STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

Hon. Paul J. Cusick
3rd Circuit Court
Detroit, Michigan 48226

FC No. 104

Master: Peter D. Houk

Margaret N.S. Rynier (P 34594)
Melissa A. Johnson (P71695)
Disciplinary Counsel
3034 W. Grand Blvd.
Suite 8-350
Detroit, MI 48202
(313) 875-5110

Donald D. Campbell (P 43088)
James J. Hunter (P74829)
Attorneys for Paul Cusick
Collins, Einhorn, Farrell, PC
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 351-5426

DISCIPLINARY COUNSEL'S CONSOLIDATED RESPONSE TO RESPONDENT'S MOTIONS FOR SUMMARY DISPOSITION

Introduction

In two motions for summary disposition respondent contends that the charges against him should be dismissed, essentially because: (1) the charges are based on an allegation that respondent made a "sentencing deal" with Thomas McCully; (2) the evidence he withheld was not "material" under *Turner v. United States*, 137 S. Ct. 1885 (2017); (3) McCully was not a res gestae witness whom he was required to disclose; and (4) this proceeding is unconstitutional under the Fourteenth

Amendment.

These motions should fail, because:

(1) The charges here are not based on a claim that respondent had a "sentencing deal" with McCully. Rather, evidence shows that respondent made an arrangement for McCully's cooperation in other criminal investigations with the understanding that that cooperation would be considered when the time came for McCully to be sentenced. Further, respondent arranged for the cooperation of McCully's girlfriend, Brandy Loggie, in other investigations, with the understanding that this too would be considered in sentencing McCully. There is sufficient evidence to support these allegations.

(2) The question of materiality, under *Brady v. Maryland* or *Turner v. United States* is not at issue here. That question pertains to the standard for reversing a conviction, which exceeds the standard for requiring disclosure of exculpatory or impeachment evidence. The question here is whether respondent violated his ethical and legal obligations as an attorney and a prosecutor, and whether his answers to the Commission demonstrate misconduct while he was a judge. The evidence shows that he violated his ethical obligations both as a prosecutor and in his answers to the Commission.

(3) McCully was centrally involved in the continuum of the matter under investigation and was indeed a res gestae witness, as the evidence will show.

(4) The Michigan Supreme Court has repeatedly held the procedures used in judicial disciplinary proceedings are constitutional.

For these reasons and as further discussed below, the motions should be denied.

LEGAL STANDARDS: SUMMARY DISPOSITION

MCR 9.231 provides that the master is to rule on all motions regarding the complaint, answer, and hearing. Regarding dispositive motions, the rule provides that "[r]ecommendations on dispositive motions shall not be announced until the conclusion of the hearing, except that the master may refer to the commission on an interlocutory basis a recommendation regarding a dispositive motion."

Summary disposition motions may be granted under MCR 2.116(C)(10) *if* there are no genuine issues of material fact *and* the moving party is entitled to judgment or partial judgment as a matter of law. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden v. Rozwood*, 461 Mich. 109, 120 (1999). When evaluating motions for summary disposition, the reviewing court should consider the evidence proffered in opposition to the motion in the light most favorable to the party opposing the motion. *Id*. at 120.

When "ruling on a motion for summary disposition, "a court may not weigh

the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Lysogorksi v. Bridgeport Charter Twp.*, 256 Mich.App. 297, 299 (2003), quoting *DeFlaviis v. Lord & Taylor, Inc.*, 223 Mich.App. 432, 436 (1997).

Nor may a trial court make a determination with regard to credibility in ruling on a motion for summary disposition. *White v. Taylor, Distributing Co., Inc*. 275 Mich App. 615, 625 (2007), *aff'd*, 482 Mich. 136, 753 N.W.2d 591 (2008). "[W]here the truth of a material factual assertion of a moving party depends upon a [witness's] credibility, there exists a genuine issue for the trier of fact and a motion of summary disposition should not be granted." *Vanguard Ins. Co. v. Bolt*, 204 Mich.App. 271, 276 (1994).

FACTUAL BACKGROUND

The complaint alleges respondent committed five counts of misconduct:

1) Suborning perjury in the 35rth District Court;
2) Suborning perjury in the 3rd Circuit Court;
3) Withholding information and/or evidence in *People v. Joslin* and *People v. Berry et al.*;
4) Obstructing and/or interfering with cross-examination in *People v. Joslin* and *People v. Berry et al.*; and
5) Misrepresentations to the Commission.

These charges, as well as disciplinary counsel's opposition to respondent's motions for partial summary disposition, rely on the facts and evidence recited below.

In January of 2013, the Western Wayne Narcotics Task Force (Task Force) began an investigation into a large drug trafficking organization (DTO) responsible for the distribution of hydroponic marijuana throughout southeastern Michigan. Thomas McCully was the head of the operation and Ryan Goble and Nicholas Stevens were his main associates. The investigation also established that McCully was responsible for the delivery of marijuana to other states and that in February of 2013 he and his girlfriend, Loggie, arranged the delivery of over seven pounds of marijuana to Lexington, Kentucky.[1] (Judicial Tenure Commission Disciplinary Counsel Proposed Exhibit 1)

On May 20, 2013, members of the Task Force, including Sgt. Paul Calleja, Officer Paul Tennies, and Det/Lt. Andrew Osborne, presented the details of their investigation via PowerPoint to respondent and other members of the Attorney General's office.[2] (JTC Prop. Ex. 3; 94, par. 16; 97j, par. 18; 97k, par. 8) The presentation included information about the role each suspect played in the DTO,

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[1] This police report includes evidence gathered by the Lexington police, including cell phone text messages that showed McCully and Loggie paid the father of Loggie's two children, Micah Delavale, to drive the marijuana to Kentucky. It also showed that Loggie rented the vehicle Delavale used for the delivery, and that after Delavale was arrested, Loggie posted his bond and paid for his attorney. When Delavale was released from jail, Loggie and McCully drove two vehicles to Ohio, one of which was to be used by Delavale to return to Michigan.

[2] The other members of the AG's office present for the PowerPoint included respondent's immediate supervisor, William Rollstin, and AAG Kimberly Mitseff, who was assigned to the AG's forfeiture unit.

the personal relationship between McCully and Loggie, and Loggie's participation in the delivery of marijuana to Kentucky.

Respondent was the lead AAG and was assigned to the case at the start of the investigation. (Respondent's Answer to FC 104, par. 8; par. 9) Respondent remained in frequent contact with the Task Force, was regularly made aware of all investigatory developments, and provided guidance as the Task Force made numerous arrests, executed the search warrants he had approved, seized money, drugs and other contraband, and obtained witness/suspect statements. (R's Ans. to FC, par. 10) Respondent also conducted several investigative subpoena depositions of individuals involved in the McCully DTO. (R's Ans. to FC, par. 10) As the investigation progressed, the Task Force continually provided respondent with a copy of police reports witness statements, and transcripts.[3] (JTC Prop. Ex. 13; 94, par. 11f) These documents confirmed Loggie's relationship with McCully and her familiarity with, and participation in, his marijuana operation.

Based on the entirety of the investigation, in December 2013 respondent sought and obtained authority to charge ten individuals, including McCully, Goble and Stevens, with conducting a criminal enterprise, conspiracy to commit a criminal

[3] The report provides details of Loggie's post-arrest statement in which she admitted knowing that McCully was selling large amounts of marijuana and that she observed many heat-sealed one-pound bags of marijuana and large amounts of cash at his residence. She also admitted she had arranged for Delavale to make marijuana deliveries for McCully, and that she rented the vehicle Delavale used in the Kentucky delivery.) (JTC Prop. Ex.5, Bates 190-192)

enterprise, and conspiracy to deliver/manufacture marijuana.[4] (JTC Prop. Ex. 13) Respondent did not seek and did not issue any charge against Loggie.

On January 30, 2014 McCully, Goble, and Stevens waived preliminary examination and were bound over to circuit court for trial. Within days of the waivers respondent commenced plea negotiations with the attorneys representing McCully (Steve Fishman), Goble (Kris Kessel), and Stevens (Neil Rockind). Beginning in January and continuing through the next several months, Fishman and respondent exchanged emails and phone calls about resolving the case. The correspondence included the following email exchanges:

- January 17, 201, Fishman emailed respondent stating, in part, "I have a few thoughts on our case that I would like to share with you. I think we might be able to make the case go a lot smoother." (JTC Prop. Ex. 89c)

- February 11, 2104, Fishman emailed respondent stating, "I have made it quite clear for awhile that McCully is going to plead guilty . . . McCully still wants to enter into a plea agreement. He knows he will spend some time in jail as part of this agreement." (JTC Prop. Ex. 89e)

- March 5, 2014, in an email string with respondent, Fishman stated he wants to keep the McCully matter in Judge Groner's court because "... there are too many screwballs over there who could mess up *our deal*." (emphasis added). Respondent replied "I don't think any judge will inhibit a plea and sentence agreement that we work out." (JTC Prop. Ex. 89f)

[4] Respondent sought that authority by preparing a "Request to Initiate Litigation" in which he outlined the evidence and the potential charges. The request required the approval of the chief of the Criminal Division, Richard Cunningham, and several bureau chiefs, including Laura Moody, John Pallas, Thomas Cameron and Matthew Schneider.

Respondent documented these negotiations in the AG's internal electronic Legal Files system (Legal Files)[5] by specifically noting on February 7 that he had spoken with Fishman about the case and "the goal was to meet and have a deal by March 6th." (JTC Prop. Ex. 88d)

On March 6, 2014, before the Honorable David Groner, Stevens pleaded guilty pursuant to a plea agreement. (JTC Prop. Ex. 24) Fishman, who appeared for both McCully and Goble on this date, requested adjournments for McCully and Goble and stated, on the record in the presence of respondent, that they were "making a deal." (JTC Prop. Ex. 24). Later that day, in his electronic legal notes, respondent wrote that he had met with Fishman and had gone over the guidelines. He said that the AG's office

> …would probably be prepared to ask him to plead to 48 mos [sic] even if he claims that he doesn't have any proceeds from the sales (which is a joke). We may be able to negotiate something different but as of a now he needs 48 mos [sic]. Steve said he would meet with him and he would come back. (JTC Prop. Ex. 88h)

That same day, Fishman and respondent exchanged emails about the sentencing guidelines. In that email exchange, Fishman stated that that he would call respondent the next day with "a few thoughts." (JTC Prop. Ex. 89g)

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[5] Legal Files is a case management system used by the AG's office. It allows AAGs and other assigned users to save documents and emails and allows an AAG to compose and maintain notes pertaining the progress of each case assigned to him or her.

On March 13, 2014, Goble and McCully also pleaded guilty before Judge Groner.[6] Respondent was present at each defendant's plea hearing. (JTC Prop. Ex. 100) Although Stevens and Goble accepted plea offers that included incarceration,[7] (JTC Prop. Ex. 25) McCully declined respondent's offer[8] (JTC Prop. Ex. 26) and pleaded guilty as charged, under sentencing guidelines of 72 to 150 months.

Less than two weeks later, on March 27, 2014, Fishman contacted respondent via email regarding McCully's cooperation as a (CI) and providing the Task Force with information about other drug organizations. (JTC's proposed Exhibit (JTC Prop. Ex. 89h) On April 24, Fishman sent another email asking when respondent wanted to sit down with McCully "re various targets." (JTC Prop. Ex. 89k) In reply respondent noted that he had discussed the issue with the Task Force's Lt. Dave Kelly and Sgt. Paul Calleja and that May 2, 2014, appeared to be a good date for McCully's "debriefing." (JTC Prop. Ex. 89k)

Respondent's agreement, or understanding, for McCully to become a CI with the Task Force was evident when Fishman, on March 27, emailed respondent stating:

> There is no doubt in my mind that [McCully] has valuable information that would lead to easy seizures of controlled substances and/or money. He is also ready and willing to do

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6 Before McCully's plea respondent and Fishman spoke with Judge Groner. This is documented in Judge Groner's handwritten notes from March 13, 2014. (JTC Prop. Ex. 35, Bates 724)

7 Stevens pled guilty to one count of conducting a criminal enterprise, with a sentence agreement of 51 months to 20 years in custody. Goble pled guilty to one count of conducting a criminal enterprise, with a sentence agreement of one year in the Wayne County Jail.

8 The offer for McCully was to plead to one of the 20-year felonies, with a sentence agreement of a minimum of four years in custody. (R's Ans. to FC, par. 26c)

> proactive things such as make phone calls, make buys, and/or introduce agents. (JTC Prop. Ex. 89h)

According to respondent's electronic Legal Files notes, by April 7, McCully began providing this "valuable information" through Fishman directly to respondent. (JTC Prop. Ex. 88l) Respondent forwarded that information to the Task Force after he, AAG Cunningham and AAG Rollstin agreed to do so "to see if any of [it] warranted a debriefing." (JTC Prop. Ex. 92, Bates 3004) At the end of April respondent, Fishman, and the Task Force exchanged a series of emails setting McCully's debriefing for May 2, 2014. (JTC Prop. Ex. 89k)

At the May 2 meeting, respondent informed the Task Force that he had agreed for McCully to work as a CI in exchange for favorable consideration in his sentence. (JTC Prop. Ex. 97a, par. 47-53) This is confirmed by respondent's contemporaneous Legal Files notes, in which he wrote that McCully's cooperation may "mitigate" his sentence. (JTC Prop. Ex. 88b)

On May 12, 2014, McCully met with Sgt. Calleja and signed a CI agreement. In the "remarks" section of the agreement form, Sgt. Calleja wrote, "working for a reduced sentence, (sic) with Michigan AG office Paul Cusick." (JTC Prop. Ex. 30) This notation was made with respondent's knowledge and permission. (JTC Prop. Ex. 38; 97a, par. 36-41). Throughout the time McCully worked with the Task Force, Sgt. Calleja and other officers maintained contact with respondent, by phone and by

email, regarding the information and cases McCully was "generating." (JTC Prop. Ex. 97a, par. 22, 54, 57)

Among those investigations was a large-scale DTO that was operated in Livingston, Washtenaw, and Genesee counties by Darryl Berry. (JTC Prop. Ex. 39) As with the *McCully* case, respondent was the lead AAG of the *Berry* investigation and was regularly informed of its progress and developments. (R's Ans. FC, par. 10a; JTC Prop. Ex. 97, par. 54).

McCully provided information regarding Berry's organization and on August 6, 2014, he made the initial introduction between Berry and an undercover officer, Robert Lowes. (R's Ans. to FC, par 58c) During that meeting Sgt. Lowes purchased a small amount of marijuana from Berry. Berry, in the presence of McCully, also discussed and agreed to sell whole marijuana plants to Sgt. Lowes. (R's Ans. to FC, par. 58e, 58f; JTC Prop. Ex. 97i, par. 23)

On September 5, 2014, McCully also accompanied Sgt. Lowes to Berry's grow field in Livingston County, where he witnessed Sgt. Lowes give Berry $3,000 as a deposit for three fully grown marijuana plants.[9] McCully also was present when Berry discussed his other grow operations and talked about plants that were available

[9] Sgt. Lowes did not take possession of the marijuana plants until October 2014, when they were fully grown. (JTC Prop. Ex. 39, Bates 742)

for purchase. Berry told them that he wanted to sell 72 plants for $125,000. (JTC Prop. Ex. 39, Bates 735)

On September 24, 2014, Sgt. Lowes returned to Berry's grow operation, without McCully, to inspect the marijuana plants he had put a deposit on. While they were checking on the plants, Sgt. Lowes asked if the 72 plants were still for sale for $125,000. Berry offered to sell him 70 plants.

Also during the summer of 2014, the Task Force began an investigation into the Pure Wellness Center, a marijuana dispensary owned and operated by Amanda Joslin. (JTC Prop. Ex. 56) Respondent was the lead AAG of this investigation as well. (R's Ans. to FC, par. 8c) To seek to establish a basis for a search warrant, the Task Force asked McCully to make controlled buys from the Pure Wellness dispensary. McCully demurred because he did not have a valid medical marijuana card and he believed the owner of the facility, Amanda Joslin, might recognize him as a major marijuana grower. (JTC Prop. Ex. 97a, par. 64) McCully then offered to have Loggie, his girlfriend, act in his stead. (JTC Prop. Ex. 97a, par. 63) The Task Force then sought and obtained respondent's consent to use Loggie as a CI for McCully's benefit. (JTC Prop. Ex. 97a, par. 67)

The Task Force then spoke to Loggie by phone, asked if she was willing to work as a CI to help McCully, and informed her of the work that would be expected of her. (JTC Prop. Ex. 97a, par. 67) Loggie agreed to work as a CI and on September

4, 2014, she signed confidential source documents which outlined the expectations. (JTC Prop. Ex. 55; 97a, par. 69) With respondent's approval of the arrangement, after Loggie signed the CI agreement form and left to make the first controlled buy, Sgt. Calleja wrote "assisting boyfriend, Thomas McCully (redacted CI number) on his charges" in the remarks section of the form.[10] (JTC Prop. Ex. 55)

Once Loggie had signed the form Det. Zinser followed her to the Pure Wellness Center, where she made a controlled buy of marijuana and marijuana products from one of Joslin's employees. Per respondent's instructions, Loggie made three additional buys from the Pure Wellness Center on March 16, 17, and 18. (R's Ans. to FC, par. 82, 83)

In two emails updating respondent on the progress of these investigations Sgt. Calleja reminded him that Loggie's work was on "McCully's behalf." In the first, sent on January 16, 2015 and titled "McCully (Update)," Sgt. Calleja advised respondent of several investigations that were "generated" by McCully or Loggie or in which McCully or Loggie was used as a CI (JTC Prop. Ex. 89t). Included in that email was a reference to:

> …an ongoing MJ Dispensary case in Canton that *McCully generated* and his girlfriend (*Loggie on McCully's behalf*) has done some CI work on. (emphasis provided)

[10] Sgt. Calleja is 99.99% certain that before Loggie signed the CI documents, he "advised and consulted" respondent about the Task Force using Loggie for McCully's benefit. (JTC Prop. Ex. 97a, par. 88)

In the second email, titled "Ref: Open Dispensary Case" and sent to respondent on January 26, 2015 with copies to AG's Trial Division Chief Cunningham and Sgt. Andrew Osborne, Sgt. Calleja stated:

> Any word ref: Ongoing MJ Dispensary case in Canton that *McCully generated and his girlfriend* (*Loggie on McCully's behalf*) has done some CI work on. The Canton Twp. Chief is inquiring as to a time frame for us to take this illegal drug trafficking down/out of their city. I would love to set up a meeting with your office to discuss this…either fri (sic) 30th, Mon 2nd or tue (sic) 3rd. (emphasis provided) (JTC Prop. Ex. 89u)

On March 19, 2015 respondent authorized search warrants for the Pure Wellness Center in Canton and for Joslin's home in Ypsilanti. (R's Ans. to FC, par. 85; JTC Prop. Ex. 57; 58) These search warrants resulted in the confiscation of marijuana and marijuana products, various documents, computers, and US currency. It also resulted in the arrest of Joslin, her boyfriend Eric DeJonghe, and her son Jacob Scholin. (JTC Prop. Ex. 59)

On July 9, 2015 respondent charged Joslin in Wayne County with conducting a criminal enterprise, possession with intent to deliver marijuana, and delivery of marijuana. (JTC Prop. Ex. 60) Five days later he also charged Joslin, DeJonghe, and Scholin in Washtenaw County with conspiracy to manufacture/deliver marijuana and possession with intent to deliver marijuana. (R's Ans. To FC, par. 89b) On or about July 23 respondent provided discovery to Joslin's attorney, Michael Komorn, for both cases. (JTC Prop. Ex. 88ee) It is undisputed that respondent did not include

copies of, or information about, McCully's or Loggie's CI agreements in the discovery materials. (R's Ans. to FC, par. 91) It is also undisputed that respondent did not disclose any information about the case pending against McCully or his relationship with Loggie. (R's Ans. to FC, par. 91)

Meanwhile, Fishman continued to periodically check in with respondent to update him on McCully's successful work with the Task Force. On August 6, Fishman emailed respondent stating,

> Tom McCully stopped in to see me this morning. I understand that things are still going on, although he has not met with the agents since some time (sic) in early July. He also tells me that his girlfriend Brandy Loggie has also been cooperating and may very well be a witness in one of your cases.

(JTC Prop. Ex. 89dd) Within minutes of that email Fishman sent a follow up email advising respondent that he:

> …forgot to include this *spreadsheet* in my last email. This is a summary prepared by McCully that gives *all of the work he has done* since approximately May of last year. I think we sent you another one that summarizes the stuff before then. (emphasis provided) (JTC Prop. Ex. 89ee)

The attached "spreadsheet" was a two page document outlining 30 cases that both McCully and Loggie had worked on with the Task Force. (JTC Prop. Ex. 89ee)

By September of 2015 the *Berry* investigation concluded and respondent reviewed and approved search warrants on Berry's grow operations in Livingston and several other counties. (R's Ans. to FC, par. 52) During the search warrant

review process Sgt. Lowes sought advice on the drafting of the search warrant and specifically asked how to word it to protect the CI (McCully). (JTC Prop. Ex. 89gg) Shortly after the search warrants were executed, respondent became aware that Komorn represented Berry. (R's Ans. to FC, par. 54)

On November 3, 2015, Judge Gerou conducted a preliminary examination in *People v. Amanda Joslin*. Respondent called Loggie as a witness to establish his case in chief. Loggie was the sole eyewitness to testify about the alleged illegal sale of marijuana. During his direct examination of Loggie, respondent did not ask about how and why Loggie became a CI. But Komorn, defense counsel for Joslin, did ask about this on cross-examination. Komorn asked several questions trying to discern why and how Loggie was involved in the case, including her motive for becoming a CI and testifying. Loggie stated only that she was testifying voluntarily as a concerned citizen. (JTC Prop. Ex. 67a, Bates 1335-1340) Loggie did not say at any point in her testimony that she was motivated to become a CI to assist her boyfriend who had pled guilty but was pending sentencing. Realizing that Loggie's testimony was inaccurate, incomplete, and untrue Detective Zinser, who was the officer in charge (OIC) of the Pure Wellness investigation and who was sitting next to respondent at the prosecutor's table, told respondent that Loggie's testimony was not completely true or accurate and needed to be clarified. (JTC Prop. Ex. 97q, par. 50-54)

Respondent did not correct or clarify Loggie's testimony at the preliminary examination or at any point thereafter. (JTC Prop. Ex. 67a, Bates 1319-1333, 1365-1369; Ex. 69, Bates 1749-1754, 1766-1767; 97b, par. 19) Similarly, respondent never disclosed or otherwise provided information to Komorn that:

- McCully and Loggie had both been suspects in the McCully Drug Trafficking Organization (DTO) investigation that had been prosecuted by respondent;

- McCully had been charged with and pled guilty to three felony counts stemming from the McCully DTO investigation and was pending sentencing;

- McCully and Loggie both became CIs for the Task Force and signed CI agreements;

- Loggie was motivated to become a CI to assist her boyfriend who was awaiting sentencing;

- Ms. Loggie and Mr. McCully had active forfeiture cases pending at the time that they acted as CIs. [11] stemming from their arrests in the DTO case. (R's Ans. To FC, par. 91)

On December 18, 2015, the district court judge bound Joslin over to face trial as charged. In making his decision he relied in large part on Loggie's testimony that Joslin was the owner of the dispensary; that Loggie had made four separate marijuana transactions; and that on one of those occasions Joslin identified herself as "the boss" of Pure Wellness, escorted Loggie into the back of the facility, and was

[11] Respondent was aware on or about March 4, 2014, of the forfeiture proceedings against McCully and Loggie. R's Ans. to FC, par. 25.

"standing close by when a [marijuana] transaction was made." (JTC Prop. Ex. 67b, Bates 1653-1654)

On January 7, 2016, after five stipulated adjournments and less than three weeks after Joslin's was bound over, respondent appeared before Judge Groner for McCully's sentencing. Respondent advised the court that he had no objection to non-reporting probation. (JTC Prop. Ex. 29, Bates 499). Judge Groner said he had "talked to the lawyers in the back about this" and that respondent ("– off the record –") had indicated there was no objection to probation. (JTC Prop. Ex. 29, Bates 499) The judge sentenced McCully to one year of non-reporting probation. On the same day Loggie paid McCully's fines and costs, totaling approximately $1700, by signing a document that released the bond money she had posted for him two years earlier. (JTC Prop. Ex. 30) McCully's probation was closed seven months later. (JTC Prop. Ex. 36)

On January 19, 2016, respondent submitted a "Request to Initiate Litigation" seeking to charge Berry, Michael and others with marijuana relates crimes. In this request respondent acknowledged that the investigation was initiated when the grow operation was brought to the attention of the Task Force by a CI who was "a defendant on a previous case that our office prosecuted." (JTC Prop. Ex. 41) That CI was McCully. (R's Ans. to FC, par. 58).

In February 2016 respondent charged Darryl Berry and Jeffrey Michael in 36th District Court with the delivery of marijuana that took place during the August 6, 2015, introductory meeting with Sgt. Lowes. (JTC Prop. Ex. 47, Bates 988-993) At the same time, in Livingston County, respondent charged Berry, Michael, and several others with operating a criminal enterprise, conspiracy to deliver marijuana, and delivery of marijuana, based on the grow operation Berry had conducted in Livingston County. (JTC Prop. Ex. 43)

On March 1, 2016, Komorn made a demand for discovery in the *Berry* case in Livingston County. (JTC Prop. Ex. 50) It is undisputed that respondent did not at any time disclose or provide to Komorn the following information or documents:

- that McCully was the CI in the *Berry* investigations (R's Ans. To FC, par. 138b);
- any documents or information about the *McCully* DTO investigation or the related prosecution (R's Ans. To FC, par. 138c, 146b);
- a copy of or any information about McCully's CI Source Card; (R's Ans. to FC, par. 138d)
- any documents or information regarding the forfeiture action then pending against McCully. (R's Ans. To FC, par. 138f)

On March 4, 2016, respondent voluntarily dismissed the 36th District Court case against Berry and Michael. (JTC Prop. Ex. 48). Respondent documented the dismissal in his Legal Files notes, stating: "There was a nolo prosequi today in this case pursuant to my discussions with Rick and Bill in part because it came to our attention that the CI is also a res gestae witness." (JTC Prop. Ex. 88jj) Respondent continued prosecuting the Livingston County matter.

In the fall of 2016 respondent was appointed to the bench and his cases, including the Joslin and Berry cases, were reassigned to AAG Dianna Collins. (R's Ans. to FC, par. 140) AAG Collins spent two weeks reviewing the files with respondent before he left the office. Respondent never disclosed to her the existence of the *McCully* case, the connection between the *McCully*, *Berry*, and *Joslin* investigations, McCully's CI work in the *Berry* investigation, or the personal relationship between McCully and Loggie.[12] (R's Ans. to FC 142a-b, e, h; JTC Prop. Ex. 97b, par. 5, 8, 9, 11-17, 37)

The *Joslin* jury trial was scheduled for August 14, 2017. It was continued to August 15, and on that date Judge Kenny accepted Joslin's waiver of her right to a jury and continued the case until August 17. (JTC Prop. Ex. 79)

[12] AAG Collins did not become aware that respondent prosecuted McCully until she spoke to Loggie during the jury-room interview ordered by Judge Kenny.

Before the trial resumed, AAG Collins interviewed Loggie. Sgt. Calleja was present during that interview. At the conclusion of the interview, and after Loggie had left, Sgt. Calleja informed AAG Collins that if Loggie had not worked as a CI for her boyfriend's benefit the Task Force may have been unable to make a case against Joslin. According to AAG Collins, Sgt. Calleja also informed her that respondent was fully aware of the CI agreement Loggie had with the Task Force and that McCully's situation provided the motivation for her to become a CI and testify against Joslin. (JTC Prop. Ex. 97b, par. 11-17)

AAG Collins reviewed the Joslin file, including the preliminary examination transcripts, and realized that Loggie had not fully disclosed the details of her cooperation with the Task Force during her testimony. (JTC Prop. Ex. 97b, par. 19) AAG Collins also realized that evidence of Loggie's motivation to cooperate had not been provided to the defense as part of discovery. (JTC Prop. Ex. 97b, par. 21) On the afternoon of August 16, after consulting with her supervisors, AAG Collins sent an email to Komorn notifying him of the situation. (JTC Prop. Ex. 97b, par. 20-22)

On August 17 AAG Collins and Komorn disclosed the situation to Judge Kenny, who ordered the prosecution to provide all documents regarding Loggie's and McCully's agreements. (JTC Prop. Ex. 97b, par. 23-29) Judge Kenny also directed the parties and Det. Zinser to interview Loggie in the court's jury room to

regarding her role as a CI and her lack of candor during the preliminary examination.(JTC Prop. Ex. 72a, Bates 1792-1793; 97b, par. 24, 25) With those instructions, Judge Kenny adjourned the proceedings.

During the jury room interview Loggie admitted that the police "asked" her to become a CI, but claimed she agreed because she wanted to "help them out." Although Loggie initially stated that her preliminary examination testimony about being concerned with the safety of people buying marijuana and driving was true, she eventually admitted she had signed the CI agreement "to help [her] boyfriend," who she identified as McCully. (JTC Prop. Ex. 95)

Loggie denied that anyone, including respondent, instructed her not to testify about the CI agreement. She claimed she did not disclose it during the preliminary examination because she was "never asked" about it. During the jury room interview Det. Zinser, who did not join the Task Force until late summer of 2014, said that to the best of his knowledge Loggie became a CI after Sgt. Calleja spoke to McCully about finding informants for the Pure Wellness investigation. According to Det. Zinser, McCully offered Loggie as a CI and prompted her to contact the Task Force. Det. Zinser said that he and Sgt. Calleja had then met with Loggie, "discussed the Joslin case, and she signed the [CI] form." Although Det. Zinser did not know exactly what impact Loggie's CI work had on McCully's obligations, he agreed that Loggie's work was more credit or benefit for McCully. (JTC Prop. Ex. 95)

At the next court date Komorn advised Judge Kenny that during the jury room interview Loggie had admitted she was cooperating with the police in exchange for leniency in McCully's sentence and that respondent had been aware of the agreement. (JTC Prop. Ex.72b, Bates 1906-1907) Komorn also claimed that Loggie "admitted that she lied [during the preliminary examination], … admitted she knew she was lying." (JTC Prop. Ex. 72b, Bates 1905) Although AAG Collins offered several explanations for Loggie's failure to make a full disclosure of her motive for becoming a CI, she did not dispute Komorn's representations regarding Loggie's admission to perjury. (JTC Prop. Ex.72b, Bates 1920-1922) Recognizing Loggie's potential criminal exposure, Judge Kenny appointed an attorney to represent her and adjourned the case so she could speak with counsel. (JTC Prop. Ex. 72b, Bates 1927-1928)

Loggie asserted her Fifth Amendment right against self-incrimination. (JTC Prop. Ex. 72b, Bates 1933) She continued to assert that right after AAG Collins made an offer of immunity. In light of that, Judge Kenny barred the prosecution from using Loggie's preliminary examination testimony at trial because "…that would be improper in this particular case because *we know that at the earlier proceeding the witness [Loggie] perjured herself."* (emphasis added) (JTC Prop. Ex. 72c, Bates 1943)

At trial Det. Zinser testified that while he did not personally speak with respondent about Loggie, he believed that she became a CI "because she was trying to help her boyfriend." (JTC Prop. Ex. 72d, Bates 2042) Det. Zinser also testified he could not be certain that Loggie did not subjectively believe that selling marijuana to motorists was dangerous, as she testified at the preliminary examination. He admitted, however, that failure to disclose that she entered into the CI agreement to work off her boyfriend's case rendered her answer "false." (JTC Prop. Ex. 72d, Bates 2047-2048)

On October 3, 2017, Judge Kenny found Joslin guilty of possession with intent to deliver less than five kilograms of marijuana and not guilty of operating a criminal enterprise and of delivery of marijuana. Joslin appealed her conviction. (JTC Prop. Ex. 77a)

On August 14, 2018, the AG's office filed a response to Joslin's appeal with the Michigan Court of Appeals, which stated, in part:

> In this case involving an illegal marijuana dispensary, the State failed to disclose the terms of an informant's cooperation as part of discovery, and to make matters worse, the informant gave testimony on that issue at the preliminary examination that the trial court later found was "not…truthful." (JTC Prop. Ex.77c, Bates 2314)

In December 2018 the Michigan Court of Appeals vacated Joslin's conviction on the grounds of insufficiency of evidence. The court did not address the allegations that

Loggie lied during the preliminary examination or that respondent was complicit in that lie. (JTC Prop. Ex. 97l, par. 41) The AG's office did not appeal that ruling.

ARGUMENT

The Judicial Disciplinary Proceedings are Constitutional

Respondent argues that these proceedings violate his due process rights under the United States Constitution. He acknowledges, as he must, that the Michigan Supreme Court has rejected this argument every one of the half dozen times it has been presented to the Court. The Court most recently rejected the argument unanimously in *In re Morrow*, 508 Mich 490, 499-503 (2022).

In an apparent effort to breathe life into this dead issue, respondent claims that *Morrow* "basically took a 'good enough' approach." (Respondent's Motion and Brief for Partial Summary Disposition (Res Gestae), p. 48). To the contrary, nothing in the *Morrow* opinion so much as hints that the Court merely thought Michigan's judicial discipline process to be "good enough."

Disciplinary counsel ask that the Master reject respondent's due process claim as required by *Morrow*.

Partial Summary Disposition

The Facts Support the Allegations of Ethical Violations

Respondent contends that the allegations against respondent should be dismissed because they are based on a false premise that respondent offered McCully

a sentencing deal. He cites four pieces of evidence in support of his argument: Fishman's superseding statement, McCully's March 13, 2014 plea transcript,[13] the Kastigar letter, and McCully's January 7, 2016 sentencing transcript.

Respondent's arguments are based on a misunderstanding of the theory of the case. The gist of the allegations in the complaint is that respondent reached an agreement or understanding with Fishman and McCully that McCully would plead guilty as charged and would "cooperate" with the Task Force in exchange for favorable consideration in his case. The complaint does not allege, nor do disciplinary counsel here claim, that the parties negotiated a specific deal for McCully's cooperation. Rather, the fact of his cooperation and of the cooperation of his girlfriend Loggie, and the motivation for that cooperation and her testimony to help mitigate McCully's sentencing, were information that respondent should have provided to defense counsel regardless of whether there was a concrete sentencing deal.

[13] Respondent argues that Disciplinary Counsel withheld exculpatory material until the "eve of trial." This is false. The plea transcript was in the materials provided for disciplinary counsel to review on March 13, 2023. Disciplinary counsel believe the transcript was in the documents initially produced for review on January 12, 2023. However, due to the move of offices by JTC and Ms. Rynier's hospitalization, we cannot say that with 100% certainty. Regardless, at respondent's subsequent inquiry and request, disciplinary counsel reviewed the previously produced documents, located the plea transcript, and provided it to respondent's counsel. All of this occurred by March 17, 2023, prior to the date for completion of discovery and well in advance of the hearing, Thus, disciplinary counsel provided the transcript within the scheduling order and rules. Further, it should be noted that respondent and his counsel were aware of the March 13, 2014 plea hearing. Respondent was the prosecutor in the *McCully* case and was present at the hearing.

A summary disposition motion challenges the factual sufficiency of a complaint. Here, the evidence readily supports that there was an understanding between respondent, Fishman and McCully that McCully would work as a CI and cooperate with the police and that work would be considered to mitigate his sentence. The evidence also demonstrates that respondent not only authorized and entered into an understanding for McCully to work as a CI, but he also authorized the Task Force to utilize Loggie as a CI as an additional sentencing benefit for McCully. This is demonstrated by the January 17, 2014, February 11, 2014, March 5, 2014, and March 6, 2014 email exchanges between respondent and Fishman that are detailed above, as well as Fishman's statement on the record before Judge Groner that they were "making a deal." It was respondent who set up McCully's May 2 debriefing, and it was respondent who reached the understanding. This is verified by respondent's contemporaneous Legal File note in which he wrote that McCully's cooperation may "mitigate" his sentence. (JTC Prop. Ex. 88b)

Members of the Task Force were not permitted to make any deals or promises. (R's Ans. To FC, par. 11) They were also not allowed to use a CI without the express approval of the prosecuting official. (JTC Prop. Ex. 97a, par. 46; 97f, par. 28; 97k, par. 22) In the *McCully*, *Berry*, and *Joslin* matters respondent was that prosecuting official. In line with that policy, when McCully could not serve as a CI in the *Joslin* investigation and offered up Loggie to take his place, Sgt. Calleja sought and

obtained respondent's permission to have Loggie do the job and to have her work serve as a further sentencing benefit to McCully. (JTC Prop. Ex. 97a, par. 67) None of that could have happened without respondent's approval.

Respondent admits that the *Joslin* investigation called for controlled buys to be made from the Pure Wellness Center, and that McCully could not make those buys because, in part, he did not have the required medical marijuana card. (R's Ans. to FC par. 71, par. 82; JTC Prop. Ex. 97a, par. 22, 64) Respondent also was aware that Loggie "came into the *Joslin* investigation" because her medical marijuana card enabled her to make controlled buys. (JTC Prop. Ex. 94, par. 96h, 96i) He also recalls that in 2014 to 2015, which was the time when Loggie signed her CI agreement, she did not have any cases pending against her and did not receive any personal benefit, including financial, for her CI work. (JTC Prop. Ex. 94, par. 96m)

Respondent's knowledge of the circumstances under which Loggie became a CI is also established by the two emails Sgt. Calleja sent to him in January of 2015. In each email, sent to give respondent an update on the cases McCully was generating, Sgt. Calleja advised respondent that Loggie was working with the Task Force "on behalf of McCully." Respondent received and responded to them. (JTC Prop. Ex. 88t, 88u)

On August 6, (three months before Loggie testified), he received an email in which Fishman stated:

> Tom McCully stopped in to see me this morning. I understand that things are still going on, although he has not met with the agents since some time (sic) in early July. He also tells me that his girlfriend Brandy Loggie has also been cooperating and may very well be a witness in one of your cases. (JTC Prop. Ex. 89dd)

Within minutes of that email Fishman sent a follow up email advising respondent that he:

> …forgot to include this *spreadsheet* in my last email. This is a summary prepared by McCully that gives *all of the work he has done* since approximately May of last year. I think we sent you another one that summarizes the stuff before then. (emphasis provided) (JTC Prop. Ex. 89ee)

The attached "spreadsheet" was a two-page document outlining 30 cases that Fishman wanted respondent to credit to McCully for sentencing purposes. The document specifically listed Loggie as having been involved in six of those cases. Clearly, Fishman's reason for sending the email and its attachment was to remind respondent of his client's efforts to reduce his sentence. The only reason for Fishman to include Loggie's cooperation in the same email was because her cooperation, secured by McCully, was also part of the consideration for McCully's benefit.

Respondent's reply to Fishman's August 6 emails acknowledged Loggie's cooperation, stating:

> Tom McCully has indeed cooperated and Western Wayne has appreciated it. His cooperation no doubt will benefit him. Brandy Loggie is a main witness on another case that we have. Let's adjourn it one more time (and I mean just one more time), to December or January if that works for you. He is still helping on a pretty big case. (JTC Prop. Ex. 89dd)

The proceeding respondent wanted to adjourn was McCully's sentencing, which was then set for September 10, the day before Loggie was scheduled to testify in the *Joslin* preliminary examination.[14] Then on November 24, just a few weeks after Loggie testified, respondent emailed Fishman that he is "ready to put this [McCully's case] behind us…"[15] (JTC Prop. Ex. 89kk)

Respondent relies on the *Kastigar* letter to suggest that there was no agreement for McCully to become a CI in exchange for a sentencing consideration. This reliance is misplaced, based on misunderstanding the purpose and meaning of a *Kastigar* letter. The purpose of a *Kastigar* letter is to protect a cooperating defendant from future or additional charges based on the information and cooperation he agrees to provide, not to bar consideration of that cooperation towards the sentence in his already pending matter. The existence of a *Kastigar*

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[14] On September 4, 2015, three days after McCully's sentencing was adjourned to January, the preliminary examination in *Joslin* was postponed from September 11 to October 23. It was again adjourned to November 4, at which time Loggie was the prosecution's first witness. (JTC Prop. Ex. 78)

[15] The comment was in response to an email in which Fishman reminded respondent of the January 7, 2016 sentencing, and expressed his and his client's sentiment that they are "ready to get it over with." (JTC Prop. Ex. 89kk)

agreement with a defendant is independent of any agreement or understanding that the defendant will gain consideration for sentencing.

Further, the terms of the *Kastigar* letter in no way refute the existence of an understanding for McCully to work as a CI—or his motivation to do so—in exchange for consideration in sentencing. Rather, the letter only states that a *specific* sentence has not been agreed upon. Any consideration in sentencing would depend upon the quality of the cooperation. This is confirmed by a note in respondent's Legal Files that McCully's work with the Task Force "may mitigate his sentence," which respondent explains as reflecting an "understanding" that the agreement was premised on a "we'll see what happens" approach to McCully's sentence. (JTC Prop. Ex. 93, par. 56)

Respondent also claims that McCully did not need a sentencing agreement because Fishman was "supremely" confident that Judge Groner would not impose a jail/prison sentence for a "marijuana violation." (Respondent's Motion and Brief for Partial Summary Disposition (Res Gestae), p. 4) That argument is unpersuasive. Had Fishman truly believed that he would not have offered for his client to work with the Task Force, would not have regularly kept respondent aware of all the cases McCully was generating, and would not have set up a meeting with Judge Groner just weeks before the sentencing date.

The claim that Fishman believed Judge Groner would not impose jail time on a "marijuana violation" is further belied by the fact that Judge Groner sentenced McCully's codefendants to prison (Stevens) and jail (Goble). Additionally, on March 13, 2014, the date of McCully's plea to the charges, Judge Groner's notes in the court file state: "[Fishman] is looking for 36 months. I made no guarantees." (JTC Prop. Ex. 35, Bates 724).

There is further evidence that contradicts respondent's claims of factual insufficiency or a misunderstanding by Sgt. Calleja that there was an understanding as to consideration at sentencing. Respondent, Fishman, and Judge Groner all admitted to disciplinary counsel that there was an understanding between respondent and the parties.

In its Request for Comments to respondent in 2021, the Commission asked in Question 44(a) for respondent to confirm whether a plea or sentence agreement, or other understanding, been reached with McCully as of March 13, 2014, although not placed on the record. Respondent replied, in part, as follows:

> Yes, from the documents provided and based on Judge Cusick's recollection, there was an understanding. Mr. McCully would plea as charged. Attorney Fishman offered for his client to cooperate with law enforcement. Judge Cusick recalls further that the sentencing would be put over for a period of time to permit Mr. McCully to demonstrate that he was cooperating. That cooperation would factor into and be considered at the time of sentencing. (JTC Prop. Ex. 93, R's Ans. 44(a))

Further, in response to Question 48(d) which asked whether McCully's sentence included consideration of any other matter, respondent wrote, in part:

> Judge Cusick recalls that Mr. McCully was to cooperate with law enforcement on matters. He recalls that if Mr. McCully did that, his cooperation would be taken into account at sentencing. Judge Groner was made aware of the fact that Mr. McCully was to provide cooperation at the time of the plea and that the imposition of a sentence would be delayed to allow him to do so. (JTC Prop. Ex. 93, R's Ans. 48(d))

Fishman stated the following in his sworn statement to the Commission on September 12, 2022:

> 13. By March of 2014, I and AAG Cusick had reached a tentative agreement that Mr. McCully would become a CI with the Task Force in exchange of favorable consideration/mitigation of his sentence.
>
> 14. **At the time of my client's guilty plea, I was confident that Judge Groner would not impose a prison sentence in a case involving marijuana and a defendant who was cooperating with the Task Force**. (bold original) (JTC Prop. Ex. 97d, par. 13, 14)

Judge Groner also provided a sworn statement that was signed on August 28, 2022, to the Commission. In it Judge Groner said he believed Fishman told him at the time of the plea that McCully would cooperate with the police. (JTC Prop. Ex. 97e, par. 10). Further, Judge Groner said Fishman stated, in the presence of respondent, that McCully's sentence was to be adjourned so McCully could cooperate with the police. (JTC Prop. Ex. 97e, par. 8). While Judge Groner did not recall all of the details of the McCully case, he did recall the following:

A. Mr. Fishman and Judge Cusick entered into an agreement to allow Mr. McCully to work with the Western Wayne Narcotics Task Force as a CI in exchange for a sentencing consideration in the People v. McCully, et al, case no. 14-1140.

B. Mr. McCully worked with the Task Force as a CI and my understanding was that they were happy with his CI work.

C. Mr. Fishman and Mr. Cusick agreed on a probationary sentence and that is what I imposed. We may have talked about the sentence before. (JTC Prop. Ex. 97e, par. 15)

Disciplinary counsel acknowledge that respondent, Fishman, and Judge Groner have since revised their statements and that these revisions may differ from the above statements provided to disciplinary counsel. Because of the differences in statements, their assertions, whether to the Commission or to respondent, cannot be relied on in a motion for summary disposition. That is because summary disposition is improper when there is conflicting evidence or a determination of credibility is necessary. *See Lysogorksi v. Bridgeport Charter Twp.*, *supra*; *White v. Taylor, Distributing Co., Inc.*, *supra*. "A conflict in the evidence may generally only be removed from the trier of fact's consideration if it is based on testimony that is essentially impossible or is irreconcilably contradicted by unassailable and objective record evidence." *Jewett v. Mesick Consol Sch Dist*, 332 Mich. App. 462, 476 (2020). Accordingly, "when a witness's credibility is at issue, summary disposition is inappropriate." *Taylor Estate v Univ Physician Group*, 329 Mich. App 268, 284 (2019).

Here, in light of the original sworn statements of respondent, Judge Groner, and Fishman, there are genuine issues of fact which would preclude a determination on a summary disposition motion even if their conflicting statements were the only evidence. But here there is abundant additional evidence that contradicts these persons' more recent statements to respondent and from which to determine the actual circumstances which support the allegations against respondent.

Respondent suggests that *People v Atkins*, 397 Mich 163, 173 (1976) held that a prosecutor has no obligation to disclose a future possibility of leniency. (Respondent's Motion and Brief for Partial Summary Disposition (Evidence), p. 21). That's a distortion of what the Court said. It said: "However, it is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness' credibility. It is quite another to require 'disclosure' of future possibilities for the jury's speculation." *Atkins*, at 174. Future possibilities—that is the *prosecutor's* intention to recommend a sentence—might constitute vouching for the witness's credibility. Rather, "[t]he focus of required disclosure is not on factors which may motivate a prosecutor in dealing subsequently with a witness, *but rather on facts which may motivate the witness in giving certain testimony*." *Id*. (emphasis added). It is exactly those facts that respondent concealed from the defendants in *Joslin* and *Berry*.

The Law Supports the Allegations

At its core, respondent's argument is that a prosecutor has no duty to disclose, for his sole witness to an alleged crime, the witness's motivation for cooperating and testifying, or to correct her subsequent false or misleading testimony about those motivations. Nor must he disclose the cooperation agreement or motivation of a res gestae witness who participated in events in the continuum of a crime he helped to investigate.

The government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley, 514 U.S. 419, 439, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).* Consistent with this principle, the Michigan Rules of Professional Conduct set forth rules of fairness that apply to all attorneys plus special ethical obligations for prosecuting attorneys.

MRPC 3.4 states that a lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; ….

MRPC 3.8 further requires prosecutors in a criminal case to:

> (d) 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 degree of the offense ….

There are grounds for discipline when an attorney commits misconduct, including the following:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt or censure, or reproach;

(3) conduct that is contrary to the administration of justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional conduct adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States, an ordinance, or a triable law pursuant to MCR 2.615.

MCR 9.103.

MRPC 8.4 provides that it is misconduct for a lawyer to:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assistant or induce another to do so, or do so through the acts of others;
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice…

As a prosecutor respondent was required *timely* to provide the *Joslin* defense with Loggie's CI agreement and information regarding her motives for cooperating and testifying, including to assist her boyfriend McCully in mitigating his sentence. He was also required, in *Joslin* and *Berry*, to comply with the applicable discovery rules.

Duty to Disclose in Joslin

Under *Brady v Maryland*, 373 U.S. 83 (1963) and *Giglio v United States*, 405 U.S. 150 (1972), the prosecutor is required to disclose exculpatory information and evidence, including information that is inconsistent with any element of the crime charged and impeachment evidence, regardless of whether the prosecutor believes such information will make a difference between a conviction or acquittal. Suppression by the prosecution of evidence favorable to an accused has been held to constitute a violation of due process. "Evidence is favorable to the defense when it is either exculpatory or impeaching." *People v Chenault*, 495 Mich. 142, 150 (2014).

Citing *Turner v. United States*, 137 S. Ct. 1885 (2017), respondent argues that because the evidence of Loggie's motivation to cooperate and testify in *Joslin* (or McCully's status as a res gestae witness in *Berry*) may not have met the *Brady* standard of materiality, then respondent may not be faulted or disciplined for failing to disclose it. He confuses *Brady*'s (and *Turner*'s) standard of materiality for

purposes of overturning a conviction with the broader principles of due process and legal ethics requiring disclosure of exculpatory and impeaching information. Though not every ethical failure requires that a conviction be reversed, it is still an ethical failure. So, in *Turner*, noting the government's commitment to a "generous policy of discovery," the Court observed that "'[t]his is as it should be.' *Kyles*, *supra,* at 439, 115 S.Ct. 1555 (explaining that a "'prudent prosecutor['s]'" better course is to take care to disclose any evidence favorable to the defendant (quoting *Agurs*, *supra,* at 108, 96 S.Ct. 2392))." 137 S.Ct. at 1893. The *Turner* dissent agreed on this:

> We agree on the universe of exculpatory or impeaching evidence suppressed in this case: The majority's description of that evidence, and of the trial held without it, is scrupulously fair. See *ante,* at 1888 – 1891, 1891 – 1893. We also agree—as does the Government—that such evidence ought to be disclosed to defendants as a matter of course. See *ante,* at 1893. Constitutional requirements aside, turning over exculpatory materials is a core responsibility of all prosecutors—whose professional interest and obligation is not to win cases but to ensure justice is done. See *Kyles*, 514 U.S., at 439, 115 S.Ct. 1555.

137 S.Ct. at 1897. The point in this case is not whether a conviction should be reversed; it is whether respondent violated these ethical and legal responsibilities in handling these investigations and prosecutions.

Respondent admits that before the preliminary examination in *People v Joslin* he did not include in Komorn's discovery any information about the details of the McCully organization, the relationship between McCully and Loggie, McCully's and Loggie's CI work with the Task Force, copies of McCully's or Loggie's CI source cards, the pendency of McCully's sentencing, or the pendency of McCully's

and Loggie's forfeiture cases. He also admits he did not disclose that information to Komorn at any time after Joslin was bound over to circuit court for trial and that he never corrected the preliminary examination record. (R's Ans. To FC, par. 91; JTC Prop. Ex. 94, R's Ans. 115, 116)[16]

Respondent claims Komorn was not "entitled to" the documents and/or information regarding McCully and Loggie and their CI work with the Task Force. Respondent argues that *Brady v Maryland* does not mandate disclosure of these materials because they were "too little, too distant, and too weak" from the main evidentiary points issue in *Joslin*. He also claims that failure to turn them over to the defense did not constitute a *Brady* violation because they did not meet *Brady'*s materiality standards for favorable evidence.

First, respondent's argument attempts to frame the relevant issue in terms of whether there was a sufficient *Brady* violation to require that Joslin's conviction be set aside. That is not the allegation. The allegation is that, in handling *Joslin*, respondent knowingly or negligently violated his ethical and legal obligations as an

[16] Respondent also admits that prior to commencement of the April 7, 2017, preliminary examination in *Berry*, he did not include in discovery to Komorn any information or documents disclosing that McCully the CI in the Berry investigation, any documents or information about the McCully DTO or about McCully's pending criminal case, McCully's CI source card information, or any information or documents related to McCully's pending forfeiture action. (R's Ans. to FC, par. 138b-d, 138f). The materiality analysis applied to the *Joslin* case likewise applies to lack of disclosure of the CI/res gestae witness in *Berry*.

attorney and a prosecutor, and that his answers to the Commission demonstrate misconduct while he was a judge.

Second, respondent is incorrect in his claim that Komorn was not entitled to the information regarding Loggie's involvement in the McCully DTO and her motive for working with the Task Force. As the Court stated in *Giglio v United States*, 405 U.S. 150, 154 (1972), quoting *Napue v Illinois*, 360 U.S. 264, 269 (1959), "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*.]"

Loggie's credibility was at the heart of her testimony during the *Joslin* preliminary examination. Loggie was the only witness respondent presented as to the activities that occurred inside the marijuana dispensary, including the alleged illegal sales. Without her testimony, as the Michigan Court of Appeals later found, Joslin's conviction could not stand. Regardless of whether the disclosure of Loggie's motive for working with the Task Force would have resulted in the dismissal of Joslin's charges at preliminary examination, Komorn was entitled to that information.[17]

[17] Respondent argues he did not have a duty to disclose information relating to McCully and Loggie's CI work because the undisclosed evidence doesn't support the defense's "original" theory or its not sufficiently favorable. In support of his argument, he notes that Joslin admitted patient-to-patient sales at a 2016 evidentiary hearing. Respondent's argument ignores the fact that the lack of disclosure occurred at the preliminary examination six months prior to the evidentiary hearing. Often at that stage there is no defense theory. Rather the goal is to preclude

Respondent also should have reported, disclosed, and corrected Loggie's inaccurate testimony at the time she testified. *People v. Wiese*, 425 Mich. 448, 455 (Mich. 1986); *see also People v. Brown*, 506 Mich. 440, 446 (2020).

Duty to Disclose McCully as a Res Gestae Witness in Berry

Under *Brady*'s principles due process requires prosecutors to disclose evidence in its possession that is exculpatory and material. MCL 767.40a(1) requires prosecutors to attach to the information a list of all witnesses who might be called at trial, *and* all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers. The prosecuting attorney is under a continuing duty to disclose the names of any further res gestae witnesses as they become known. MCL 767.40(a)(2).

A res gestae witness is an eyewitness to some event in the continuum of a criminal transaction or one whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of an offense. *See, e.g., People v. Carter*, 415 Mich. 558, 591 (1982), *overruled in part on other grounds.*

As a general rule, the "informer's privilege" does not require prosecutors to disclose the identity of a CI. However, "[w]here the disclosure of an informer's identity, or of the contents of his communications is relevant and helpful to the

bind over to the circuit court. Had Komorn been able to attack Loggie's credibility, the judge may not have found that there was probable cause to bind over the matter to circuit court.

defense of an accused or is essential to a fair determination of a cause the privilege must give way." Similarly, where the informant was a participant in the underlying transaction rather than a mere supplier of information, he is a res gestae witness, and the privilege does not apply." *People v. Cadle*, 204 Mich. App. 646, 650 (1994) (citations omitted), *overruled in part on other grounds.*

McCully was clearly a participant in the underlying transaction and was therefore a res gestae witness. The Berry investigation started with information that McCully provided to the Task Force. (JTC Prop. Ex. 41) On August 6, McCully accompanied Sgt. Lowes, who was working undercover, to Berry's Detroit warehouse where he introduced him to Berry. On that date he witnessed the sale of marijuana by Berry to Sgt. Lowes. He also was present when Berry discussed and agreed to sell whole marijuana plants to Sgt. Lowes. Indeed, respondent *knew* that McCully was a res gestae witness. His March 4, 2016 Legal Files notes stated: "There was a nolo prosequi today in this case . . . because it came to our attention that the CI is also a res gestae witness." That CI/res gestae witness was McCully.

McCully was the sole non-defendant witness to the marijuana sale to Sgt. Lowes. He was a res gestae witness not only because he was an eyewitness to the sale, but also because his testimony is important to test the credibility of Sgt. Lowes, the undercover officer.

The discussion about sales of marijuana plants to Sgt. Lowes first started on August 6, 2014. McCully was present for that conversation as well as the second conversation on September 5, 2014, which took place at one of Berry's grow operations. On this second date McCully observed Sgt. Lowes give Berry $3,000 as a deposit for three fully grown marijuana plants and was present when Berry discussed his other grow operation and talked about plants that were available for purchase, including 72 plants Berry wanted to sell for $125,000.[18] Thus, McCully was a witness to the continuum of acts—sales and offers to sell marijuana and marijuana plants—for which Berry was criminally charged. Although respondent denies McCully was a res gestae witness on this second date, respondent does admit that the Livingston charges were based on Berry's agreement to deliver and the actual delivery of three fully grown marijuana plants to Sgt. Lowes (R's Ans. To FC, par. 65)

Respondent argues that McCully was not a res gestae witness because "[t]he fact that certain people may be present at an occurrence does not mean that they are witnesses to the occurrence or that they could testify as to the circumstances or facts which constitute the res gestae . . ." In doing so, respondent relies on *People v. Paredes-Meza,* unpublished decision, (Docket No. 291067, July 8, 2010) and *People v. Marji,* 180 Mich. App. 525 (1989).

[18] Sgt. Lowes took possession of the three marijuana plants on October 13, 2014.

Paredes-Meza is fact-dependent and its facts are completely different than the *Berry* facts in every important respect. The defendant argued he was denied a fair trial when the trial court refused to order the prosecution to disclose the identity of the CI who he alleged was a res gestae witness and who was present when defendant was arrested. The appellate court disagreed, finding there was no evidence presented that the CI was a res gestae witness, explained there was no evidence presented that the CI, who was in the car with the agents, "witnessed any events leading to the arrest that were not also witnessed by the agents."

The facts in *Marji* are also different than *Berry* in the important respects. In *Marji* the defendant argued on appeal that he was denied a fair trial because the prosecutor failed to identify or produce a CI who was a res gestae witness. Noting that the defendant failed to raise the issue below, the Court of Appeals held that the defendant waived the issue. The Court further commented that "under the facts of this case, the informant could not be considered a res gestae witness. The informant merely introduced an undercover police officer to defendant Marji and did not witness anything significant to this crime."

Neither *Paredes-Meza* nor *Marji* is similar to *Berry* in any of the ways that matter. McCully generated the investigation into Berry's grow operation, observed the sale of marijuana in Detroit, witnessed the exchange of money for a deposit on marijuana plants and, on multiple occasions, heard Sgt. Lowes and Berry discuss

that a large number of marijuana plants were available to purchase for a significant sum of money. Under such circumstances, McCully was, without question, a res gestae witness in the Wayne and Livingston County cases against Berry just as respondent himself indicated in his Legal Notes.

Conclusion

The motions for partial summary judgement should be denied. The motion for summary judgment on the basis of a violation of due process should be dismissed on the basis of stare decisis. The remaining motions should be denied based on the failure to meet the standards for summary dispositions under MCR 2.116.

Respectfully submitted,

/s/ Margaret N.S. Rynier
Margaret N.S. Rynier (P34594)
Disciplinary Counsel

/s/ Melissa A. Johnson
Melissa A. Johnson (P 71695)
Disciplinary Co-Counsel

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