United States Court of Appeals
For The First Circuit
No. 11-2206

In re: Jeffrey Auerhahn

On Appeal From a Memorandum and Order of the United States District Court for the District of Massachusetts

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Brief For *Amici Curiae* Legal Academics In Support Of Petitioner/Appellant And Reversal of the Decision Below

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF COUNSEL 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Panel Below Misconstrued Prosecutors' Ethical Obligations, Failing To Recognize The Independence Of Their Ethical Duty To Disclose From Their Constitutional Obligations Under *Brady* 5

A. Prosecutors' Ethical Duty To Disclose Information Favorable To Defense Is Independent Of And Broader Than The Parallel Constitutional Duty Under *Brady* 5

B. The Panel Below Misconstrued The Ethics Rules 10

1. The Ethical Obligation Applies To All Exculpatory Information, Regardless Of Whether It Is "Material" Or Admissible 11

2. The Panel Erroneously Expanded The Timing Requirement Of The Ethics Rule 18

II. A Robust System Of Professional Discipline As A Response To Violations Promotes Respect For These Essential And Independent Ethical Obligations 24

A. Discipline Is Necessary Because Most Violations Will Not Come To Light 25

B. Discipline Is Necessary Because Other Potential Enforcement Mechanisms Have Been Foreclosed 26

C. Discipline Is Necessary Because Prosecutorial Self-Regulation Has Proven Inadequate 27

D. Despite The Importance Of Robust State Bar Discipline, Prosecutors Rarely Face Professional Consequences Even For Egregious Ethics Violations 28

CONCLUSION 30

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Page(s)

CASES

In re Attorney C,
47 P.3d 1167 (Colo. 2002) 13

Banushi v. Dorfman,
438 Mass. 242, 780 N.E.2d 20 (2002) 9

Berger v. United States,
295 U.S. 78 (1935) 6

Brady v. Maryland,
373 U.S. 83 (1963) 5, 7

In re Carpenter,
248 Kan. 619, 808 P.2d 1341 (1991) 18

Cone v. Bell,
556 U.S. 449, 129 S. Ct. 1769 (2009) 11, 12, 13

Connick v. Thompson,
131 S. Ct. 1350 (2011) 26

Disciplinary Counsel v. Kellogg-Martin,
124 Ohio St. 3d 415, 923 N.E.2d 125 (2010) 13

Ferrara v. United States,
456 F.3d 278 (1st Cir. 2006) 10, 17, 20

Ferrara v. United States,
384 F. Supp. 2d 384 (D. Mass. 2005) 17

In re Grant,
343 S.C. 528, 541 S.E.2d 540 (2001) 18, 20

Imbler v. Pachtman,
424 U.S. 409 (1976) 25, 26

In the Matter of Jeffrey Auerhahn,
No. 09-10206-RWZ-WGY-GA, 2011 U.S. Dist. LEXIS 104717 (D. Mass. Sept. 15, 2011) ..... *passim*

Kyles v. Whitley,
514 U.S. 419 (1995) 11

Lafler v. Cooper,
556 U.S. _, No. 10-209, slip op. at 11 (Mar. 21, 2012) 21

In re Lupo,
447 Mass. 345, 851 N.E.2d 404 (2006) 25

In re Murray,
455 Mass. 872, 920 N.E.2d 862 (2010) 24

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 20, 21

In re Special Proceedings,
No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012) 29, 30

Strickler v. Greene,
527 U.S. 263 (1999) 6

Town of Newton v. Rumery,
480 U.S. 386 (1987) 24

United States v. Acosta,
357 F. Supp. 2d 1228 (D. Nev. 2005) 13

United States v. Bagley,
473 U.S. 667 (1985) 9, 17

United States v. Mannarino,
850 F. Supp. 57 (D. Mass. 1994) 28

United States v. McKinney,
758 F.2d 1036 (5th Cir. 1985) 12

United States v. Osorio,
929 F.2d 753 (1st Cir. 1991) 27

United States v. Snell,
899 F. Supp. 17 (D. Mass. 1995) 30

In re Wainwright,
448 Mass. 378, 861 N.E.2d 440 (2007) 24

ETHICS OPINIONS

ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-376 (1993) 21

ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) ..... *passim*

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Brief of the National Association of Assistant United States Attorneys & National District Attorneys Association as Amici Curiae in Support of Petitioners, *Pottawattamie Cty. v. McGee*, No. 08-1065, 2009 U.S. S. Ct. Briefs LEXIS 691 (U.S. July 20, 2009) 27

Brief of the ABA as Amicus Curiae in Support of Petitioners, *Smith v. Cain,* 132 S. Ct. 627 (2012) (No. 10-8145), 2011 U.S. S. Ct. Briefs LEXIS 1144. 8

STATUTES, RULES & REGULATIONS

ABA Annotated Model Rules of Prof'l Conduct R. 3.8 (1983) ..... *passim*

ABA Annotated Model Rules of Professional Conduct (2007) 13

ABA Canons of Professional Ethics, Canon 5 (1908) 7

ABA Standards for Criminal Justice, Prosecution Function Standard 3-3.11 (1993) 6, 18, 30

D.C. Rules of Prof'l Conduct R 3.8 cmt. 1 (2007) 13

D. Mass. R. 116.1 (1990) 20

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Bruce A. Green, *Prosecutors' Ethical Duty of Disclsoure: In Memory of Fred Zacharias*, 48 San Diego L. Rev. 57 (2011) 13

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Merriam-Webster's College Dictionary (11th ed. 2011) 20

New Oxford American Dictionary (3d ed. 2010) 20

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Peter A. Joy & Kevin C. McMunigal, *Do No Wrong: Ethics for Prosecutors and Defenders* (2009) 13

Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987) 29

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are legal academics, one of whom is a former federal judge in the District of Massachusetts and two of whom are legal ethicists. *Amici* all have backgrounds in professional ethics and/or the administration of criminal justice. Their interest is in ensuring that the Court's consideration of this issue recognizes the fact that prosecutors' ethical obligation to disclose exculpatory information is both independent of and broader than prosecutors' obligations under the Constitution's Due Process Clause. *Amici* are concerned that, absent robust professional discipline for clear violations of the ethical duty to disclose information to the defense, respect for this fundamental duty will be eroded, leading to more wrongful convictions and compromising the public's confidence in the justice system.

Professor Nancy Gertner is Professor of Practice at Harvard Law School and a former federal judge in the District of Massachusetts (1994 - 2011). Professor Gertner was formerly a Visiting Professor of Law at both Harvard and Yale Law Schools. In 2008, Professor Gertner became the second woman to receive the Thurgood Marshall Award from the American Bar Association ("ABA"), Section of Individual Rights and Responsibility.

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[1] Pursuant to Rule 29(a) of the Rules of this Court, this brief is being filed by leave of court.

Professor Gertner also has received the Massachusetts Bar Association's Hennessey Award for judicial excellence.

Lawrence J. Fox is a partner at Drinker Biddle & Reath LLP. He is also Visiting Lecturer of Law and the Crawford Lecturer at Yale Law School, where he teaches Ethics and Professional Responsibility and supervises the Ethics Bureau at Yale. Mr. Fox was formerly a lecturer on law at both Harvard Law School (2007 - 2010) and the University of Pennsylvania Law School (2000 - 2008), and has authored numerous articles and books on Professional Responsibility. He is the former Chair of the ABA Standing Committee on Ethics and Professional Responsibility and has served as an advisor to the Restatement (Third) of the Law Governing Lawyers. He is the 2007 recipient of the ABA's Michael Franck Award for Professional Responsibility, the ABA's top honor for professional responsibility.

Professor Bruce A. Green is the Stein Professor of Law at Fordham University School of Law and Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law. He has taught legal ethics since 1987. Professor Green formerly was Assistant United States Attorney, Deputy Chief Appellate Attorney, and Chief Appellate Attorney in the Office of the United States Attorney for the Southern District of New York.

He formerly served as a member of the ABA Standing Committee on Ethics and Professional Responsibility, and Chair of the Criminal Justice Section of the ABA. Professor Green has published widely in the area of legal ethics and prosecutorial misconduct.

The brief of *Amici Curiae* will not address every point argued by the parties. Instead, *Amici* focus on the single issue of prosecutors' ethical obligation to disclose all exculpatory information and the extent to which this ethical duty is independent of and broader than prosecutors' constitutional obligations under the Due Process Clause.

STATEMENT OF COUNSEL

This brief was written by the Ethics Bureau at Yale. The Bureau is a group of fourteen law school students supervised by an experienced practicing lawyer and lecturer. The Bureau provides professional responsibility advice to nonprofit legal services providers; drafts *Amicus* briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims; and offers ethics advice on a pro bono basis. No person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

I. Prosecutors violate their ethical obligations when they fail to disclose information favorable to the defense "as soon as reasonably practicable"—an obligation both independent of and broader than prosecutors' obligations under the Due Process Clause. Given the difference between prosecutors' ethical and constitutional duties, *Amici* argue that the panel below misinterpreted the ethics rule standard in two respects, scope and timing: (A) the ethics rule requires the disclosure of *all* exculpatory information, regardless of whether it is also "material" or admissible evidence; and (B) the ethics rule requires prosecutors to turn over information not only when the information might be useful in a court proceeding, but "as soon as reasonably practicable."

II. Where prosecutors violate ethics rules, the courts and bar must not shy away from imposing discipline, which is essential to our criminal justice system. Our system accords prosecutors tremendous power and resources in investigating crime, resources that few defendants possess. With prosecutorial power and discretion, however, come significant ethical obligations. When prosecutors transgress, professional discipline is necessary to preserve respect for these obligations, deter future violations, and restore public faith in the criminal justice system. That prosecutors are

rarely subjected to discipline, even for egregious ethics violations, particularly in the context of their duties to disclose, is of grave concern to *Amici Curiae*.

ARGUMENT

I. The Panel Below Misconstrued Prosecutors' Ethical Obligations, Failing To Recognize The Independence Of Their Ethical Duty To Disclose From Their Constitutional Obligations Under *Brady*

Prosecutors have an ethical duty to disclose information favorable to the defense. This duty is both independent of and broader than their constitutional disclosure duties under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. By reading a materiality requirement into the ethical duty to disclose and loosening the timeliness requirement, the panel eviscerated that duty. It failed to recognize that the ethics rules do not simply codify *Brady's* constitutional requirements, and it compromised the important public policy reasons that justify the broader ethical obligation.

A. Prosecutors' Ethical Duty To Disclose Information Favorable To Defense Is Independent Of And Broader Than The Parallel Constitutional Duty Under *Brady*

Prosecutors' ethical obligation to disclose exculpatory information favorable to the defense is independent of and broader than their constitutional obligations. This ethical obligation stems from prosecutors' quasi-judicial role, obligation to seek justice, and duty to ensure fairness for

the accused. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999). Prosecutors do not represent "an ordinary party to a controversy," but rather "a sovereignty . . . whose interest . . . in a criminal prosecution is . . . that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (1983) ("[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," which "carries with it specific obligations to see that . . . guilt is decided on the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution." (footnotes omitted)); ABA Standards for Criminal Justice, Prosecution Function Standard 3-1.2(b), (c) (1993) [hereinafter "Prosecution Function"] ("The prosecutor is an administrator of justice . . . [whose] duty is to seek justice, not merely to convict."); Bruce A. Green, *Why Should Prosecutors "Seek Justice,"* 26 Fordham Urb. L.J. 607, 615 (1999) ("The professional obligation to 'seek justice' places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients on the other . . . [and] impl[ies] specific professional obligations that set prosecutors apart from other lawyers – obligations that have been variously described as 'different,' 'special' and 'extraordinary'" (internal quotation marks and footnotes omitted)).

The ABA, in its role as promulgator of model codes of ethics for over one hundred years, first recognized the prosecutor's ethical disclosure obligation nearly fifty years before *Brady*. *Compare* ABA Canons of Professional Ethics, Canon 5 (1908) ("The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."), *with Brady*, 373 U.S. 83 (decided 1963). Since then, the ABA has consistently reiterated that a knowing failure to turn over evidence favorable to the accused is a violation of the prosecutor's ethical duties. *See* Model Code DR 7-103(B) (1969) (Prosecutors must "make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."); Model Rules of Prof'l Conduct R. 3.8(d) (1983) (using substantially similar language).

Continuing that theme, Model Rule 3.8(d) reflects the proposition that it is "highly reprehensible" for prosecutors to withhold evidence favorable to defendants. Prosecutors must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Model Rules of Prof'l Conduct R. 3.8(d). Most importantly, the rule has been adopted in the same or

substantially similar form by forty-nine states, the District of Columbia, the United States Virgin Islands, and Guam. *See* Brief of the ABA as Amicus Curiae in Support of Petitioner at app. B, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145), 2011 U.S. S. Ct. Briefs LEXIS 1144.

Any interpretation of the ethical disclosure obligations expressed in Rule 3.8(d) as merely codifying constitutional obligations eviscerates the independent significance of that rule and violates basic principles of statutory construction. If the Massachusetts Supreme Court only intended to ensure that prosecutors obeyed their obligations under *Brady* and its progeny, and *nothing more*, there would have been no reason to promulgate Rule 3.8(d). Several other rules already require prosecutors to abstain from knowingly committing *Brady* violations. Rule 3.4(a) mandates that lawyers may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value." Mass. Rules of Prof'l Conduct R. 3.4 (2011). Similarly, Rule 1.3 requires lawyers to "represent a client zealously [but] within the bounds of the law." Mass. Rules of Prof'l Conduct R. 1.3 (2011). And Rule 8.4 makes it "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation" or to "engage in conduct that is prejudicial to the administration of justice." Mass.

Rules of Prof'l Conduct R. 8.4 (2011). Because compliance with *Brady* obligations *already* is mandated under other rules of professional conduct, any construction of Rule 3.8(d) as doing no more than codifying those obligations would be contrary to the well-recognized canon of construction against superfluity. *Cf. Banushi v. Dorfman*, 438 Mass. 242, 245, 780 N.E.2d 20, 23 (2002) ("We do not read a statute so as to render any of its terms meaningless or superfluous.").

Furthermore, to conflate the ethics rule with *Brady* would mean that prosecutors would face almost zero personal risk for failing to disclose exculpatory information. Indeed, the interpretation of Rule 3.8(d) urged by Appellee would embolden prosecutors to gamble and withhold information, eschewing their duties as ministers of justice. *Cf. United States v. Bagley,* 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) (criticizing the constitutional materiality standard for "invit[ing] a prosecutor . . . to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive").

B. The Panel Below Misconstrued The Ethics Rules

By misconstruing the ethics rules as merely codifying constitutional disclosure requirements, the panel below erred in two respects.[2] Both of these errors would justify reversal in their own right. In concert, they *demand* it.

First, the panel erred by grafting a *Brady*-like materiality requirement onto the ethics rule despite the fact that courts and commentators nearly unanimously deny such a requirement. Second, the panel misconstrued the rule's timing requirement, expanding it to enable a prosecutor to knowingly fail to disclose exculpatory information for almost a full year after coming

[2] This brief asserts that the panel committed errors of law and errors in applying the law to the determined facts. Indeed, those errors are the only way to account for the profound difference between the facts as found by the panel below and those found by this Court in *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006). While this Court did not hesitate to "shoot down Auerhahn's self-serving version of the relevant events" in concluding that "the government's actions . . . paint[ed] a grim picture of blatant misconduct," *id.* at 287-88, 293, the panel accepted, for the most part, Auerhahn's account as true. *See In the Matter of Jeffrey Auerhahn*, No. 09-10206-RWZ-WGY-GA, 2011 U.S. Dist. LEXIS 104717 (D. Mass. Sept. 15, 2011). In addition, the panel narrowed the record, which had been used by this Court to find that the "government's nondisclosure was so outrageous that it constituted impermissible prosecutorial misconduct." *Ferrara*, 456 F.3d at 293.

into possession of that information. In making these errors, the panel eviscerated Rule 3.8's independent significance.[3]

1. The Ethical Obligation Applies To All Exculpatory Information, Regardless Of Whether It Is "Material" Or Admissible

The panel incorrectly determined that Auerhahn's disclosures were adequate because they found that the information he suppressed was immaterial. In fact, prosecutors' ethical obligation to disclose information favorable to the defense "does not implicitly include the materiality limitation recognized in the constitutional case law." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) [hereinafter "ABA Formal Op. 09-454"]. Instead, it requires disclosure "without regard to the anticipated impact of the evidence or information on a trial outcome." *Id*. While prosecutors' *constitutional* duty to disclose applies only to evidence garnering a "reasonable probability that its disclosure would have produced a different result" at trial, *Kyles v. Whitley*, 514 U.S. 419, 422 (1995), their *ethical* duty to disclose is broader. *See Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769, 1783 n. 15 (2009); *Kyles*, 514 U.S. at 437.

The differences between the two obligations are consistent with their distinct underlying purposes. The constitutional rule typically arises as an

[3] Because construction of Rule 3.8(d) is a legal question, it is subject to *de novo r*eview by this Court.

ex-post standard for post-conviction review and constitutes a minimal baseline guarantee to the defendant of his constitutional right to due process. *United States v. McKinney*, 758 F.2d 1036, 1049 (5th Cir. 1985) ("*Brady* does not establish a broad discovery rule; rather, it defines the Government's minimum duty under the due process clause to ensure a fair trial."). In contrast, the ethics rule imposes *ex-ante* obligations on the prosecutor by virtue of her "specific obligations" as a "minister of justice." ABA Formal Op. 09-454 (quoting Model Rules of Prof'l Conduct R. 3.8 cmt. 1). Rather than an individual right of the accused, the ethical duty to disclose establishes a high standard of prosecutorial professionalism and ensures the effectiveness and fairness of the criminal justice system as a whole.[4] Unlike the constitutional obligation, Rule 3.8(d) thereby "requires prosecutors to steer clear of the constitutional line, erring on the side of caution." *Id*.

The Supreme Court has confirmed that the ethical duty to disclose is broader than the constitutional one. In *Cone v. Bell*, the Court cautioned that "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." 129 S. Ct. at

[4] Indeed, this Court recognized that "[r]espect for these obligations are 'axiomatic' to the system of criminal justice." *See Ferrara*, 456 F.3d at 279.

1783 n.15. Similarly, in *Kyles*, the Court recognized that *Brady* "requires less of the prosecution" than Rule 3.8(d) and the ABA Standards for Criminal Justice, "which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." 514 U.S. at 436-37.[5]

Because the ethical duty of disclosure does not contain a *Brady*-like materiality requirement, the panel's grafting of such a standard onto the rule constitutes reversible error. The panel incorrectly justified Auerhahn's failure to make a clear record of the Myrtle Beach statement on the premise that he "may have viewed [it] as an *immaterial* or *only marginally material* inconsistency." *In the Matter of Jeffrey Auerhahn*, No. 09-10206-RWZ-WGY-GA, 2011 U.S. Dist. LEXIS 104717, at *34 (D. Mass. Sept. 15, 2011) (emphasis added). It reasoned that it need not "consider whether the disciplinary rules require pre-plea or presentence disclosure" because the

[5] Courts and commentators agree with the Supreme Court that prosecutors' ethical obligations are broader than their constitutional duties. *See, e.g.*, *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005); ABA Annotated Model Rules of Professional Conduct 375 (2007); 2 Geoffery C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 34-6 (3d ed. 2001 & Supp. 2009); Peter A. Joy & Kevin C. McMunigal, *Do No Wrong: Ethics for Prosecutors and Defenders* 145 (2009); Bruce A. Green, *Prosecutors' Ethical Duty of Disclsoure: In Memory of Fred Zacharias*, 48 San Diego L. Rev. 57, 71-84 (2011). Only a handful of jurisdictions have ignored the Supreme Court's mandate that the ethics rule does *not* merely codify *Brady*. *See, e.g.*, D.C. Rules of Prof'l Conduct R 3.8 cmt. 1 (2007); *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St. 3d 415, 419, 923 N.E.2d 125, 132 (2010); *In re Attorney C*, 47 P.3d 1167, 1170 (Colo. 2002) (en banc).

Myrtle Beach statement "would have made *no significant difference* to Ferrara's plea discussions." *Id*. at *47 (emphasis added). And the panel justified Auerhahn's nearly one-year-long suppression of the Myrtle Beach statement on the basis that it "certainly had *less exculpatory force* than the 'no permission statement.'" *Id*. (emphasis added). Yet it is undisputed that the Myrtle Beach statement suppressed by Auerhahn for nearly a year was exculpatory. *See id*. at *34-35 ("The 'Myrtle Beach statement' . . . qualifies as exculpatory evidence . . . ."). Any further inquiry conducted by the panel into whether or to what extent this information might have altered an outcome of a defendant is irrelevant to the appropriateness of discipline given the ethics rules' absence of a materiality requirement.

Moreover, even if this Court concludes that Auerhahn's disclosures of the substance of Jordan's equivocations were adequate, Auerhahn, at a minimum, should have timely disclosed the suspicious circumstances surrounding the conversations at issue. The ethical duty "is not limited to admissible 'evidence,' such as . . . transcripts of favorable testimony," but requires disclosure of favorable "information," which "may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations." ABA Formal Op. 09-454. Because of the trust placed in prosecutors regarding the investigation and

management of information, a broad ethical obligation to disclose any information that might lead to favorable evidence for the defense is necessary to protect the fairness of the system. It ensures that defense counsel, despite being outmatched by the prosecution in terms of resources, will have access to any possible leads unearthed by the prosecution that could lead to a vigorous defense.

Under these principles, Auerhahn was required to disclose the circumstances surrounding Jordan's confession to Coleman in the hotel and Auerhahn's own subsequent conversations with Coleman and Jordan.[6] These events—spanning from the hotel conversation between Jordan and Coleman

[6] The panel found that "Jordan disclosed [to Coleman] that he had withheld certain information concerning Ferrara's involvement in the Limoli homicide." *Auerhahn*, 2011 U.S. Dist. LEXIS 104717, at *24; *cf. id.* at *26 (finding "that Coleman and Jordan had a conversation on the night of July 24th" but noting that "the contents of this conversation have not been proven"); *id.* at *38 (declining to infer from Coleman's agitation anything about what Jordan told Coleman). On July 26, back in Boston, "Coleman asked to meet privately with Auerhahn to report about his visit with Jordan in Utah." *Id.* at *26. During the meeting, "Coleman was visibly upset." *Id.* at *28. "Auerhahn saw that [Coleman] was very agitated and almost near tears" and was "even worried that Coleman was going to have a heart attack he was so upset." *Id.* at *26 (internal quotation marks omitted). Auerhahn conceded that "Coleman did tell him generally that Jordan had come to him in his hotel room and admitted to withholding some information." *Id.* at *27; *cf. id.* at *28 ("[I]t has not been proven what Coleman specifically told Auerhahn."). On July 29, Auerhahn "arranged for Jordan to telephone from witness protection." *Id.* at *28-29. Coleman was present for this phone call. *Id.*; *cf. id.* at *30 ("The substance of this telephone call has not been proven by clear and convincing evidence . . . ."). Auerhahn traveled with Coleman to Minnesota to meet with Jordan. *Id.* at *32.

to the meeting in Minnesota—together form a body of information that would have been more than "relevant or useful to establishing a defense or negating the prosecution's proof." *Id*. Whatever the content of Jordan's confession to Coleman in the hotel room, it was shocking enough to make Coleman highly agitated. *See Auerhahn*, 2011 U.S. Dist. LEXIS 104717, at *26. Whatever Coleman related to Auerhahn about that confession was important enough to spur Auerhahn into quickly arranging a phone call with Jordan. *See id*. at *28-29. Whatever Jordan revealed on that call was striking enough to motivate Auerhahn, days before trial, to arrange a new face-to-face meeting with Jordan halfway across the country in Minnesota. *See id*. at *32-34. Thus, even if the panel below was correct that this chain of events did not amount to clear and convincing evidence that these conversations themselves contained information more exculpatory than contained in Auerhahn's minimal disclosures, Auerhahn still had an ethical obligation to disclose their circumstances.

Finally, not only did Auerhahn fail to disclose the required information, he appears to have effectively suppressed it. Auerhahn's minimal disclosure letters to counsel for Patriarca and Barone omitted highly suggestive details. They minimized the significance of Jordan's

equivocation,[7] likely inducing counsel to believe that Jordan could not be impeached or challenged on his testimony. *Cf. Bagley*, 473 U.S. at 683 (applying *Brady* to a prosecutor who "misleadingly induced defense counsel to believe that [certain witnesses] could not be impeached").

Had Ferrara's, Patriarca's, or Barone's counsel timely learned of the suspicious circumstances surrounding Jordan's confession to Coleman and the ensuing events, they might have changed their defense approaches. Indeed, one need not speculate as to whether this information would have been of use to the defense; when it *was* disclosed, it formed the heart of Ferrara's successful habeas petition. *See Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006), *aff'g* 384 F. Supp. 2d 384 (D. Mass. 2005). By suppressing this undoubtedly valuable information in pre-trial proceedings through misleading and incomplete disclosure letters, Auerhahn violated his ethical duty.

Not only are the interests of defendants at issue here, systemic values are at risk. Auerhahn's misleading disclosure has forced scarce judicial

[7] Auerhahn's letters to defense counsel buried his disclosure of Jordan's equivocation in a paragraph outlining the Prosecution's theory of the case. There, Auerhahn acknowledged that "[o]n one occasion . . . Barone provided a different reason which compelled Barone and Jordan's flight from Boston," but quickly noted that "Barone immediately retracted the statement, and reiterated that the murder was at Ferrara's direction" and that "Barone never again stated that the murder was anything but a sanctioned hit." *Id.* at *42-43 (quoting Auerhahn's letter).

resources to be expended on the repeated relitigation of this factual issue in post-conviction proceedings. Had Auerhahn complied with his ethics responsibilities, the issue would have been dispositively adjudicated at the pre-trial or trial level. Because the panel failed to recognize this violation of the ethical disclosure obligations, it should be reversed.[8]

2. The Panel Erroneously Expanded The Timing Requirement Of The Ethics Rule

For information to be disclosed in a "timely" manner in accordance with Rule 3.8(d), the prosecutor must turn over the information "as soon as reasonably practicable." ABA Formal Op. 09-454; *see also* Prosecution Function 3-3.11(a) (calling for disclosure "at the earliest feasible opportunity"). The panel below misconstrued this "timely disclosure" requirement to permit Auerhahn to keep highly useful information away from the defense for nearly a year, and after two defendants had already entered guilty pleas. *See Auerhahn*, 2011 U.S. Dist. LEXIS 104717, at *42-47. This error, too, warrants reversal.

[8] Moreover, because Auerhahn's suppression of these key facts was also "prejudicial to the administration of justice," it also constitutes a violation of Mass. Rule of Prof'l Conduct R. 8.4(d) (2011). *Cf. In re Grant*, 343 S.C. 528, 541 S.E.2d 540 (2001) (holding that a prosecutor violated Rule 8.4 in addition to Rule 3.8(d) for failing to disclose impeachment evidence); *In re Carpenter*, 248 Kan. 619, 808 P.2d 1341 (1991) (holding that a prosecutor violated the Kansas equivalent of Rule 8.4 for failing to disclose exculpatory evidence where there was insufficient evidence to find a knowing violation).

Contrary to the panel's reading, a prosecutor's disclosure is "timely" only when the defense has access to the information soon enough to use it effectively—not merely for a specific trial proceeding, but for critical decisions and actions taken long before trial. *See* ABA Formal Op. 09-454 ("[T]o be timely, [disclosure] must be made early enough that the information can be used effectively."). It is critical that a defense lawyer receive exculpatory information "as soon as reasonably practicable" for it to be useful in "conducting a defense investigation," "deciding whether to raise an affirmative defense," or in "determining defense strategy in general." *Id*. Additionally, timely receipt of exculpatory information can influence counsel to consider a different plea, develop or reevaluate the theory of the case, or decide whether to use and how to prepare a witnesses for trial. *See Id*. ("[B]ecause the defense can use favorable evidence and information most fully and effectively the sooner it is received, . . . [it] must be disclosed . . . as soon as reasonably practical."). Therefore, under the ethics rules, prosecutors must disclose such information "*sufficiently in advance* of these and similar actions and decisions." *Id*. (emphasis added). This interpretation of the timing requirement is not only consistent with the rule's plain

meaning[9] and purpose,[10] but also in accord with the timeliness requirement of the Massachusetts district court's own local rule.[11]

As noted by the ABA Ethics Committee, one of "the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty." *Id*.[12] This means that "[t]he language of the rule . . . mandates that prosecutors disclose favorable material during plea negotiations if not sooner." Peter A. Joy & Kevin C. McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 16 Crim. Just. 41, 42 (2001). Defense attorneys have an obligation to provide adequate and informed advice to their clients on whether to plead guilty, *see, e.g.*, *Padilla v. Kentucky*, 130 S.

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[9] Dictionaries define "timely" as "done or occurring at a favorable or useful time," *New Oxford American Dictionary* 1816 (3d ed. 2010); and "early, soon" or "opportunely," *Merriam-Webster's College Dictionary* 1309 (11th ed. 2011).

[10] As noted earlier, the breadth of the ethics rule in comparison to the constitutional rule reflects their two different purposes. While the constitutional rule is designed to ensure a minimal level of disclosure to preserve the defendant's individual right to due process, the ethics rule aims to promote goals of fairness and accuracy for the entire system.

[11] "Under the local rules in effect when Jordan recanted," the "initial disclosure" of exculpatory evidence was "required . . . within fourteen days of arraignment," with "a continuing duty to supplement . . . if and when new material surfaced." *Ferrara*, 456 F.3d at 283; *see* D. Mass. R. 116.1(C) (1990).

[12] Prosecutors have been disciplined for failing to timely disclose exculpatory material and impeachment evidence *prior* to a defendant entering a guilty plea. *See, e.g.*, *In re Grant*, 343 S.C. at 529, 541 S.E. at 540 (2001).

Ct. 1473, 1480-81 (2010), yet they generally do not have the same access to information and resources as prosecutors. By failing to disclose exculpatory information to the defense before negotiating a plea, the prosecution abuses its role and undermines the fairness and accuracy of the system.[13] Upholding the "as soon as reasonably practicable" standard of Rule 3.8(d) ensures a more level playing field and enables defense lawyers to perform their jobs effectively. Given the increasing rarity of trials, without the enforcement of this timeliness requirement in the plea context, disclosure obligations would prove largely illusory and meaningless in practice. *See, e.g., Lafler v. Cooper*, 556 U.S. _, No. 10-209, slip op. at 11 (Mar. 21, 2012) (noting that "criminal justice today is for the most part a system of pleas, not a system of trials" and that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

In this case, it is undisputed that Auerhahn knowingly possessed exculpatory information for nearly a year before he disclosed it to the

[13] In an analogous situation, the ABA Standing Committee held that Rule 3.3 requires counsel to disclose any material facts prior to settlement where he or she later learns his or her client has lied in responding to interrogatories and/or deposition questions. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-376 (1993) (noting that because reliance on false deposition testimony and/or interrogatories can be "outcome-determinative," "decepti[ve]," and "subversi[ve] of the truthfinding process," a lawyer's obligation to disclose material facts to the Tribunal implies a duty to make similar disclosures to opposing counsel in pre-trial settlement negotiations).

prosecution. Auerhahn acknowledged that as early as July 26, 1991, Coleman told him that "Jordan had . . . admitted to withholding some information," *Auerhahn*, 2011 U.S. Dist. LEXIS 104717, at *26-27, and that on August 27 and 28, 1991, Jordan equivocated "as to whether, in South Carolina, Barone said Ferrara did or did not order the hit." *Id*. at *32. In preparation for the trial in *United States v. Patriarca et al*., Auerhahn filed a trial brief in which he asserted that Jordan would "testify to Barone's statement that Limoli was killed on the orders of Vincent Ferrara," but made absolutely no mention of Jordan's earlier retraction. *Id*. at *41-42 (internal quotation marks omitted). Ferrara and Patriarca subsequently pled guilty. *Id*. Auerhahn made his first (extremely limited) disclosure of Jordan's equivocation to Patriarca's attorney when Patriarca faced sentencing in May 1992. *Id*. at *42-43. And it was not until May 28, 1993 that the government made the same limited disclosure to Barone's counsel. *Id*. at *44. And no disclosure was ever made to Ferrara's counsel. *Id*. at *44-45. Thus, "nearly a year" went by before Auerhahn revealed anything to the defense about Jordan's equivocation. *Id*. at *44.

The panel's holding that this conduct was not a violation of Auerhahn's ethical disclosure obligations was incorrect. It measured the timing requirement only "with reference to the court proceeding such

discovery may affect." *Id*. at *46.[14] It ignored the fact that Auerhahn knew about the "Myrtle Beach statement" "nearly a year" before he disclosed it to anyone, and only revealed it after both Ferrara and Patriarca had pled guilty. *Id*. at *43-44. Effectively ignoring the rule's requirement of disclosure "as soon as reasonably practicable," Auerhahn denied all three defendants meaningful use of this information. If Auerhahn had disclosed the information about the "Myrtle Beach statement" within a reasonable time of his learning of it, it is probable that neither Ferrara nor Patriarca would have pled guilty, since the case against them would have appeared far weaker. And Barone's counsel could have conducted a more thorough investigation or made different strategic choices prior to or at trial.

In sum, the panel erred by diluting the timeliness requirement of the ethical duty to disclose so as to forgive a prosecutor who suppressed exculpatory evidence for nearly a year before turning it over. This error warrants reversal.

[14] The court drew a contrast between this limited construction of D.R. 7-103(b) and the more expansive but merely hortatory "admonition in PF 7(a) that disclosure of such matters be made 'at the earliest feasible opportunity.'" *Auerhahn*, 2011 U.S. Dist. LEXIS 104717, at *48.

II. A Robust System Of Professional Discipline As A Response To Violations Promotes Respect For These Essential And Independent Ethical Obligations

It is true that courts generally assume that prosecutors act properly even when they are given the "opportunity to act improperly." *See also Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) ("[T]radition and experience justify [the] belief that the great majority of prosecutors will be faithful to their duty."). But, at the same time as our system relies on prosecutors to act as "ministers of justice," *see* Model Rule 3.8 cmt. 1, its adversarial nature also causes them to become fierce advocates for securing convictions. This inherent tension leaves prosecutors with both tremendous power and the incentive for abuse. Disciplining prosecutors who violate their ethical obligations protects the fairness and accuracy of the system, and upholds the system's legitimacy. *See, e.g.*, *In re Murray*, 455 Mass. 872, 886-87, 920 N.E.2d 862, 874 (2010) ("The overriding consideration in bar discipline is the effect upon, and perception of, the public and the bar." (internal quotation marks omitted)); *In re Wainwright*, 448 Mass. 378, 388, 861 N.E.2d 440, 447 (2007) ("[T]he purpose of bar discipline proceedings is to maintain public confidence in the competence and propriety of attorneys . . . .").

Perhaps nowhere is the trust accorded to prosecutors more important than in discovery. Given the government's resources, which few defendants can match, prosecutors largely control criminal investigation. Therefore, the fairness of our system depends on the prosecutors' disclosure obligations. Punishing prosecutors who abuse their obligations constitutes an important public affirmation of these principles. Discipline is critical because (1) most violations will not come to light, (2) alternative enforcement regimes have been foreclosed, and (3) prosecutorial self-regulation has proven inadequate.

A. Discipline Is Necessary Because Most Violations Will Not Come To Light

Because of the remarkable level of trust our system places in prosecutors, for every case of discovery abuse that comes to light, many others will never be revealed. *Imbler v. Pachtman*, 424 U.S. 409, 443-44 (1976) (White, J., concurring in the judgment) ("The judicial process will by definition be ignorant of the [*Brady*] violation when it occurs; and it is reasonable to suspect that most violations will never surface."). As such, it is essential that when breaches *do* come to light, violators face significant professional consequences that are sufficient to "provide a strong deterrent to lawyers engaging in such practices." *In re Lupo*, 447 Mass. 345, 359, 851 N.E.2d 404, 415 (2006) (internal quotation marks omitted); *see also Imbler*, 424 U.S. at 429.

B. Discipline Is Necessary Because Other Potential Enforcement Mechanisms Have Been Foreclosed

Moreover, an effective system of professional discipline for prosecutorial ethics violations is critical because the courts have foreclosed alternative enforcement mechanisms. Victims of prosecutorial abuse will not have viable damages claims, since prosecutors have absolute immunity for actions within the scope of their prosecutorial function. *See id*. Making matters worse, in *Connick v*. *Thompson*, 131 S. Ct. 1350 (2011), a case of the most egregious misconduct, the Supreme Court rejected the possibility of damages claims against supervising prosecutors under a failure-to-train-theory.

Courts and litigants routinely have justified this narrowing of private remedies against prosecutors by pointing to state bar disciplinary processes as robust and adequate substitutes for civil remedies. In foreclosing the failure-to-train theory in *Connick*, the Court pointed directly to the fact that "[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment" as providing adequate deterrence. *Id*. at 1362-63; *see also Imbler*, 424 U.S. at 429 (holding that prosecutors have absolute immunity, while noting that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline

by an association of his peers"); Brief of the National Association of Assistant United States Attorneys & National District Attorneys Association as Amici Curiae in Support of Petitioners at 7, *Pottawattamie Cty. v. McGee*, No. 08-1065, 2009 U.S. S. Ct. Briefs LEXIS 691, at *11 (U.S. July 20, 2009) (arguing that private claims are not necessary to deter because state bar discipline is "more narrowly tailored to do so" (internal quotation marks omitted)). Without alternative remedies providing sufficient deterrence, professional discipline is critical.

C. Discipline Is Necessary Because Prosecutorial Self-Regulation Has Proven Inadequate

Finally, state bar discipline is necessary to preserve respect for ethical obligations because prosecutors' offices repeatedly have failed to resolve chronic discovery abuses through internal reforms and regulations. Assistant U.S. Attorneys for the District of Massachusetts, as other prosecutors across the country, have neglected their ethical and constitutional disclosure obligations even after receiving substantial warnings from the courts to amend their practices. In 1991, the First Circuit identified "the recurring problem of belated government compliance with its duty to provide timely disclosure of exculpatory evidence." *United States v. Osorio*, 929 F.2d 753, 755 (1st Cir. 1991). And in 1994, Judge Woodlock complained of prosecutors' pattern of "lame excuses" and "sloppy practices" in regards to

their disclosure obligations. *United States v. Mannarino*, 850 F. Supp. 57, 71 (D. Mass. 1994). Noting the "historic pattern" of abuse in the district, Judge Woodlock criticized the office for its "concerted indolence" in pursuing its obligations and "willful blindness" to its agents' failures and abuses. *Id*.

With the failure to deal with ethical transgressions internally, the public and courts' respect for the legal profession's tradition of self-regulation falters. It is no surprise that internal mechanisms of review have proven insufficient. Deferring to the internal self-regulation of prosecutors' offices makes no more sense than deferring to a law firm to self-regulate its lawyers. Without independent professional enforcement of ethical obligations, prosecutors will continue to disrespect these duties.

D. Despite The Importance Of Robust State Bar Discipline, Prosecutors Rarely Face Professional Consequences Even For Egregious Ethics Violations

Though essential for preserving respect for these ethical obligations, prosecutorial discipline, particularly for disclosure violations, is exceedingly rare. One recent fifty-state survey concluded that "prosecutors have rarely been subjected to disciplinary action by state bar authorities." David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson, 121 Yale L.J. Online 203, 205 (2011), http://yalelawjournal.org/images/pdfs/1018.pdf.

Other empirical studies have reached the same conclusion. *See, e.g.*, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 60 (only forty-four out of two thousand surveyed cases resulting in discipline); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 720 (1987); Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip the Scales*, USA Today, Sep. 23, 2010, at 1A (surveying 201 recent federal cases involving "flagrant" and "outrageous" prosecutorial misconduct, and finding that only one federal prosecutor "was barred even temporarily from practicing law for misconduct during the past 12 years" (internal quotation marks omitted)).

Recent high-profile cases of prosecutorial misconduct reflect the gravity of such abuses and the continued lack of consistent disciplinary enforcement. For example, overzealous prosecutors knowingly withheld exculpatory evidence in their botched corruption case against the late Sen. Ted Stevens. *See* Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 9, 2009, at 1, *In re Special Proceedings*, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012) (concluding that prosecutors were engaging in "systematic concealment of significant exculpatory evidence"). A detailed report recently released by

special investigator Henry Schuelke III highlights the egregiousness of the prosecutorial missteps. *Id*.

As prosecutors' respect for these ethical disclosure obligations is weakened, the temptation to withhold favorable evidence becomes more appealing. Without effective disciplinary enforcement, the only consequence for discovery abuses is the (itself, exceedingly rare) chance "that the information will surface [later] and threaten a conviction." *United States v. Snell*, 899 F. Supp. 17, 22 n.11 (D. Mass. 1995) (Gertner, J.). Rather than shoring up respect for ethical obligations, a system without discipline "encourages [prosecutorial] brinkmanship, [and] taking one's chances . . . at a later date," where prosecutors may hope that "the issue will be dealt with more leniently by the Court." *Id*. at 23 n.11. If courts continue to fail to discipline prosecutors for egregious ethics breaches, the abuses will only become more severe and further erode our system of justice.

CONCLUSION

"[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Model Rules of Prof'l Conduct R. 3.8 cmt. 1. This "carries with it specific obligations to see that . . . guilt is decided on the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution." Prosecution Function 3-3.11(a). These

are critical concepts in the world of professional responsibility. But they are only meaningful if the courts that adopt the rules are prepared to vigorously enforce them by holding errant prosecutors responsible for their conduct, disciplining prosecutors who violate the courts' rules, and informing the public that the courts will not tolerate unethical conduct by those in whom we repose such trust. The judgment of the three-judge panel below should be reversed.

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