IN THE DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE:	**STEPHEN P. JONES, BPR #16764** **Respondent, an Attorney Licensed to Practice Law in Tennessee** **(Shelby County)**	**DOCKET NO. 2016-2534-9-KH**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Because there are no genuine issues as to any material fact and because he is entitled to a judgment in his favor as a matter of law, Respondent Stephen P. Jones ("Mr. Jones") filed a motion for summary judgment in this matter on August 3, 2016. As required by Tenn. R. Civ. P. 56.03, Mr. Jones also separately filed a Statement of Undisputed Material Facts ("SUMF). In further support of the motion for summary judgment, Mr. Jones now submits this memorandum of law and states as follows:

PROCEDURAL BACKGROUND

On May 16, 2016, Mr. Jones filed a motion for judgment on the pleadings in this matter. As a result of those filings, Mr. Jones is confident that the Hearing Panel is familiar with the procedural background of this matter with respect to the contents of the original petition, amended petition, and Mr. Jones' answers to each of those filings. Mr. Jones' motion for judgment on the pleadings was denied by order of the Hearing Panel on June 20, 2016.

Since that time, the Board has taken Mr. Jones' deposition and the deadline for the completion of discovery has passed. As is indicated below, Mr. Jones submits that the material

facts upon which his conduct should be judged are undisputed and that the Hearing Panel should now be in a position to conclude he is entitled to judgment in his favor as a matter of law.

FACTUAL BACKGROUND

As has been itemized in the separately filed SUMF, the undisputed material facts of this matter are as follows:

Mr. Jones is an assistant district attorney in Shelby County and has been licensed to practice law in Tennessee since 1994. (SUMF ¶ 1). Mr. Jones was not the lead prosecutor handling the trial but became involved as co-counsel with another prosecutor in the Shelby County District Attorney's office in the lead up to the February 2009 trial of the Noura Jackson case. (SUMF ¶ 2). The trial in Ms. Jackson's case lasted for two weeks, and the State called more than 45 witnesses and introduced more than 300 exhibits at trial. (SUMF ¶ 3).

One of the State's more than 45 witnesses was Andrew Hammack. (SUMF ¶ 4). Mr. Hammack provided two formal statements to the police regarding his interactions with Ms. Jackson during the night of June 4, 2005, and the early morning of June 5, 2005 – the time period for which it was alleged that Ms. Jackson's mother was murdered. (SUMF ¶ 5). During preparation for the testimony of a different State witness, Detective Miller, Mr. Jones reviewed a supplemental summary Detective Miller wrote and noticed a reference to a third "statement" by Mr. Hammack – actually a handwritten letter -- that was not in the possession of the prosecution. (SUMF ¶ 6). The defense had been provided Mr. Hammack's two formal statements that the prosecution did have in its possession and also had been provided Detective Miller's supplemental summary, which described the contents of the third "statement." (SUMF ¶ 7).

Mr. Jones worked to get possession of the third "statement," but then, as explained by Mr. Jones both in a February 26, 2009 filing with the criminal court, and as explained again more

than five years later in a letter from his lawyer to the Board, it was placed into the flap of a trial notebook and then forgotten until after the trial concluded. (SUMF ¶ 8). After Mr. Hammack testified on direct examination at the trial, Ms. Jackson's counsel did not make any motion under Tenn. R. Crim. P. 26.2. (SUMF ¶ 9).

Mr. Jones was the person who brought the situation to the light, and he did so through the February 26, 2009 filing – after the jury had rendered its verdict but before the defense had moved for a new trial so that the trial court could consider it in its ruling on a motion for a new trial. (SUMF ¶ 10). Mr. Jones's notice laid out the factual sequence of events surrounding the State obtaining the statement from the police and how the statement came to be mislaid, briefly forgotten, and, as a result, not provided to defense counsel until after the trial had concluded but before the defense had moved for a new trial. (SUMF ¶ 11). Mr. Jones' conduct was unintentional and inadvertent. (SUMF ¶¶ 12-13). The trial court, in connection with Ms. Jackson's motion for new trial, not only concluded that Mr. Jones did not intentionally withhold the third Hammack statement but also concluded that the delayed production of that statement was not a Brady violation. (SUMF ¶ 14).

On appeal, the Court of Criminal Appeals affirmed the trial court's ruling likewise finding no Brady violation had occurred. (SUMF ¶ 15). The Tennessee Supreme Court ultimately disagreed on the constitutional question, determining that a Brady violation requiring reversal of Ms. Jackson's conviction occurred as a result of the untimely disclosure of the third Hammack statement. (SUMF ¶ 16). The Tennessee Supreme Court explained its differing conclusion as to Brady on the basis that there were a number of ways that counsel for Ms. Jackson could have used the contents of Mr. Hammack's third statement to challenge the State's case during trial. (SUMF ¶ 17). The Tennessee Supreme Court, however, specifically made

clear that it did not conclude that Mr. Jones had intentionally withheld the statement: "By our holding we do not disturb the trial court's finding that ***the prosecutor did not intentionally withhold Mr. Hammack's third statement***." (SUMF ¶ 18). After remand, prosecutors from a different judicial district handled the case, and Ms. Jackson's case was not re-tried and, instead, Ms. Jackson entered an Alford plea to manslaughter charges and agreed to a reduced fifteen-year sentence. (SUMF ¶ 22).

Including the members of the Tennessee Supreme Court, nine different Tennessee judges became familiar with the facts relating to Mr. Jones having not produced the third Hammack statement until after the jury had returned its verdict, and every one of those judges had obligations under Tennessee's judicial ethics rules that arise from unethical conduct of lawyers appearing before them. (SUMF ¶19). None of the nine judges with knowledge of the underlying facts made any disciplinary report of any sort about Mr. Jones or took any other action to sanction or reprimand Mr. Jones for his conduct. (SUMF ¶ 20). In fact, one of those judges – the trial judge who was in the best position to make a determination regarding Mr. Jones' intentions and conduct – has executed a sworn declaration in this matter indicating he did not at the time, and still does not, consider Mr. Jones to have engaged in any unethical conduct. (SUMF ¶¶ 21).

STANDARD OF REVIEW

Unless otherwise provided to the contrary somewhere else in Rule 9 itself, the Tennessee Supreme Court Rules make clear that the Tennessee Rules of Civil Procedure "apply in disciplinary case proceedings before a hearing panel." Tenn. Sup. Ct. R. 9, § 34.3(a). Thus, a respondent "may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part" of a Board petition. Tenn. R. Civ. P. 56.02.

In response to such a motion, "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. In October 2015, the Tennessee Supreme Court returned Tennessee's standard as to summary judgment proceedings to a position consistent with summary judgment under the Federal Rules of Civil Procedure. Rye v. Women's Care Ctr., 477 S.W.3d 235 (Tenn. 2015). In so doing, our Court has attempted to return summary judgment to what it should be "a rapid and inexpensive means of resolving issues and cases about which there is no genuine issue regarding material facts." Id. at 261 (citations omitted).

Thus, for a movant such as Mr. Jones – who would not bear any burden of proof at a trial of this matter – he "satisf[ies his] burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the [Board's] evidence *at the summary judgment stage* is insufficient to establish the [Board's] claim." Id. at 264 (emphasis in original). Upon so doing, in response the Board "must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." Id. at 265. And, "the focus is on the evidence the [Board] comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." Id.

LAW AND ARGUMENT

This disciplinary proceeding was brought because Mr. Jones made a mistake during the criminal trial of Noura Jackson's case. Mr. Jones did not intentionally withhold evidence; he did not make any conscious or deliberate decision to avoid disclosure of Mr. Hamack's statement.

No court concluded that he did anything other than make an inadvertent error. In fact, the Tennessee Supreme Court – the entity that has the ultimate responsibility for regulating the conduct of lawyers – explicitly went out of its way in its 2014 opinion to disclaim any belief that Mr. Jones had acted intentionally. State v. Jackson, 444 S.W.3d 554, 597 n. 52 (Tenn. 2014). The Board cannot prove, on the record before this Hearing Panel, that what transpired with respect to the late disclosure of the third statement of Andrew Hammack was anything but an inadvertent mistake on the part of Mr. Jones. The undisputed material facts of this matter make plain that Mr. Jones' conduct does not justify the imposition of any discipline, much less the imposition of public discipline. Mr. Jones should not be put through the expense and additional negative, unwarranted publicity of a trial in this matter. Accordingly, this Hearing Panel should grant Mr. Jones's motion for summary judgment and bring this matter to an end.

A. Mr. Jones Is Entitled to Judgment as a Matter of Law That He Did Not Violate RPC 3.8(d).

The primary rule that the Board accuses Mr. Jones of violating provides that "[t]he prosecutor in a criminal case … (d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that ***tends to negate the guilt*** of the accused or mitigates the offense." Tenn. Sup. Ct. R. 8, RPC 3.8(d) (emphasis added). The fact that the Tennessee Supreme Court determined that the delayed disclosure of the third Hammack statement as a result of Mr. Jones' inadvertent mistake constituted a *Brady* violation does not mean that the third Hammack statement qualifies as something "that tends to negate the guilt" of Ms. Jackson. The ethical duty under RPC 3.8(d) applies only to information that is either exculpatory or that mitigates guilt. The standard applicable under Brady is different in terms of what must be disclosed. The Brady standard applies to "material" information that "is favorable to the defendant," such as information that can be useful for impeachment of an important witness even

if it does not tend to negate guilt. See State v. Jackson, 444 S.W.3d at 593-94. Importantly, "*Brady* applies not only to evidence in the prosecution's possession, but also 'to any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" Id. at 594 (quoting Strickler v. Greene, 527 U.S. 263, 275 n.12 (1999)). Thus, the Tennessee Supreme Court's ruling that a *Brady* violation took place is certainly not dispositive of the question of whether RPC 3.8(d) was violated and, given the difference in the tests involved, is of less value to resolving this case than is the fact that the Court, as discussed *infra* in Section D, explicitly did not disturb the finding of the trial court that Mr. Jones did not intentionally withhold the document.

When asked by disciplinary counsel during his deposition, Mr. Jones explained at length what made Mr. Hammack an important witness in the case to the prosecution – and the only aspect of his importance was something that was corroborated by other records, a phone call – and even that was but a piece of a puzzle leading to proving a period of time in which Ms. Jackson *was not* calling or texting anyone:

> Q. All right. Let me ask an open question. What did Mr. Hammack add to the case? What was his significance?
>
> A. His phone call to Noura -- or the phone call he received from Noura. I can't remember if he -- I think the defendant called him, and that was corroborated by her phone records, and that was the importance. Because this was a circumstantial case, we had to exclude every other reasonable hypothesis except for guilt. We did not want to be in a situation in closing argument and have the defense say "the State didn't call this witness" or "you never heard from them," so we called everybody, put them on and let them testify. And he certainly didn't say "I saw her do it," didn't say "I did it." You know, it was just one small puzzle piece to this big puzzle that at the end of the day with my closing argument you reveal the whole picture to the jury with all the pieces fit into there, and his was that phone call, and I think it was -- it's in evidence in the phone records, was the definitive unimpeachable thing that, you know, you can't refute, she placed a call to him, and I think it was before. I think he was the one that -- well, I think it was before the homicide.

Q. Is the import of that what she said or the time and place of the call?

A. The time and place certainly placed it, the fact that -- and that was just one. She made other phone calls to other people, except there was – I wouldn't use -- there was a period where she made no phone calls whatsoever and sent no texts whatsoever. And that was our contention, that that period where she was not making any -- did not have any phone activity was the time that defined when she committed the homicide.

(Jones Deposition at p. 102 line 8-p.103 line 20).

Mr. Jones is entitled to judgment as a matter of law because the third Hammack statement actually is not provable as information that tends to negate Ms. Jackson's guilt. No one in this case takes the position that it was information that in any way mitigated the offense. Thus, the Board cannot prove any violation of RPC 3.8(d), and Mr. Jones is entitled to judgment as a matter of law.

Nevertheless, assuming for the sake of argument that the third Hammack statement *could* be treated as tending to negate Ms. Jackson's guilt, Mr. Jones can never be proven to have acted with the necessary element of intent to constitute a violation of RPC 3.8(d). Neither the language of the rule itself, nor the only language in the Comment specifically addressing (d), offers any insight into the necessary mental state a prosecutor must have to trigger a disciplinable violation of the rule. However, there must be a mental state of one type or the other involved in the rule as an element of the offense. The language of Tennessee's rule as to the pertinent part of RPC 3.8(d) and Comment [3] is identical to the ABA Model Rule. Thus, interpretations of the ABA Model Rule, and precedent from other jurisdictions with language patterned after the ABA Model Rule should be viewed as persuasive authority.

In the event this Hearing Panel does not grant Mr. Jones summary judgment as to RPC 3.8(d) on the basis that the third Hammack statement does not "tend to negate guilt," of the accused, then the Hearing Panel must decide what mental state is necessary to trigger a violation

of this provision and should follow the lead of Colorado and explicitly rule "hold that a prosecutor violates Rule 3.8(d) only if he or she acts intentionally." In re Attorney C, 47 P.3d 1167, 1168 (Colo. 2002). Tennessee, in particular, should take such an approach given its status as one of a significant minority of United States jurisdictions that uses only a "preponderance of the evidence" standard, rather than the "clear and convincing evidence" standard for attorney discipline matters. If Tennessee's RPC 3.8(d) is treated as requiring intentional conduct on the part of a prosecutor for a violation, there can be no question but that the Board cannot demonstrate a violation by Mr. Jones as a matter of law. (SUMF ¶ 12).

The Board does not appear to be attempting to argue that Mr. Jones acted intentionally. Rather, the Board has argued in this case that RPC 3.8(d) should be interpreted to extend to knowing conduct rather than just intentional conduct. See In re Jordan, 913 So.2d 775, 783 (La. 2005) (disciplining prosecutor for violation of RPC 3.8(d) where the Court found that the attorney "knowingly withheld *Brady* evidence"); Lawyer Disciplinary Bd. v. Hatcher, 483 S.E.2d 810, 818 (W. Va. 1997) (noting that a prosecutor who "knowingly" fails to disclose exculpatory evidence "runs the risk of violating ... Rule 3.8"). However, even if Tennessee's rule were to be treated as applying to "knowing" violations on the part of prosecutors, Mr. Jones would still be entitled to judgment as a matter of law.

The ABA Standards for Imposing Lawyer Sanctions define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." There are no facts in the record in this matter that would demonstrate a knowing withholding of evidence by Mr. Jones in the sense that he was "consciously aware" that he was creating circumstances that would result in an untimely disclosure. The record before the Hearing Panel in this matter makes clear that

the delayed disclosure of the third Hammack statement resulted from an inadvertent mistake by Mr. Jones. Thus, whether this Hearing Panel concludes that only intentional conduct can trigger a violation of RPC 3.8(d) or concludes that "knowing" conduct on the part of a prosecutor also can trigger a violation of RPC 3.8(d), Mr. Jones is entitled to summary judgment in his favor. (SUMF ¶ 13).

The only way that the Board's claim could survive summary judgment in this case is if an act of mere negligence on the part of a prosecutor alone could be a violation of RPC 3.8(d). As a matter of public policy, Tennessee should not adopt a position that an unintentional discovery violation in criminal proceedings is a violation of RPC 3.8(d) deserving of discipline. Having an unintentional mistake on the part of a prosecutor qualify as a violation of RPC 3.8(d), particularly one punishable by public discipline, would deter prosecutors from doing the right thing and immediately disclosing that such a mistake has been made. That outcome would be detrimental both to the criminal justice system and to the legal profession as a whole.

Undersigned counsel is aware of only one jurisdiction that has concluded negligent conduct on the part of a prosecutor is sufficient to justify the imposition of discipline for violation of its Rule 3.8(d), North Dakota. In re Feland, 820 N.W.2d 672, 680 (N.D. 2012). Disappointingly, the Board has argued in this matter that North Dakota's approach to this issue should become the law in Tennessee as well. Tennessee should not follow North Dakota's path.

First, unlike Tennessee, North Dakota's disciplinary system requires proof by "clear and convincing evidence" to impose discipline upon a lawyer, and the weighty nature of that burden of proof played a role in the North Dakota court's analysis: "If the Court were to engraft an intent requirement onto Rule 3.8(d) as urged by Feland, proof of such intent by clear and convincing evidence would be extremely difficult." Id. at 681. Given the lower preponderance

of the evidence standard in use in Tennessee, no similar concern regarding the difficulty of proving such intent arises. Second, the North Dakota court, in reaching the conclusion that it could impose discipline for an isolated negligent act on the part of a prosecutor, ended up in a situation that it admitted was ironic – only an admonition (private discipline) should have been warranted yet the court was rendering a public opinion imposing supposedly private discipline. Id. at 686. Tennessee Supreme Court Rule 9 prohibits this Hearing Panel from imposing private discipline. Thus, despite the fact that application of the ABA Standards for Imposing Lawyer Sanctions would clearly indicate that, if any discipline was merited for an isolated instance of negligence, it would be private discipline, if this case were to go to trial and the Hearing Panel find a violation of RPC 3.8(d), the Hearing Panel would have to impose discipline that was more harsh than what the ABA Standards would say was appropriate.

Here, the better path is to recognize – again if and only if Tennessee's RPC 3.8(d) is to be interpreted as extending to negligent conduct – as the Wisconsin Supreme Court has done that "even where a prosecutor does fail to disclose exculpatory evidence in violation of *Brady*, a single inadvertent failure does not necessarily constitute an ethical violation." In re Riek, 834 N.W.2d 384, 392-93 (Wis. 2013). This is a principle that flows from the recognition that "[n]egligence and ethical misconduct are not necessarily synonymous." Id. at 393.

> Most courts and official ABA policy agree that a single instance of "ordinary negligence" may trigger other adverse consequences and possible sanctions but not usually constitute a disciplinary violation warranting public discipline. *See, e.g.*, *In re Conduct of Gygi*, 273 Or. 443, 541 P.2d 1393, 1396 (1975) (stating "we are not prepared to hold that isolated instances of ordinary negligence are alone sufficient to warrant disciplinary action"); *Attorney Grievance Comm'n of Maryland v. Kemp*, 335 Md. 1, 641 A.2d 510, 518 (1994) ("While we do not condone, and certainly do not encourage, attorney negligence or carelessness in the handling of client affairs, neither do we routinely treat negligence or carelessness as a violation of the Rules of Professional Conduct.").

Id.

The concept that, for prosecutors just as for other lawyers in Tennessee, an isolated instance of negligence should not result in discipline flows not just from common sense and fairness but from a recognition of the legal landscape presented by a largely analogous situation – a court determination that a conviction must be revered due to ineffective assistance of counsel in violation of a defendant's constitutional rights. "To prevail on a claim of ineffective assistance of counsel, a defendant must establish that 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense." Bryant v. State, 460 S.W.3d 513, 522 (Tenn. 2015) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996)).

When viewed through the lens of the impact on the outcome of a criminal case, conduct constituting a Brady violation and conduct resulting in a finding of constitutional ineffective assistance of counsel under Strickland are, effectively, identical because each situation has had the same level of prejudicial impact on the proceedings in terms of materiality. See, e.g., Cauthern v. State, 145 F.3d 571, 598-99 (Tenn. Crim. App. 2004) ("[T]he materiality aspect of a *Brady* claim is governed by the same prejudice standard as an ineffective assistance of counsel claim; that is, a defendant must show that there is a reasonable probability that the result of the proceedings would have been different."). Yet, when viewed through the lens of what conduct on the part of a lawyer is necessary for either situation to occur, it is clear that it takes a much higher level of failing on the part of a defense lawyer for a court to find a constitutional violation for the ineffective assistance of counsel than for a prosecutor to commit a Brady violation.

"Establishing deficient performance 'requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" Bryant, 460 S.W.3d at 522 (quoting Strickland, 466 U.S. at 687). "'Effective'

counsel means the provision of advice or services 'within the range of competence demanded of attorneys in criminal cases.'" Id. (quoting Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). "The reasonableness standard is objective, measured by the professional norms prevailing at the time of the representation." Id. And, in the process of a court reaching a conclusion regarding ineffective assistance, it must make "every effort … to eliminate the distorting effects of hindsight," and overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

Further, when viewed through the lens of the ethics rules, there is a much more direct relationship between rendering ineffective assistance of counsel and violation of the relevant ethics rule – RPC 1.1[1] – than there is between a *Brady* violation and a violation of RPC 3.8(d) given that information need not "tend to negate guilt" to trigger *Brady* and need not even be known by the prosecutor if in the hands of the police. Simply put, the adoption of a simple negligence standard as sufficient to justify the imposition of public discipline upon a prosecutor for a violation of RPC 3.8(d) would set a dangerous precedent. Thus, even if the Hearing Panel concludes that negligence is sufficient to trigger a violation of RPC 3.8(d), the Hearing Panel should adopt a rationale like the Wisconsin court and Mr. Jones should be granted summary judgment.

B. Mr. Jones Is Entitled to Judgment as a Matter of Law That He Did Not Violate RPC 3.4(c).

[1] Tenn. Sup. Ct. R. 8, RPC 1.1 requires lawyers to provide competent representation to their clients.

In the Amended Petition, the Board alleged that "Mr. Jones did not comply with Tenn. R. Crim. P. 26.2, requiring that, upon motion, the prosecution must produce any statement in its possession that relates to the subject matter of the witness's testimony." This allegation is the only allegation in the Amended Petition which could conceivably support the Board's claim that Mr. Jones violated RPC 3.4(c). That rule prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." Tenn. Sup. Ct. R. 8, RPC 3.4(c).

Rule 26.2 of the Tennessee Rules of Criminal Procedure provides as follows:

> (a) MOTION FOR PRODUCTION. — ***After a witness*** other than the defendant ***has testified on direct examination***, the court, ***on motion of a party who did not call the witness***, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.
>
> (b) PRODUCTION OF STATEMENT. —
>
> (1) ENTIRE STATEMENT. — If the entire statement relates to the subject matter of the witness's testimony, the court shall order that the statement be delivered to the moving party.
>
> (2) REDACTED STATEMENT. —
>
> (A) DELIVERY TO COURT. — If the other party claims that the statement contains matter that does not relate to the subject matter of the witness's testimony, the court shall order that it be delivered to the court in camera.
>
> (B) REDACTION OF UNRELATED PORTIONS. — Upon inspection, the court shall redact the portions of the statement that do not relate to the subject matter of the witness's testimony. The remaining parts of the statement shall be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the state. In the event of a conviction and an appeal by the defendant, this preserved portion shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.
>
> (c) RECESS FOR EXAMINATION OF STATEMENT. — The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.
>
> (d) SANCTION FOR FAILURE TO PRODUCE STATEMENT. — ***If the party who called the witness disobeys an order to deliver a statement, the court shall strike the***

> ***witness's testimony from the record and order the trial to proceed. If the attorney for the state disobeys the order, the court shall declare a mistrial if required in the interest of justice.***
>
> (e) PRODUCTION OF STATEMENTS AT PRETRIAL HEARING. — Except as otherwise provided by law, this rule shall apply at a motion hearing under Rule 12(b).
>
> (f) DEFINITION OF "STATEMENT." — As used in this rule, a witness's "statement" means:
>
> (1) A written statement that the witness makes and signs, or otherwise adopts or approves; or
>
> (2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement.

Tenn. R. Crim. P. 26.2. (emphasis added). Even if the Board could prove a violation of Rule 26.2, the Board still would have to prove that Mr. Jones's violation involved him "knowingly disobey[ing]" Rule 26.2 in order to trigger a violation of RPC 3.4(c). The undisputed facts in this matter are clear that the delayed disclosure was not an act involving knowing disobedience of any sort. (SUMF ¶ 13). Yet, the Hearing Panel need not resolve this aspect of the case based on the fact that the conduct did not involve knowing disobedience, because given the text of Tenn. R. Crim. P. 26.2, as a matter of law, there was no violation of Rule 26.2 at all.

The undisputed facts are that Ms. Jackson's counsel did not, after Mr. Hammack testified on direct examination, make such a motion. (SUMF ¶ 9). Thus, no order requiring production of a statement by Mr. Hammack on such a motion was entered; and Mr. Jones certainly did not disobey any order to produce such a statement entered in response to such a motion. Thus, Mr. Jones did not violate Rule 26.2, an essential element of the Board's claim has been negated, and summary judgment dismissing the Board's claim as to a violation of RPC 3.4(c) is in order.

C. Mr. Jones Is Entitled to Judgment as a Matter of Law That He Did Not Violate RPC 8.4.

RPC 8.4(a) is little more than an add-on allegation in a disciplinary matter as it serves to make the violation of any other ethics rule a violation of RPC 8.4(a) as well. For many of the reasons set forth above as well as those set forth below, Mr. Jones is entitled to summary judgment as to any contention of a violation of RPC 8.4(a).

RPC 8.4(d) prohibits lawyers from "engag[ing] in conduct that is prejudicial to the administration of justice." The Board's case fails because the undisputed facts in the record are clear -- the Board cannot prove a sufficient intent on the part of Mr. Jones. The last sentence of Comment [1] to RPC 3.8 tellingly explains that "[a] knowing disregard of obligations or a systemic abuse of prosecutorial discretion could constitute a violation of RPC 8.4." Tenn. Sup. Ct. R. 8, RPC 8.4 cmt. [1]. There is no logical basis to interpret RPC 8.4(d)'s prohibition to justify the imposition of discipline on a lawyer for an inadvertent mistake. And that is particularly true in this case where the record is clear that it was Mr. Jones' own filing of the Notice of Omitted Jencks Material that brought this matter to the attention of Ms. Jackson's counsel and the trial court and given that his filing was made at a time in which the trial court was able to address it before ruling on a motion for new trial. (SUMF ¶ 10). The fact that Mr. Jones, upon realizing his mistake, acted promptly so that the trial court would know about the issue prior to ruling on Ms. Jackson's motion for new trial actually demonstrates Mr. Jones's respect for the law and further proves that there was nothing intentional or willful about Mr. Jones's failure to provide the statement before that point.

But, there are three additional reasons the Board's claim as to RPC 8.4(d) cannot survive summary judgment.

First, RPC 8.4(d) is a broad provision that primarily has utility for addressing conduct that is directly related to judicial proceedings but that is not more specifically covered by some

other provision in the ethics rules but that is significant enough to raise real questions about a lawyer's fitness to practice law. Not surprisingly, reported cases involving violations of RPC 8.4(d) always involve a finding that another ethics rule along with that rule was breached. The Tennessee Rules of Professional Conduct, as court rules, are subject to similar principles of statutory interpretation as are statutes. See, e.g., State v. Johnson, 342 S.W.3d 468, 471 (Tenn. 2011) (citing State v. Crowe, 168 S.W.3d 731, 744 (Tenn. 2005)). A rule addressing a specific instance of conduct – RPC 3.8(d) – should have primacy over a more general provision – RPC 8.4(d), just as "a specific statutory provision . . . will control over a more general statutory provision." Washington v. Robertson County, 29 S.W.3d 466, 475 (Tenn. 2000). Thus, if the Board's claim under RPC 3.8(d) fails, the same conduct should not be subject to discipline on a claimed basis that it violates RPC 8.4(d).

Second, the way that the proceedings unfolded in Ms. Jackson's case after the Tennessee Supreme Court reversed and remanded her conviction demonstrates that the "administration of justice" was not actually prejudiced by Mr. Jones's mistake. There was no retrial of the case. Ms. Jackson was not ultimately exonerated or acquitted. Thus, what the Tennessee Supreme Court concluded was a *Brady* violation did not play some role in an innocent person spending time in jail. Rather, after the case was remanded, Ms. Jackson entered an *Alford* plea to voluntary manslaughter and agreed to a sentence for her guilty plea of fifteen years in prison. (SUMF ¶ 22).

Third, the imposition of discipline for the violation of a provision focused upon prejudice to the "administration of justice," in circumstances in which both the trial court and the intermediate appellate court found no *Brady* violation and, in fact, the trial judge has offered a sworn declaration that he did not consider Mr. Jones to have engaged in any unethical conduct

would defy all logic and common sense. (SUMF ¶¶ 14-15). Judge Craft was in the best position to make a determination regarding Mr. Jones' intentions and conduct as he had the lawyers involved in front of him, presided over all of the discovery motions in the case, heard all of the live testimony during the jury trial of the matter, and specifically (and contemporaneously) evaluated the credibility of Mr. Jones' explanations in the context of Ms. Jackson's motion for new trial. Judge Craft is unequivocally on record in this matter that he did not then, and still does not now, consider Mr. Jones' mistake to be unethical conduct. (SUMF ¶ 21).

D. The Tennessee Supreme Court Has Acted and Refrained From Acting in Ways That Are Preclusive and Binding Upon The Hearing Panel.

All of the Board's powers, as well as all of the powers of this Hearing Panel, come from, and are subject to, the Tennessee Supreme Court. See Tenn. Sup. Ct. R. 9. That statement is particularly important to the outcome of these proceedings given that these proceedings began when someone, doing little more than send a copy of the Supreme Court's opinion in Ms. Jackson's case, filed a complaint with the Board[2] against Mr. Jones and another lawyer that said this and only this:

> As the TN Supreme Court concluded, Jones (with Weirich) violated Noura Jackson's constitutional right to due process, What punishment will Jones & Weirich face from the Board? If the Board doesn't protect the people from lawyers like these, who will?

(SUMF ¶ 20). The Court, however, specifically did not set aside the trial court's determination that Mr. Jones' conduct was unintentional. (SUMF ¶ 18). This Hearing Panel has no power to revisit or contradict the determination made by the Court regarding the unintentional nature of Mr. Jones' omission.

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[2] Mr. Jones has previously detailed, in connection with his earlier motion for judgment on the pleadings, how the Board managed to launch these formal disciplinary proceedings against Mr. Jones without even understanding that the document attached to the Petition as Exhibit D was a document that the prosecution had disclosed to Ms. Jackson's lawyers and not the third Hammack statement at all.

Equally important, if not more important, for purposes of the questions before this Hearing Panel regarding Mr. Jones' conduct, is what the five Justices of the Court did not say or do: not one reported Mr. Jones to the Board nor did they take any other action to sanction or admonish him. (SUMF ¶ 20). At the time that the members of the Tennessee Supreme Court issued the ruling in Ms. Jackson's case, each of them had obligations under Tennessee's judicial ethics rules to inform the appropriate authority – the Board – if they had knowledge of a violation of the Rules of Professional Conduct raising a substantial question regarding Mr. Jones' honesty, trustworthiness, or fitness as a lawyer in other respects. See Tenn. Sup. Ct. R. 10, RJC 2.15(B). The Court did not, as it certainly could have done, indicate in its ruling that it was referring the matter of Mr. Jones' conduct to the Board for investigation or that it would be sending a copy of its ruling to the Board. Nor did any of the individual Justices otherwise make any disciplinary report to the Board. Further, each of the Justices had obligations under Tennessee's judicial ethics rules to take "appropriate action" if they received information that indicated a substantial likelihood that Mr. Jones had committed a violation of the ethics rules not significant enough to rise to the level that required informing the appropriate authority. See Tenn. Sup. Ct. R. 10, RJC 2.15(D). Again, neither the Court nor any of its five Justices took any action to sanction or admonish Mr. Jones for any conduct and, instead, specifically noted that the trial court's conclusion about lack of intent was not being disturbed.

This Hearing Panel must defer to the fact that the Court took no such action. To do otherwise would place this Hearing Panel in a position of calling into question whether the members of the Tennessee Supreme Court somehow failed in their own ethical responsibilities under the Code of Judicial Conduct.

CONCLUSION

For all of the foregoing reasons, Mr. Jones's Motion for Summary Judgment should be granted, and the Amended Petition for Discipline against him should be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Law in Support of Motion for Summary Judgment has been served upon Deputy Chief Disciplinary Counsel Krisann Hodges, Esq., by email and by regular U.S. Mail, postage prepaid, at 10 Cadillac Drive, Suite 220, Brentwood, Tennessee 37027 on this the 2nd day of August 2016.

BRIAN S. FAUGHNAN