barrientos matter was set for trial on July 7, 2003. This initial trial date triggered a statutory duty under Penal Code section 1054.1, subdivisions (a), (e) and (f)¹² and section 1054.7 to disclose all exculpatory evidence by June 7, 2003. Respondent was therefore obligated under Penal Code section 1054.1, subdivision (f), to disclose the Martinez interview to all defendants. Since the trial was scheduled to occur in less than 30 days, respondent was required by Penal Code section 1054.7 to disclose the Martinez statement immediately to all defendants. Still respondent did not disclose Martinez's statement.

Attorney Mattison testified that when the July 7, 2003 trial date was continued, all the parties agreed that the new trial date would be August 18, 2003. Furthermore, if there was going to be a problem with that trial date, the represented parties would have notified the master calendar court on August 13, 2003.¹³ On August 13, 2003, all parties indicated that they were ready to proceed to trial on August 18, 2003.¹⁴ Until Martinez told her about his statement

¹² The court has left out Penal Code section 1054.1, subdivision (b) because at the time, Martinez was not a defendant in the case as he had already pled.

¹³ It is the custom of the Santa Clara Superior Court that all Monday schedule trials meet on the prior Wednesday to discuss problems that might prevent a case from going to trial on the following Monday.

¹⁴ Mattison did testify that Braun had given some indication that he might have asked for a continuance based on Penal Code section 1368 (incompetence of defendant) and that all counsel rolled their eyes. In any event, it was not until September 15, 2003, that Braun filed a motion for continuance based on Penal Code section 1368 and Evidence Code section 1017.

which was confirmed by respondent on August 16, 2003, Mattison fully expected to go to trial on August 18, 2003.

On July 7, 2003, all counsel agreed that the matter would be set for trial on August 18, 2003. This second trial setting triggered an additional statutory duty under Penal Code section 1054.1 to disclose the Martinez statement. And, under Penal Code section 1054.7, the disclosure deadline expired on July 19, 2003.

d. Respondent's Arguments

Respondent argues, among other things, that he did not comply with Penal Code section 1054.7 because he knew that July 7 was not a “real” trial date and that everyone understood it was not a “real” trial date. Nevertheless, he was preparing for the July 7, 2003 trial, by transferring Martinez to the county jail, because respondent said it was the policy of the Santa Clara District Attorney’s office to be ready for trial.

Respondent testified that, as an experienced homicide prosecutor, he knew that the Ballard case was not going to trial in July or August for a number of reasons. One reason was that the defense had waived time and that in Santa Clara County, time-waived homicide cases were on the calendar for many months before the actual case went to trial.

Another reason was that he was aware that attorney Braun was going to file a motion for continuance under Penal Code section 1050, subdivision (b) on behalf of Barrientos.¹⁵ However, this motion for continuance was not filed until September 13, 2003. Braun stated that it was not until August 27, 2003, that he noticed Barrientos’ deteriorating condition.

And a final reason was that on August 22, 2003, Braun filed a response to the City of San Jose’s motion to quash his subpoenas which would indicate that that in late August 2003, Braun,

¹⁵ The basis of the continuance motion was that his client was so significantly depressed that he was unable to go to trial and that if his condition did not improve he was going to have to ask the court to commence proceedings under Penal Code section 1368.

as an experienced defense attorney, was not going to litigate subpoenas for a case that might have been tried in July or August. However, this court has no idea of when the subpoenas were served and the motion itself was an in limine trial motion.

Respondent contends that the California Penal Code requires the prosecution to provide disclosure of information and evidence of which is mandated by statutes to be made no later than 30 days prior to the trial of the case. Therefore, according to respondent, he did provide the Martinez interview to defense counsel more than six months before the third scheduled trial date in March 2004.

Respondent once again claims that the August 18, 2003 trial date was also not a real trial setting. He argues that his failure to give the defense Martinez's statements until August 16, 2003, six months after they were made and two days before the second trial setting date, was not a violation of *Brady* because the requirements of *Brady* are based on a defendant's due process right to a fair trial and as such, the beginning date of defendant's trial is the latest date that prosecution would have to disclose *Brady* material. The jury trial began in early March 2004. Respondent, therefore, contends that the defense had the *Brady* material at least six months before the trial was to begin after being reset on August 18, 2003.

e. Respondent Failed to Comply With Laws

The court rejects respondent's arguments. Penal Code section 1054.7 requires that discovery be provided 30 days before the first trial date, July 7, 2003. Penal Code section 1054.7 cannot be allowed to read that the prosecutor determines which trial date is real and which trial date is illusory. Respondent's interpretation would only create a chaos in terms of criminal discovery. The statute must be interpreted to mean that lawyers must comply with the statute 30 days before the date set for trial.

The Santa Clara County Superior Court rejected respondent's arguments and held that Martinez's February 11, 2003 interview was exculpatory *Brady* material that should have been disclosed by respondent sua sponte prior to the preliminary hearing. And that as a result, Ballard was denied a substantial right to put on a defense that resulted in prejudice and to the extent that he did suffer it, the 25 year gun-use-enhancement was dismissed on February 11, 2004. As the Santa Clara County Superior Court rejected respondent's arguments, so does this court.

Moreover, the court finds respondent's other contentions unmeritorious (i.e., respondent must protect Martinez's safety and the defense already knew). There was no special provision made for Martinez's safety while he was housed in the county jail. The California Supreme Court pointed out that "'however praiseworthy was the prosecution's motive in protecting the informer from the threat of reprisal,' we could not be indifferent to the resulting denial of the defendant's substantial rights, and those 'motives and purposes cannot prevail when, as here, they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial. [*People v. Kiihoa* (1960) 53 Cal.2d 748, 754.]'" (*In re Ferguson* (1971) 5 Cal.3d 525, 532.)

In conclusion, this court finds that respondent violated *Brady* and subsequent cases interpreting *Brady* by failing to disclose the February 11, 2003 Martinez interview prior to the preliminary hearing.

Furthermore, the court finds that respondent failed to support the laws of California by violating Penal Code sections 1054.1, subdivisions (b), (e) and (f), and 1054.7 before the first July 2003 trial date when he failed to disclose the Martinez February 11, 2003 interview by at least June 19, 2003, when the court issued its order to produce in-custody inmate. Thus, respondent willfully violated section 6068, subdivision (a).

Count 13: Suppression of Evidence (Bus. & Prof. Code §6106)

The State Bar charges that respondent committed acts of moral turpitude by intentionally suppressing evidence that he knew or should have known he had a legal obligation to disclose the Martinez interview to Ballard and Barrientos, in willful violation of section 6106.

Respondent argues, among other things, that under *Brady* he had no legal duty to disclose the Martinez statement because at the time he thought it was inculpatory and *Brady* only requires disclosure of exculpatory statements. In other words, that respondent claims an innocent misinterpretation of *Brady* cannot be the basis of a finding of moral turpitude.

The court finds respondent's interpretation unreasonable, particularly for such an experienced deputy district attorney. He knew or should have known that he was obligated to reveal the exculpatory evidence on at least three different junctures of the proceedings – preliminary hearing and 30 days before the July 7 and August 18 trial settings. Yet, he never volunteered to disclose such important evidence to the defense. Instead, both attorneys Mattison and Braun had to discover the evidence on their own. They then confronted respondent regarding the exculpatory evidence.

Therefore, by clear and convincing evidence, respondent willfully violated section 6106, by intentionally suppressing exculpatory evidence, an act involving moral turpitude and dishonesty.

Count 14: Suppression of Evidence (Rules of Prof. Conduct, Rule 5-220)

The State Bar alleges that respondent, by failing to produce the February 11, 2003 witness statement to the defense, suppressed evidence that he had a legal obligation to produce in violation of rule 5-220. As discussed previously, the State Bar indicates that rule 5-220 should only be considered if the court declines to find culpability under either count 12 or 13 because the charge is duplicative.

Accordingly, respondent willfully violated rule 5-220 by suppressing the Martinez interview. Because the same facts underlie sections 6068, subdivision (a), and 6106 and rule 5-220 violations, it is not necessary to find him culpable of all violations. Therefore, the court dismisses count 14 with prejudice.

D. The Minor A. Matter

1. Minor A.'s Age

Minor A. was accused of sexual assault and claimed to be 13 years old. In April 1995, respondent was assigned to prosecute Minor A. Judge Socrates Peter Manoukian was the assigned judge. Respondent believed that Minor A. was older than 13. But, based on conversations with Minor A.'s mother and a birth certificate, Minor A.'s attorney, deputy public defender Jaime A. Leanos (Leanos), reasonably believed that the defendant was 13½ years old.

If respondent could prove that Minor A. was at least 16, then respondent could petition the court under Welfare and Institutions Code section 707(a) for a finding that the defendant was unfit for juvenile court, and have the case transferred from the juvenile court to another court, where Minor A. would be treated as an adult. This petition is referred to as "filing fitness."

Welfare and Institutions Code section 608 states:

“In any case in which a person is alleged to be a person described in Section 601 or 602, or subdivision (a) of Section 604, and the age of the person is at issue and the court finds that a scientific or medical test would be of assistance in determining the age of the person, the court may consider ordering an examination of the minor using the method described in ‘The Permanent Mandibular Third Molar from the Journal of Forensic Odonto-Stomatology.’”

2. Respondent's Request for Minor A.'s Dental Exam — Denied

Before April 18, 1995, respondent discussed with his supervisor, who is now Judge Kurt Kumli (Kumli), regarding his concern that Minor A. was not really a minor. Kumli did not believe that a court order was necessary to obtain a dental exam. In fact, in Santa Clara County, it was the practice that if the juvenile probation department had a concern about a prisoner's age,

the department would conduct the permanent mandibular third molar test without prior court approval. Respondent agreed with Kumli but decided that the better course of action was to seek court permission.

At the pretrial hearing on April 18, 1995, Commissioner Pro Tem Al Fabris was assigned to the matter that day. Respondent expressed his concern about the age of the defendant and asked the court's permission to have the juvenile probation department conduct the dental test.

The court denied his request, stating in its minute order:

“Determination is whether minor is 13 or 16 years old. D.A. requests 3d molar mandibular test. Denied. D.A. may file papers in that regard. Original birth certificate proffered by mother.”

Moreover, Leanos testified that after Commissioner Fabris denied respondent's request for the test, the court specifically told respondent to file papers if he wanted to conduct the dental test. The court set a pre-trial conference for April 27, 1995, for the purpose of hearing respondent's motion for a mandibular third molar examination.

On April 24, 1995, Leanos and respondent had an informal meeting with Judge Manoukian. Judge Manoukian recalls that respondent wanted the test but Leanos did not. Judge Manoukian was aware that with respect to the mandibular third molar test, reliability was an issue. Judge Manoukian was fairly clear that he told respondent that he had to make a motion to give the test. There is no record one way or the other of that April 24 informal meeting.

3. *Subjecting Minor A. to a Dental Exam Without a Court Order*

Yet, despite the court's denial of his request, sometime between April 18 and April 27, 1995, respondent instructed the juvenile probation department to arrange a dental exam for Minor A. He never filed any papers requesting an order for a mandibular third molar test nor did he obtain a court order. Sometime before April 27, 1995, the juvenile probation department

subjected Minor A. to a dental exam. According to respondent, the result of the dental exam indicated that Minor A. was between 16 and 19 years old.

On April 27, 1995, deputy public defender Gregory C. Paraskou (special appearance for Leanos) and respondent appeared before Judge Raymond J. Davilla. Respondent moved to amend the petition to state that Minor A.'s age was 16 so that he could file fitness papers. Deputy public defender Paraskou objected because he understood that the court had ordered respondent to file papers before he could undertake a dental examination of Minor A. Respondent, on the other hand, argued that, based on his understanding of the April 24 informal meeting with Judge Manoukian, he thought that Judge Manoukian had said there was nothing in the law that prevented him from going ahead and having the examination done. Respondent also argued that the only requirement was that he, as a prosecutor, determines the minor's age and after the determination, amends the petition. Judge Davilla decided to continue the case to May 1, so that Judge Manoukian and Leanos could hear the motion to amend.

On May 1, 1995, respondent made a motion to amend the petition to allege what he thought was Minor A.'s correct age so that he could charge the defendant as an adult.¹⁶ Judge Manoukian denied the motion but allowed him to file the fitness papers and told respondent to raise the issue of the minor's age at a hearing prior to the commencement of the jurisdictional hearing.

4. May 4, 1995 Jurisdictional Hearing

On May 4, 1995, during the jurisdictional hearing, Judge Manoukian stated that he never issued an order permitting the dental exam and never authorized respondent to obtain the dental exam. Judge Manoukian further stated that during their discussion on April 24, he "invited

¹⁶ Respondent said Minor A. was at least 16 and that he had a letter from the examining doctor who did the mandibular third molar test.

[respondent] to go ahead and file papers." The court also stated that it was concerned because there was a lawful order of the court that required respondent to file papers requesting a dental exam, respondent failed to file the papers and thereafter "obtained [the dental exam] without a colorable reason for doing so."

At the hearing, Minor A.'s mother sworn and stated that she was 27 years old. The court found that Minor A. was 13 ½ according to the evidence.

Consequently, Judge Manoukian suppressed the dental exam because of respondent's violation of a court order that required him to file a motion and obtain a court order in order to obtain a dental exam. The court found that the result of the dental exam was illegally obtained evidence.

Respondent requested a stay of the jurisdictional hearing on the grounds that the court's ruling prevented the prosecution from presenting evidence of the minor's age. The court responded that it was not the court, but respondent's conduct that prevented the court from considering the dental exam. Thereafter, the court dismissed the matter without prejudice because respondent was unprepared to present evidence.

Count 15: Failure to Obey A Court Order (Bus. & Prof. Code § 6103)

Respondent is charged in count 15 with a violation of section 6103, by willfully disobeying or violating an order of the court requiring him to do or forbear an act connected with or in the course of respondent's profession which he ought in good faith do or forebear.

Commissioner Pro Tem Al Fabris clearly denied respondent's request for the dental test and wrote: "D.A. may file papers in that regard." Refusing to acknowledge the court order and determined to prove that Minor A. was older than 13, respondent arranged for the juvenile probation department to subject Minor A. to a dental exam without filing papers and without obtaining a court order. As a result, Judge Manoukian had to suppress the dental exam as

illegally obtained evidence and dismiss the matter without prejudice. Therefore, by clear and convincing evidence, respondent violated the court's April 18, 1995 order, in willful violation of section 6103.

Count 16: Failure to Comply With Laws (Bus. & Prof. Code, § 6068, Subd. (a))

The State Bar charges that respondent willfully violated section 6068, subdivision (a), by failing to comply with Welfare and Institutions Code section 608.

Respondent argues that a court order is permissive and not mandatory.

Where the age of a person is at issue and the court finds that a scientific or medical test would help determine the person's age, it may order an examination of the minor using the permanent mandibular third molar method described in the Journal of Forensic Odonto-Stomatology. (Welf. & Inst. Code, §608.) The burden of proof is on the party seeking to establish the existence of minority. (10 Witkin, Cal. Law (10th ed. 2005) Parent and Child, § 741, pp. 926-927; *People v. Quiroz* (2007) 155 Cal.App.4th 1420.) Here, the court found that Minor A. was 13½ based on the evidence that the mother was 27 and a birth certificate.

Welfare and Institutions Code section 608 provided that if the age is an issue and a medical examination would be helpful, then it is within the court's discretion to order such an exam. The law does not provide that a prosecutor may on his or her own determine that such an exam would be helpful to determine the medical exam and therefore, could ask the juvenile probation department to perform the test without a court order. In fact, Judge Manoukian was surprised that respondent misinterpreted Welfare and Institutions Code 608.¹⁷ As Judge Manoukian stated:

¹⁷ Whether the Santa Clara County D.A.'s Office can loosely interpret Welfare and Institutions Code 608 and adopt a general practice in juvenile proceedings whereby the prosecutor can easily obtain a minor's dental examination without a court order is an issue of concern to this court. Contrary to public policy, the administration of justice and the constitutional rights of minors, such a practice circumvents and defies Welfare and Institutions

“It says here ‘the court may order,’ how you construe that to be -- the DA may do it on the DA’s own volition.”

The dental exam is indeed intrusive. Without a court order, it violates the minor’s constitutional rights against unreasonable searches and seizures. If respondent truly suspected that Minor A. was 16 or older, even though the common sense evidence goes against his suspicion, he clearly should have sought a court order. In fact, Minor A.’s mother stated that she was 27 and proffered the minor’s birth certificate as evidence.

Respondent willfully violated section 6068, subdivision (a), by failing to comply with Welfare and Institutions Code section 608.

Because the court has the discretionary power, not the prosecutor, to decide on such an examination, respondent’s failure to seek a court order and obtained a dental exam on Minor A. without a court order violates the law.

By obtaining a dental exam on Minor A. without a court order, respondent violated Welfare and Institutions Code section 608. By violating the California code, respondent willfully failed to support the laws of this state, in violation of section 6068, subdivision (a).

Count 17: Failure to Maintain Respect to the Courts (Bus. & Prof. Code § 6068, Subd. (b))

Respondent is culpable, by clear and convincing evidence, of the charged violation of section 6068, subdivision (b). Respondent failed to maintain the respect due to the courts of justice and judicial officers when he obtained the dental examination without first filing papers and obtaining a favorable ruling—in accordance with the directions he had received from the court.

Code 608. Nevertheless, this is not the court to determine the constitutionality of the general practice of the D.A.’s Office.

SECOND NOTICE OF DISCIPLINARY CHARGES

E. The Shazier Matter

In 1994, Dariel Shazier (Shazier) pled guilty to multiple acts of sexual misconduct, and was sentenced to state prison for 17 years 8 months. In April 2003, the Santa Clara County District Attorney filed a petition to commit defendant as a sexually violent predator (SVP) pursuant to Welfare and Institutions Code section 6600 et seq., under Santa Clara Court Docket No. 210813 (the *Shazier* matter).

Respondent was at all times the assigned deputy district attorney of record in the *Shazier* matter.

On August 7, 2003, the Santa Clara County Superior Court ruled that probable cause existed to believe that Shazier would qualify as a SVP, and set the matter for jury trial on or about June 1, 2004. Shazier was sent to Atascadero State Hospital pending trial. The first trial in the *Shazier* matter began on or about November 16, 2004, when motions in limine were heard. At that time, the court granted Shazier's motion for an order that witnesses be prohibited from telling the jury what would happen to Shazier if the petition were found to be true. The text of the limine motion was as follows:

"The doctors who testify on behalf of the Petitioner are not to tell the jury what would happen to Mr. Shazier if the jurors found the petition true. The doctors are prohibited from telling the jurors that Mr. Shazier would not go to prison, but would go to a hospital and receive treatment. (**People v. Rains** (1999) 75 Cal.App.4th 1165, 1169). Such evidence is not relevant (**Id.** at p. 1170)." (Bolding original.)

In December 2004, the first jury trial ended in a mistrial because of a hung jury.

The *Shazier* matter was set for retrial to begin on March 14, 2005, and Shazier was ordered confined to Atascadero pending the second trial. Prior to the commencement of the *Shazier* re-trial, counsel for Shazier filed an in limine motion seeking an order precluding both

respondent and his witnesses from telling the jury what would happen to Shazier if he were found to be a sexually violent predator. The text of the motion was as follows:

"Neither Petitioner, nor the doctors who testify on behalf of Petitioner are to tell the jury what would happen to Mr. Shazier if the jurors find the petition true. Respondent requests that they be prohibited from telling the jurors that Mr. Shazier would not go to prison, but would go to a hospital and receive treatment and no mention should be made of the right to have another trial after two years. (**People v. Rains** (1999) 75 Cal.App.4th 1165, 1169.) Such evidence is not relevant. (**Id.** at p. 1170). **Further, Respondent requests that Petitioner be ordered to admonish his witnesses as to the court's order on this issue.**"

On the first day of the retrial, the court granted the motion, stating:

"With regard to the motions in limine, I have had a chance to review Mr. Shazier's motions, they are largely parallel and very similar to the motions brought for the trial in December. I am going to call that for purposes of our discussion here the prior trial, and there are a few additional motions by Mr. Shazier. But with regard to those that are the same as last time, the Court is going to adopt all the previous rulings from the prior trial, Mr. Shazier. On each of those motions that will be the ruling unless I indicate otherwise."

Respondent did not object to the motion or the order and further stated on the record that both his motions and respondent's motion were going to be adopted from the last trial and he need no further clarification.

The *Shazier* retrial lasted from on or about March 14, 2005 to on or about March 29, 2005. During the rebuttal closing argument, respondent told the jury:

"[Y]ou're not supposed to let penalty or punishment factor into your decision. You're not supposed to let the consequences of your decision factor into your decision.

"And that's a difficult thing to do. But you should all do it, and let me tell you one reason why. And that is that if you do speculate about the consequences of your decision, you're probably going to guess wrong. *And I'm not trying to insult anybody here, but let me just tell you it's best if you don't speculate about what the consequences will be, and then you can ask afterwards. We can talk about it afterwards. It's no secret.*

"But as far as doing your job as jurors what you're supposed to do is simply decide the questions that you're asked about whether or not the respondent fits the requirements of the SVP or sexually violent predator, and you shouldn't consider penalty or punishment.

"The defense has had some testimony about how difficult a place Atascadero State Hospital is. It's a stressful environment, that sort of thing. And that testimony is intended at least in part to make you think sympathetically toward the [defendant].

"One of the jury instructions tells *you* that you're supposed to set aside any passion or prejudice or any sympathy. And I'm not asking you to sympathize with the victims here. That would be wrong. *And I'm saying also that you should not make a decision based on what you think it's going to be like for the [defendant] in Atascadero State Hospital.* That's not for you.

"The best thing for you, the jury, to do is to make the decision that you've been asked to make on the basis of the facts and the law, and you shouldn't feel badly about doing that. That's the job you've been asked to do. It's a difficult job. It's enough to do that, and it's not on you to consider the consequences of what happens."

After respondent made the argument set forth above, Shazier's counsel objected and moved for a mistrial on the ground that respondent had violated the court's order that there be no mention of the consequences in the case. The trial court denied the request for a mistrial.

However, the court did state:

"Part of the phrase in one of your arguments was that you didn't want the jury to – not to think what it's going to be like for the respondent at Atascadero, which seems to suggest that he's going to Atascadero.

"There were other comments during the argument where you told them don't speculate as to what was going to happen. You told them they were probably going to be wrong if they did speculate, and you told them you would tell them later, it was no big secret. I don't ever want to hear those comments again. I can't think of a reason why the jury needs to hear those. I don't think they are useful, and I think they're on dangerous ground."

At the conclusion of the trial, the jury found true that Shazier was a SVP within the meaning of Welfare and Institutions Code section 6600. Accordingly, Shazier was committed to the Department of Mental Health for two years, commencing in March 2005.

In March 2005, Shazier appealed the judgment of commitment to the Sixth District Court of Appeal. In its opinion filed May 8, 2006, the Court of Appeal reversed the *Shazier* judgment based on prosecutorial misconduct committed by respondent. The appellate court found respondent's "comments here to be deceptive and reprehensible in addition to being in direct contravention of the trial court's orders."

On September 5, 2006, the California Supreme Court granted a petition for review in *Shazier*, and deferred briefing pending its consideration and disposition of another case entitled *People v. Lopez*. On or about May 15, 2008 – a few months after its ruling in *People v. Lopez* (2008) 42 Cal.4th 960, the Supreme Court dismissed its review in *Shazier* and issued a remittitur. Accordingly, the Sixth District Court of Appeal opinion in *Shazier* became final on or about May 15, 2008.

Count 1: Failure to Comply With Laws (Bus. & Prof. Code, § 6068, Subd. (a))

The State Bar charges that respondent violated section 6068, subdivision (a), by failing to comply with California law prohibiting prosecutors from informing jurors of the consequences of a "true" finding in an SVP proceeding. (*People v. Rains, supra*, 75 Cal.App.4th 1165, 1169). The State Bar alleges that respondent failed to support the California law when he made the rebuttal argument at the retrial in March 2005 and informed the jury what would happen to Shazier if it found him to be a SVP.

In 1999, the California appellate court held in *People v. Rains* that in a Sexually Violent Predators Act (SVPA) trial, evidence of the consequences of the jury's finding as to whether the defendant is or is not a SVP is not relevant and therefore not admissible.

The California appellate court further held in *People v. Grassini* (2003) 113 Cal.App.4th 765 that in SVP proceedings, evidence of defendant's amenability to voluntary treatment warranted sua sponte instruction requiring jury to determine whether custody in a secure facility

was necessary to ensure that defendant was not a danger to others. Because it was relevant to the ultimate determination whether defendant was likely to engage in sexually violent predatory crimes if released, it is constituted general principle of law necessary to jury's understanding of the case. In short, the ruling of *Grassini* was that if the defense wanted to assert that an accused could be released into the community and receive treatment in a nonsecure, noncustodial facility, that person is entitled to an instruction that the prosecution must prove beyond a reasonable doubt that any treatment has to occur in a secure facility.

Respondent argues that Shazier's counsel in putting on a *Grassini* defense opened the door to a discussion of consequences. He argues that at trial his only intent in raising the topic of "consequences" of the jury's finding was to refute the defendant's appeal to sympathy for the difficult conditions at Atascadero defendant would apparently face if the petition were found true. He further maintains that his argument was not addressing the explicit argument that had been made under *Grassini* but the more subtle appeal to sympathy that had been made by Shazier's counsel in offering *Grassini* evidence.

This court rejects, as the appellate court did, that respondent's lengthy argument on rebuttal regarding the consequences of a true finding were made only to diminish juror sympathy toward Shazier. Furthermore, at the hearing on this matter, respondent admitted that when he told the jury that they were not supposed to let the consequences be part of their deliberation and they were not to speculate on the consequences, the argument had nothing to do with the *Grassini* defense. This court finds, as the appellate court did, that when respondent told the jurors in his final rebuttal argument that they should not make a decision based on what they thought it was going to be like for the defendant in Atascadero State Hospital, his primary purpose in so doing was to make it clear to the jurors that they should not worry about Shazier because he was just going to the hospital to get treatment.

Thus, this court finds that respondent failed to support the laws of California when he made the rebuttal argument, in willful violation of section 6068, subdivision (a).

Count 2: Failure to Obey A Court Order (Bus. & Prof. Code § 6103)

Respondent is charged in count 2 with a violation of section 6103. The law is clear that a jury may not consider the consequences of a finding that a person meets the SVPA commitment criteria (*People v. Rains*). The trial court recognized this clear law and issued an order prohibiting references to the consequences of a true finding. Respondent violated the court's in limine order when he made the argument:

“And I'm not trying to insult anybody here, but let me just tell you it's best if you don't speculate about what the consequences will be, and then you can ask afterwards. We can talk about it afterwards. It's no secret. . . . And I'm saying also that you should not make a decision based on what you think it's going to be like for the [defendant] in Atascadero State Hospital. That's not for you.”

Respondent's rebuttal argument violated not only the law but also the court's in limine order prohibiting reference to the consequences of a true finding. In so doing, respondent failed to comply with a court order, in willful violation of section 6103.

Count 3: Moral Turpitude (Bus. & Prof. Code, § 6106)

The State Bar charges that respondent committed acts of moral turpitude by intentionally making an improper rebuttal argument in willful violation of section 6106.

Respondent argues, among other things, that he thought that because defense counsel had put on a *Grassini* defense, she had opened the door to consequences and therefore, his argument regarding consequences was within the scope of permissible argument. His argument is rejected as the court does not find his testimony to be credible.

Under *Grassini*, respondent can argue that a person cannot be treated outside of a secure facility, but he cannot argue about what treatment a person will receive if there is a true finding. Respondent admitted that none of his arguments that related to consequences had anything to

with the fact that Shazier could not be treated outside a secure facility. Furthermore, when defense counsel requested a mistrial due to respondent's improper argument re: Atascadero and consequences and the court asked respondent for an explanation, the only explanation respondent gave for his motive for the argument was to dispel any sympathy defense counsel may have created in her questions regarding the environment at Atascadero.

There is clear and convincing evidence that respondent knew exactly what he was saying in his rebuttal argument and that his argument was carefully crafted to get the jury to consider the consequences of a true finding. The California Supreme Court in *People v. Samayoa* (1997) 15 Cal.4th 795, 841, stated that a prosecutor commits misconduct by using deceptive and reprehensible means of persuasion. And the appellate court in *People v. Shazier* found that respondent's comments "to be deceptive and reprehensible in addition to being in direct contravention of the trial court's orders."

This court also finds that respondent used deceptive means of persuasion, particularly in presenting this argument at a critical point in the proceedings – the end of trial – and the references to consequences were multiple and lengthy. The appellate court noted that "given the timing of the delivery, as well as the content of the message, the prosecutor's comments impacted the jury." Respondent's conduct in his rebuttal argument was egregious and therefore supports a finding of moral turpitude, in willful violation of section 6106.

Counts 4 and 5: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A)) and Failure to Maintain Respect to the Courts (Bus. & Prof. Code, § 6068, Subd. (b))

In count 4, the State Bar charges that respondent violated rule 3-100(A) by failing to perform legal services with competence when he made the rebuttal argument quoted above and thereby engaged in deceptive and reprehensible misconduct in violation of both California law

and the trial court's in limine order. The court finds that respondent's misconduct is not a matter of incompetence.

In count 5, the State Bar charges that respondent violated section 6068, subdivision (b), by failing to maintain the respect due to the courts of justice and judicial officers when he made the rebuttal argument quoted above and thereby engaged in deceptive and reprehensible misconduct in violation of both California law and the trial court's in limine order.

The State Bar submits in its closing brief that these two counts are based on the same conduct as counts 1 through 3 and were alleged as fallback allegations. The State Bar does not request that additional discipline be imposed based on multiple culpability findings based on the same conduct.

Accordingly, since respondent is found culpable of counts 1 through 3, the court hereby dismisses with prejudice counts 4 and 5 as duplicative.

IV. Level of Discipline

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)¹⁸

A. Mitigation

Although respondent has no prior record of discipline, his misconduct in the Minor A. matter took place only two years after he was admitted to the practice of law and his latest misconduct in the Shazier matter occurred in 2005. Thus, respondent's discipline-free practice at the time of his misconduct in 1995 is not a mitigating factor. (Standard 1.2(e)(i).)

In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held and reasonable. Respondent's beliefs regarding his

¹⁸All further references to standards are to this source.

interpretation of the court orders and of the law were neither honestly held nor reasonable. Thus, they were not a mitigating circumstance. (Standard 1.2(e)(ii); See *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646.)

Respondent was cooperative to the State Bar in the disciplinary proceedings. (Std. 1.2(e)(v).) Respondent's cooperation is entitled to some weight in mitigation.

Respondent presented substantial evidence of his community and charity work and more than 36 good character witnesses, including judges, district attorneys, attorneys, public officials, community leaders, law enforcement personnel, friends and a victim's mother. (Standard 1.2(e)(vi).) The witnesses all attested to his good moral character, integrity, honesty and dedication. Many of them have known respondent for many years and would not change their opinions of him even if he was found culpable of the alleged misconduct in this proceeding. They opined that respondent is one of the most ethical and honest people and that despite his heavy workload, respondent is tenacious and conscientious and wants to obtain justice. Many have worked with respondent and praised him to be a man of exceptional integrity and honor. They testified that he is respectful, stellar and compassionate. A couple of years ago, some of the witnesses had recommended respondent to the bench. They have never known him to be dishonest or unethical. Moreover, they attested to respondent's commitment to the community, life devotion to public service, and involvement in various community organizations.

The court finds that these 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.

Moreover, the State Bar did not rebut any of the character evidence submitted. Respondent has always devoted much time doing valuable community and charitable work, such as with Big Brothers and Hill Staffers for the Hungry and Homeless when he was in Washington,

D.C. He is also very active in many local community groups and a member of various committees, including the Santa Clara Bar Association, legislation for public interest, Silicon Valley Campaign for Legal Services and PACT (People Acting in Community Together). (Standard 1.2(e)(vi).) 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.)

Respondent has taken objective steps since 2004 designed to atone for any consequences of his misconduct. (Standard 1.2(e)(vii).) He has changed his discovery practice in that he implements an open file policy, that he has meetings with the defense regarding any discovery, and that he keeps a copy of all that he discovered.

B. Aggravation

There are several aggravating factors.

Respondent committed multiple acts of wrongdoing, including failing to support the laws of United States and of California; failing to obey court orders; failing to maintain respect to the court; making misrepresentations to the court; suppressing evidence; and committing acts of moral turpitude. (Standard 1.2(b)(ii).)

Respondent significantly harmed the public and the administration of justice by failing to uphold his duties as a prosecutor. He failed to reveal exculpatory evidence in the *Ballard* and *Auguste* matters, submitted a false search warrant affidavit in Colorado, illegally obtained

evidence regarding a minor in the *Minor A.* matter, and violated court orders at trial in the *Shazier* matter. (Standard 1.2(b)(iv).)

In the *Auguste* matter, but for the fortuitous discovery by defense counsel about the key witness's interview, which impeached the victim's credibility, the defendants' felony convictions would not have been reduced to misdemeanor convictions. Respondent's nondisclosure of exculpatory evidence significantly harmed the administration of justice. Moreover, his false search warrant affidavit resulted in improper searches of innocent third party in Colorado.

In the *Ballard* matter, respondent's failure to disclose the interview with a co-defendant resulted in the dismissal of the gun enhancement charge.

In the *Minor A.* matter, he again obtained an illegal search by subjecting the minor defendant to a dental exam without a court order. The fact that he was following the general practice in Santa Clara County and did not purposefully violated Welfare and Institutions Code 608 may be considered as a mitigating factor. But, his misinterpretation is offset by his failure to obey the April 18, 1995 court order.

Finally, in the *Shazier* matter, respondent's misconduct led to the SVP finding being overturned on appeal and the case returned to the superior court for a new trial.

Respondent's misconduct frustrated the administration of justice and wasted hours of unnecessary litigation and caused unwarranted delays. Respondent's abuse of his prosecutorial power has negatively impacted the reputation of the D.A.'s Office and the public trust in the justice system.

The State Bar argues that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility

for his acts and come to grips with his culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Here, respondent admitted that in the Ballard matter, he viewed *Brady* too narrowly and that he should have seen immediately the Martinez interview as exculpatory evidence. In the Auguste matter, respondent admitted that he was not honest in failing to disclose Smith’s interview and whereabouts. But because he was mired in a heated discovery dispute with opposing counsel and erroneously thought that attorney Gardner knew where Smith was, respondent’s anger clouded his judgment. And in the Shazier matter, respondent had no intent to disobey court order in his rebuttal argument. Because he recognized his wrongdoing, he self-reported this matter to the State Bar.

Given that in this hearing, respondent acknowledged and regretted for and testified to the errors he made, there is no clear and convincing evidence that he lacks an appreciation or understanding of his misconduct. Therefore, the court does not find this to be an aggravating factor. At the same time, the court does not give any weight to respondent’s testimony as mitigating because in his final closing brief, respondent did not demonstrate any recognition of his wrongdoing. But rather, he argued that this matter should either be dismissed or result in a public reproof.

V. Discussion

The purpose of 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.)

Respondent’s misconduct involved four criminal matters that occurred in 1995, 2003 and 2005. The standards provide a broad range of sanctions ranging from actual suspension to

disbarment, depending upon the gravity of the offenses and the harm to the client. The applicable standards in this matter are standards 1.6, 2.3 and 2.6. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person must result in actual suspension or disbarment. As discussed above, respondent’s suppression of evidence and misrepresentations to the court in the *Auguste* and *Ballard* matters were acts of moral turpitude. Also, his rebuttal closing argument in the *Shazier* matter was an act of moral turpitude.

Standard 2.6 provides that culpability of supporting the United States and California law, disobeying court orders and being disrespectful to the court will result in actual suspension or disbarment, depending on the gravity of the offense or the harm to the client.

The State Bar urges three years’ actual suspension while respondent argues that a dismissal or public reproof would be proper. Both parties cited to two Supreme Court cases involving prosecutorial misconduct in support of their recommended level of discipline – *Noland v. State Bar* (1965) 63 Cal.2d 298 [30 days actual suspension] and *Price v. State Bar* (1982) 30 Cal.3d 537 [two years actual suspension].

In *Noland*, a prosecutor counseled and aided in the unauthorized removal of the names of “pro-defense” prospective jurors from the official jury list. His ex parte tampering with the selection of potential jurors to gain advantage at subsequent trials constituted the calculated

thwarting of objective justice. The Supreme Court actually suspended the attorney for 30 days, finding that he had achieved no insight into the grave significance of his actions and that he must be discouraged from attempting any further zealous abuses of judicial administration. (*Id.* at p. 303.)

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.

The court finds guidance in *Price*. Respondent similarly suppressed evidence in two criminal matters. But respondent’s mitigation is not as compelling as that of the attorney in *Price*. Like *Price*, respondent also had an array of character witnesses testified to his good moral character and extensive public service.

But unlike *Price*, respondent has shown only some remorse or admitted to some mistakes made. He has not fully recognized his wrongdoing or its significant harm on the administration of justice and public confidence in the legal profession, particularly in view of his position as a prosecutor and the clear and convincing evidence that he deliberately withheld discoverable evidence favorable to the defense and that he illegally obtained evidence without court approval. Respondent lacks the understanding or appreciation that his job carries a heavy burden and that it

is his responsibility as a prosecutor to ensure that “justice shall be done.” Indeed, very high ethical standards are demanded of a prosecutor; respondent could not afford to be inattentive in carrying out his duties. Yet, respondent chose to ignore his ethical obligations and to be less than candid with the defense and the court. His overzealous determination to punish the bad guys at all costs needs to be re-evaluated.

In his closing argument in this proceeding, respondent still held fast to the position that he never intentionally did anything improper. He has not fully accepted responsibility for his misconduct. As a prosecutor, he knew or should have known that he “is the representative not of any 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. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer.” (*Berger v. United States* (1935) 295 U.S. 78, 88.)

It is well established that a prosecutor must be impeccably professional for he must meet standards of candor and impartiality not demanded of other attorneys. 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, supra*, 5 Cal.3d 525, 531.)

Here, it is clear that respondent failed to be candid and truthful in all dealings with the court and counsel. His overzealousness to convict and punish defendants who had murdered, robbed and raped obstructed his understanding of a prosecutor's special duty to promote justice and to seek truth.

Consequently, respondent committed serious misconduct that warrants a more severe level of discipline than the two years of actual suspension imposed in *Price* or the three years as recommended by the State Bar. In fact, disbarment would be the appropriate degree of discipline to be imposed in this case but for respondent's compelling mitigation – strong good character evidence and extensive pro bono activities. Moreover, in California cases where disbarment was ordered, the attorneys were criminally convicted for their crime of bribery or perjury. (See *In re Bloom* (1977) 19 Cal.3d 175; *In re Weber* (1976) 16 Cal.3d 578; *In re Allen* (1959) 52 Cal.2d 762; and *In re Hanley* (1975) 13 Cal.3d 448.) Here, there was no criminal conviction for respondent's misconduct.

Respondent's suppression of exculpatory evidence, misrepresentations to the court and disobeying court orders do not involve personal benefit or pecuniary gain and thus disbarment is not warranted. But, the case law and the standards provide that placing respondent on a long period of actual suspension would be appropriate to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. Because of the high ethical standard demanded of a prosecutor, respondent's prosecutorial misconduct and abuse of power in not *one* but *four* criminal matters warrant an unusual lengthy period of actual suspension, short of disbarment.

After balancing all relevant factors, including the underlying misconduct and the mitigating and aggravating circumstances, the court concludes that a four-year actual suspension would commensurate with the gravity of respondent's act and is necessary for the protection of

the public, the courts and the legal profession. The court is mindful that four years' actual suspension would be detrimental to respondent's legal career as a prosecutor. But the need to uphold the administration of justice and the "professional keeping of lawyers," and not let those with power go rogue in violation of the constitutional rights of defendants, guilty or not, preempts respondent's personal career.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Benjamin T. Field**, be suspended from the practice of law for five years, that execution of that suspension be stayed, and that respondent be placed on probation for five years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first four years of probation and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation.

Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

4. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;
5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1;
6. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);
7. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for five years that is stayed, will be satisfied and that suspension will be terminated.

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within the period of his actual suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 951(b), and Rules Proc. of State Bar, rule 3201(a)(1) and (3).)

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Willful failure to comply with the provisions of rule 955 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.¹⁹

VII. Costs

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and are enforceable both as provided in section 6140.7 and as a money judgment.

Dated: February _____, 2009

PAT McELROY
Judge of the State Bar Court

¹⁹Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)