STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

Hon. Paul J. Cusick
Third Circuit Court — FC No. 104
Detroit, Michigan — Master: Hon. Peter D. Houk

DISCIPLINARY COUNSEL'S OBJECTIONS TO MASTER'S REPORT

Pursuant to MCR 9.240, Lynn Helland, disciplinary counsel, and Margaret N.S. Rynier and Melissa A. Johnson, disciplinary co-counsel (collectively, disciplinary counsel), object to the master's report, as detailed below.

INTRODUCTION AND SUMMARY

In November 2022 the Judicial Tenure Commission filed complaint FC 104 charging Hon. Paul Cusick (respondent) with five counts of violating Michigan Court Rules (MCR), Michigan Rules of Professional Conduct (MRPC), and the Michigan Code of Judicial Conduct (Canons). The complaint alleged that respondent committed the violations while he was an Assistant Attorney General for the State of Michigan and after he became a Wayne County Circuit Court judge. Respondent answered the complaint and asserted affirmative defenses in January 2023.

The Supreme Court appointed Hon. Peter Houk as Master. A public hearing commenced on May 2 and concluded with closing arguments on June 23, 2023. Thirteen witnesses testified and more than 175 exhibits were admitted. After the hearing disciplinary counsel filed an amended complaint. Count I alleged, in sum, that respondent allowed a witness to testify falsely about her motive to cooperate and limited the scope of questioning to conceal the fact that the witness was cooperating to benefit her boyfriend, the defendant (also a cooperator) in another case. Count II alleged that respondent called that same witness to testify at a subsequent hearing and concealed both her motive to testify and the fact that she had been untruthful previously. Count III alleged, overall, that respondent withheld evidence about the same two cooperators in two criminal cases and that he also withheld the evidence from the prosecutor who took over his cases when he

left the Attorney General's office. Count IV alleged that respondent failed to disclose the existence of a res gestae witness and obstructed cross-examination that might have led to identifying him. And Count V alleged that respondent made false or misleading statements in his answers to the Commission's Request for Comments and 28-Day Letter.

The Master issued a report concluding that the evidence was insufficient to establish that respondent committed any of the alleged misconduct. Disciplinary counsel disagree with virtually all of the Master's significant findings. The Master's report accepted many of respondent's arguments with little or no analysis and simply ignored the extensive evidence that supported the allegations and contradicted respondent's claims. The report omitted essential context of transcript it cited and made basic factual and logical errors.

The Commission should reject the Master's findings of fact and conclusions of law and find the misconduct alleged in each count of the complaint was established.

BACKGROUND

This section provides context for respondent's actions that are charged as misconduct. Discussion of the charges in the complaint begins at page 11.

The McCully Drug Trafficking Organization

In January 2013 the Western Wayne Narcotics task force began investigating a large drug trafficking organization headed by Thomas McCully that was distributing hydroponic marijuana in southeast Michigan and elsewhere. In February 2013 McCully and his girlfriend, Brandy Loggie, arranged delivery of over seven pounds of marijuana to Lexington, Kentucky. (R's Ans. ¶15(a)-(e); DC Ex 5).[1]

[1] The abbreviations used in the citations are as follows: "Tx [name] vol [number] at [page number]/ [line numbers]" refers to the name of the witness, the public hearing transcript volume, the page numbers, and the line numbers on the page; "DC Ex [number]" refers to disciplinary counsel's exhibits; "R's Ex [number]" refers to respondent's exhibits; specific page numbers of exhibits are referenced as "Bates [page number]"; "R's Ans. ¶ [number]" refers to the paragraph number in Respondent's Answer to the Formal Complaint; "FC" refers to the public complaint; "Report" refers to the Master's report; and "PFOFCL" refers to disciplinary counsel's Proposed Findings of Fact & Conclusions of Law submitted to the Master.

Respondent was the lead prosecutor from the start of the investigation. (R.'s Ans. ¶¶8(a), 9; DC's Exs 1, 5; Tx Cusick vol 1, at 185/20-23). In May 2013 members of the task force presented details of their investigation to respondent and other members of the Attorney General's office. (DC Exs 3, 88a). The presentation included information about the role each suspect played in the organization, the personal relationship between McCully and Loggie, and Loggie's participation in the delivery of marijuana to Kentucky. As the investigation progressed, the task force continually provided respondent with police reports and witness statements. (R's Ans. ¶10; DC Exs 1, 5, 9; Tx Tennies vol 11 at 1985/4-25; Tx Calleja vol 8 at 1433/11-1434/6).

In December 2013 respondent charged McCully and nine others with conducting a criminal enterprise, conspiracy to conduct a criminal enterprise, and conspiracy to deliver/manufacture marijuana. (DC Exs 13, 14, 15). Respondent knew Loggie was an active participant in the McCully organization (DC Exs 1, 2, 3, 5), but did not charge her. (R's Ans. ¶19; Tx Tennies vol 11 at 1987/6-1988/2).

McCully was bound over to circuit court for trial in January 2014. (R's Ans. ¶20; DC Ex 35, Bates 721). Within days respondent commenced plea negotiations with McCully's attorney, Steve Fishman. (DC Ex 88b, Bates 2694; Tx Cusick vol 2 at 321/3-6). Fishman and respondent exchanged several emails and phone calls about resolving McCully's case. (DC Exs 88d, 89c, 89e, 89f, 89g, 89h). In March 2014 McCully declined respondent's 48-month offer. He pleaded guilty before Judge David Groner as charged, under sentencing guidelines of 72 to 150 months. (R's Ans. ¶¶26(c), 27; DC. Exs 26, 100 Bates 4056/2-7 & 4057/25-4061/18).

Respondent acknowledged that at the time of the plea or soon thereafter he and Fishman reached an understanding that the task force would give McCully an opportunity to work as a confidential informant to mitigate his sentence. Respondent explained: "Fishman offered for his client to cooperate with law enforcement" and his cooperation "would be considered at the time of the sentencing." (DC Ex 93 ¶¶ 44(a), 48(d), 55(f), 56). Fishman's also testified that they discussed McCully's cooperation in March 2014. (Tx Fishman vol 20 at 3834/7-11, 16-17).

Respondent's claim during these proceedings that McCully was merely exercising his right to mitigation and that there was no agreement, deal or understanding that he would benefit by cooperating, is contradicted by respondent's words and actions at the time. Respondent's intimate involvement in moving McCully toward cooperation in return for sentencing consideration was documented in emails to and from respondent and in respondent's Legal File notes. And respondent had announced the arrangement at McCully's May 2014 debriefing, which he had arranged to include senior members of the Attorney General's office because of the "important information" and cooperation that McCully was offering. At that meeting respondent told the task force he had agreed McCully would work as a cooperator to receive credit in his sentence. (DC Exs 88l, 89i, 89k; Tx Cusick vol 3 at 472/18-19). (DC Ex 88b Bates 2697; Tx Calleja vol 8 at 1457/7-20, 1458/11-1459/2 & 18-25, 1478/14-1479/1; Tx Calleja vol 9 at 1637/11-21). Shortly thereafter McCully met with Sgt. Paul Calleja and signed a confidential source card. In the "remarks" section of the form, Calleja wrote, "working for a reduced sentence, with [respondent]." (DC Ex 38). McCully soon began working with the task force. (R's Ans. ¶41).

Over the next 18 months respondent and Fishman stipulated to adjourn McCully's sentence five times, from June 2014 to January 2016, to allow McCully to cooperate. (R's Ans. ¶¶ 42, 43; DC Exs 28, 88b Bates 2697-2698, 89q, 89r, 89s; Tx Cusick vol 2 at 226/17-227/2; Tx Cusick vol 3 at 449/7-11, 506/8-13). Throughout the time McCully worked with the task force, Fishman, Calleja, and other officers kept respondent informed of McCully's cooperation and the cases he was "generating." (DC Exs 89o, 89p, 89q, 89r, 89t, 89u, 89v, 89w, 89x, 89bb, 89cc, 89dd, 89ee; Tx Cusick vol 3 at 499/19-500/25; Tx Fishman vol 20 at 3823/17-24; Tx Calleja vol 8 at 1478/2-13, 1482/14-16).

The Joslin / Pure Wellness prosecution

During the summer of 2014 the task force began investigating the Pure Wellness Center, a marijuana dispensary owned and operated by Amanda Joslin. (Tx Calleja vol 8 at 1492/16-23; Tx Zinser vol 13 at 2274/10-13). Respondent was the lead prosecutor of the *Joslin* case. (R's Ans. ¶8(c)).

The task force needed a cooperator to buy marijuana from Pure Wellness. (Tx Calleja vol 8 at 1495/2-5). Calleja asked McCully to do that, but McCully couldn't because he didn't have a valid medical marijuana card and he thought he might be recognized as a major marijuana grower. (Tx Calleja vol 8 at 1496/1-25). It was then suggested, by McCully or Calleja, that Loggie, McCully's girlfriend, could act in his stead. (Tx Calleja vol 8 at 1497/1-4). Calleja told McCully that if Loggie worked as a cooperator the task force would seek permission from respondent for that work to benefit McCully. (Tx Calleja vol 8, at 1497/12-1498/4). McCully then asked Loggie if she would become an informant to help with his sentence. (Tx Loggie vol 10 at 1842/16-23, 1843/17-18). Loggie told Calleja she would do it, to help McCully.[2] Calleja told her he needed clearance from the AG's office. (Tx Loggie vol 10 at 1845/19-24, 1845/25-1846/7, 1848/2-4 & 12-17; Tx Calleja vol 8. at 1499/1-9). Calleja then sought and obtained respondent's consent to use Loggie as a confidential informant to help mitigate McCully's sentence. (Tx Calleja vol 8 at 1498/8-11, 1499/22-24, 1500/12-22).

Loggie signed a confidential source card in September 2014. (DC Ex 55; Tx Loggie vol 10 at 1852/5-11). After Loggie had signed the form and left to make the first controlled buy, Calleja wrote "assisting boyfriend, Thomas McCully [redacted cooperator number] on his charges" in the remarks section of the form. (DC Ex 55; Tx Calleja vol 8 at 1504/19-1505/1). Loggie testified at the public hearing that these remarks are consistent with her reasons for working as a cooperator. (Tx Loggie vol 10 at 1853/14-1854/4). In two emails in January 2015 that updated respondent on the progress of the investigation, Calleja reminded respondent that Loggie's work was on "McCully's behalf." (DC Exs 89t, 89u). Loggie made three additional buys from Pure Wellness in March 2015. (R's Ans. ¶¶ 80(b),83; DC Exs 56 Bates 1140, 1155-1166, 88z, 99 Bates 4048).

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[2] Loggie testified inconsistently about whether she called Callejo first, or he called her first. (Tx Loggie vol. 10 at 1848/9-14; Tx Calleja vol. 8 at 1498/11-23). It doesn't matter. Loggie, McCully, and Callejo all agreed that McCully asked Loggie to help him out by cooperating and then she confirmed her willingness to participate to Callejo.

Respondent authorized search warrants for Pure Wellness and Joslin's home in March 2015. (R's Ans. ¶85; DC Exs 57, 58). The resulting seizures led to arrests of Joslin, her boyfriend, and her son. (DC Ex 56 Bates 1166-67, 1173). In July 2015 respondent charged Joslin in Wayne County with conducting a criminal enterprise, possession with intent to deliver marijuana, and delivery of marijuana. (DC Ex 60).

Joslin's lawyers requested discovery from respondent in mid-July, 2015. (DC Exs 61, 62). A few days later respondent provided discovery to Michael Komorn. (R's Ans. ¶135). Respondent did not include any information about McCully's or Loggie's cooperator agreements in the discovery materials. He also did not disclose any information about the pending case against McCully or his relationship with Loggie. (R's Ans. ¶91; Tx Cusick. vol 4 at 753/3-6, 754/2-9, 755/4-18; Tx Komorn vol 12 at 2067/1-2070/19).

Joslin's preliminary examination took place on November 3, 2015, before Judge Michael Gerou. Loggie was the sole eyewitness respondent called to testify about the alleged illegal sale of marijuana. (DC Exs 67a, 67b). During his direct examination, respondent did not ask how or why Loggie became a cooperator. (DC Ex 67a Bates 1320/8-1331/2; Tx Cusick vol 4 at 765/2-8). But during cross-examination Joslin's lawyer, Komorn, asked several questions seeking to discern why and how Loggie was involved in the case, including her motive for becoming a cooperator. (DC Ex 67a Bates 1333/11-1365/12). When he asked her, "Was there something that occurred that made you interested in contacting [the police]?" her answer was "No." (DC Ex 67a Bates 1336/5-6). Later she said she was testifying voluntarily as a concerned citizen. (DC Ex 67a Bates 1335/2-1340/11). Loggie never revealed that she became a cooperator to assist her boyfriend. (DC Ex 67a, Bates 1319/10-1381/1).

Detective Zinser, the officer in charge of the *Joslin* investigation, sat next to respondent at the prosecutor's table. As Loggie testified about how and why she contacted the task force, Zinser realized that her testimony was inaccurate and incomplete and alerted respondent that it needed to be clarified or corrected. (DC Ex 72d Bates 2047/24-2050/9; Tx Zinser vol 13 at 2298/24-2299/4, 2300/5-2301/3). Respondent made no attempt to find out what Zinser was talking about and he did

not try to correct or clarify Loggie's testimony that day or later. (DC Ex 67a Bates 1319/24-1331/19 & 1365/16-1369/20, Ex 69 Bates 1749/25-1754/21 & 1766/17-22).

Loggie's testimony was essential to the finding of probable cause that justified binding Joslin over to circuit court. (DC Ex 67b Bates 1653/11-1654/18; Tx Cusick vol 5 at 859/8-24). When the prosecution continued before Judge Timothy Kenny, the parties filed numerous pleadings and Loggie testified at an evidentiary hearing in June 2016. (DC Exs 67a, 67b, 74a, 74b, 74c, 74e, 74g). But respondent never disclosed or remedied Loggie's false preliminary examination testimony and never told Komorn that Loggie was cooperating to mitigate McCully's sentence. (R's Ans. ¶91; Tx Cusick vol 4 at 754/4-755/18; Tx Komorn vol 12 at 2067/24-2069/22, 2070/9-19, 2105/3-5).

Respondent was appointed to the bench in the fall of 2016. His open cases, including *Joslin* and *Berry*, were reassigned to Assistant Attorney General Dianna Collins. (R's Ans. ¶140). Collins spent two weeks reviewing the files with respondent before he left the office. (R's Ans. ¶141; Tx Collins vol 15 at 2795/22-24). Respondent never told her anything about the *McCully* case (which was closed by then); the connection between the *McCully, Berry*, and *Joslin* investigations, McCully's cooperator work in the *Berry* investigation; the relationship between McCully and Loggie; or Loggie's motivation to cooperate in the *Joslin* investigation. (R's Ans. ¶142(a)-(b), (e), (h); Tx Collins vol 15 at 2800/2-2804/7).

In August 2017 Collins interviewed Loggie in preparation for the *Joslin* trial. (Tx Collins vol 15 at 2808/22-2809/14). Calleja was present. After the interview, Calleja told Collins that the task force may have been unable to make a case against Joslin if Loggie had not worked as a cooperator for her boyfriend's benefit. (Tx Collins vol 15 at 2809/15-20, 2011/3-18; Tx Calleja vol 8 at 1534/17-1537/8). Calleja also told Collins that respondent was aware of the cooperator agreement Loggie had with the task force, and that McCully's situation had provided the motivation for Loggie to become a cooperator and testify against Joslin. Collins was surprised to learn this information, because she had not seen it in the file or learned about it from

respondent. (Tx Collins vol 15 at 2811/23-2812/17, 2814/12-2815/9; Tx Calleja vol 8 at 1536/20-1538/21).

Collins then reviewed the preliminary examination transcripts and other material in the *Joslin* file and realized that Loggie had concealed her main reason for cooperating. Collins also saw that respondent had not disclosed, in discovery to Joslin's attorney, Loggie's reason for cooperating. (DC Ex 67a Bates 1339/19-1380/21; Tx Collins vol 15 at 2814/12-2815/9, 2827/5-17; Tx Collins vol 16 at 2866/6-9). This was impeachment evidence that the Attorney General's discovery policy required prosecutors to provide to defense counsel. (Tx Pallas vol 15 at 2646/6-17, 2678/12-16). After consulting with her supervisors, Collins notified Komorn of the relevant facts. (DC Ex 89aaa; Tx Collins vol 16 at 2853/14-2854/24; Tx Pallas vol 15 at 2647/1-25).

Collins and Komorn promptly disclosed the situation to Judge Kenny, who ordered the prosecution to provide documents regarding Loggie and McCully, including the *McCully* police reports and cooperator source cards. (DC. Ex 72a Bates 1778/5-1787/18). Based on counsel's representations and excerpts from the *Joslin* preliminary examination transcript, Judge Kenny concluded that Loggie's testimony had not been truthful. He directed the parties and Zinser to interview Loggie regarding her role as a cooperator and her lack of candor during the preliminary examination. (DC Ex 72a Bates 1789/9-1793/7; Tx Collins vol 16 at 2873/17-2874/11).

During that interview Loggie admitted that the police "asked" her to become a cooperator, but at first she claimed she agreed simply because she wanted to "help them out." (Tx Jury Room Audio Recording vol 14 at 2514/14-16). Loggie also said initially that her preliminary examination testimony about cooperating because she was concerned with people driving while high on marijuana was true. But when Collins asked directly, Loggie admitted she had signed the cooperator agreement "to help [her] boyfriend," McCully. (DC Ex 95; Tx Jury Room Audio Recording vol 14 at 2513/8-17, 2516/8-21).

After Judge Kenny appointed counsel for Loggie, she asserted her Fifth Amendment privilege and refused to testify. Judge Kenny then barred the prosecution from using the preliminary examination testimony at trial. (DC Ex 72b

Bates 1927/21-1928/9 & 1932/18 -1933/16; DC Ex 72c Bates 1942/22-1943/8, 1955/13-19). Judge Kenny ultimately found Joslin guilty of possession with intent to deliver less than five kilograms of marijuana and not guilty of operating a criminal enterprise and delivery of marijuana. (DC Ex 76c Bates 2239).

In December 2018 the Court of Appeals vacated Joslin's conviction due to insufficient evidence.[3]

The Berry Prosecutions

One of the investigations McCully generated concerned a large-scale organization that Darryl Berry ran in Livingston, Washtenaw, and Genesee counties. Respondent was the lead prosecutor of the Berry investigation and was regularly informed of its developments. (R's Ans. ¶¶ 10(a), 49(c); Tx Cusick vol 4 at 618/17-25, 621/10-13, 628/10-15). In August 2014 McCully made the initial introduction between Berry and an undercover officer, Sgt. Robert Lowes, in Detroit. (R's Ans. ¶58(c); DC Ex 39 Bates 731, 732). During that meeting and in McCully's presence, Berry sold Lowes a small amount of marijuana and discussed selling him whole marijuana plants. (R's Ans. ¶¶ 58(e), 58(f); DC Ex 39 Bates 731; Tx Cusick vol 4 at 657/24-658/2; Tx Lowes vol 11 at 2020/6-20, 2021/8-2029/5). The next month McCully accompanied Lowes to Berry's grow field in Livingston County. There, McCully witnessed Lowes give Berry $3,000 as a deposit for three fully grown marijuana plants and heard Berry discuss his other grow operations and additional plants he had for sale. (DC Ex 39 Bates 735-736; Tx Cusick vol 4 at 658/4-10; Tx Lowes vol 11 at 2024/20, 2026/15, 2029/2-10). On September 24, 2014, Lowes returned to Berry's operation without McCully to view the marijuana plants he had put a deposit on. (DC Ex 39 Bates 738).

In January 2016 respondent submitted a "Request to Initiate Litigation" seeking to charge Darryl Berry and others with marijuana-related crimes (DC Ex 41).

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[3] The Attorney General's brief in Joslin's appeal conceded: "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." (DC Ex 77c, Bates 2314).

In his request respondent advised that the investigation was initiated by a cooperator who was "a defendant on a previous case that our office prosecuted." (DC Ex 41, Bates 934). That cooperator was McCully. The next month, respondent charged Berry and another person in Wayne County with the delivery of marijuana that took place during his Berry's first meeting with Lowes. (R's Ans. ¶61; DC Ex 47 Bates 988-993). At the same time, respondent charged Berry and others in Livingston County with operating a criminal enterprise, conspiracy to deliver marijuana, and delivery of marijuana. (DC Ex 43) Respondent did not attach to either charging document the required list of eyewitnesses and all known "res gestae" witnesses. (DC Exs 43, 47 Bates 988-995). *See* MCL 767.40(a)(1).

Just a few days prior to the preliminary examination in the Wayne County *Berry* case, scheduled for early March 2016, respondent called Fishman and told him that McCully was a res gestae witness who needed to testify. (DC Ex 44; Tx Cusick vol 4 at 680/19-20; Tx Fishman vol 20 at 3763/4-6). Fishman suggested that respondent dismiss the case instead of calling McCully. (Tx Cusick vol 4 at 680/22-23, 687/1-8; Tx Fishman vol 20 at 3763/10-20). On the Friday before the preliminary examination, scheduled for Monday, respondent made an unscheduled early morning appearance in 36th District Court and voluntarily dismissed the case. (DC Exs 48, 49; Tx Cusick vol 4 at 675/23-24, 676/7-8, at 680/24-681/1; Tx Komorn vol 12 at 2135/14-19). Berry's attorney, also Michael Komorn, was not present or aware of what respondent was going to do. (Tx Komorn vol 12 at 2135/12-23). Respondent documented the dismissal in his Legal File notes, stating: "There was a nolo prosequi today in this case pursuant to my discussions with [supervisors] in part because it came to our attention that the cooperator is also a res gestae witness." (DC Ex 88jj).

Respondent continued to prosecute the Livingston County case against Berry without disclosing McCully's role or designating him as a res gestae witness. (Tx Komorn vol 12 at 2142/1-11, 2142/19-25, 2145/1-24). Just a few weeks after dismissing the Wayne County case against Berry because McCully was a res gestae witness (DC Exs 48, 49), respondent limited his questioning of Lowes at the preliminary examination in Livingston County. Respondent only asked about the

events on and after the September 24 visit when Lowes came to Berry's operation without McCully to inspect the marijuana plants he had previously agreed to buy. (DC. Ex 52 Bates 1022/13-1044/17). Respondent avoided the events on August 6 and September 5, when the deal was negotiated in McCully's presence. (*Id.*; Tx Cusick vol 4 at 693/23-694/16). Respondent still had not told Komorn of McCully's role in the case. (Tx Komorn vol 12 at 2144/22-25). And when Komorn cross-examined Lowes, respondent persistently and successfully resisted Komorn's efforts to explore the circumstances of McCully introducing Lowes to Berry. Respondent was careful not to reveal that the cooperator was McCully. (DC Ex 52 Bates 1053/13-1059/14, 1065/4-1072/6; Tx Cusick vol 4 at 697/20-22, 699/10-13).

McCully's Sentencing

At Fishman's request, he and respondent met with Judge Groner in chambers in December 2015, a few weeks after Loggie testified at the *Joslin* preliminary examination but just before Joslin was bound over, and shortly prior to McCully's January sentencing. (DC Exs 89kk, 89ll). At or before this meeting the parties agreed that McCully should be sentenced to probation. (Tx Cusick vol 3 at 582/8-20; Tx Fishman vol 20 at 3759/20-3760/12, 3761/24-3762/14, 3829/15-3830/22).

In January 2016, after five stipulated adjournments and less than three weeks after Joslin was bound over to circuit court, respondent appeared before Judge Groner for McCully's sentencing. (DC Ex 29). As agreed, respondent advised the court that he had no objection to non-reporting probation. (DC Ex 29 Bates 499/1-18; Tx Cusick vol 3 at 596/16-598/16; Tx Fishman vol 20 at 3763/21-3764/12). Judge Groner sentenced McCully to one year of non-reporting probation plus fines and costs. (DC Ex 29 Bates 499/25-500/22). Loggie paid McCully's fines and costs. (DC Ex 30).

COUNT I: ALLOWING FALSE, INACCURATE, INCOMPLETE, AND MISLEADING TESTIMONY

Count I alleges, in essence, that respondent presented a critical cooperating witness, Brandy Loggie, in the *Joslin* preliminary examination, knowingly allowed her to present false and misleading testimony about the reason for her cooperation, and

then blocked defense counsel's efforts to reveal the true reason for her cooperation on cross-examination.

It is a misnomer that the caption of Count IA (and of Count II) is "Suborning Perjury." That is not what the factual allegations of the complaint claim or what disciplinary counsel sought to (and did) prove. What the complaint claimed and evidence proved was that: (1) Loggie's primary motivation for acting as an informant and testifying was to assist her boyfriend, McCully, in mitigating his sentence, (2) respondent was party to and aware of that motivation for her assistance; (3) Loggie gave false and misleading testimony that concealed her primary motivation for cooperation; and (4) respondent was aware of that and did nothing to address or rectify the deception. The caption was simply incorrect: disciplinary counsel did not allege, or seek to prove, that respondent caused or directed Loggie to lie and mislead. And counsel made this clear to the Master. (PFOFCL p 23 n 12). That the Master found this concession "confounding" (Report, p 3) is itself confounding. That the Master found the caption material to his review of the charges was a fundamental mistake in his analysis. "A party's choice of label for a cause of action is not dispositive." *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582, 808 NW2d 578 (2011). Put another way, "captions do not control." *Cosgrove v Bartolotta*, 150 F3d 729, 732 (CA 7,1998).

Count I required this proof: *first*, that Brandy Loggie agreed to act as an informant in the Joslin investigation to earn sentencing consideration for her boyfriend, Tom McCully; *second*, that respondent was party to the agreement that Loggie would cooperate and knew her motivation for doing so; *third*, that Loggie gave false and misleading testimony at the Joslin preliminary examination about the circumstances and motivation for her cooperation and testimony; and *fourth*, that respondent knew this testimony was false and misleading and not only did nothing to correct it, but objected to cross-examination that might have revealed it. The evidence amply supports these elements.

Respondent admitted prior to the public hearing that as of March 13, 2014, he had entered into an agreement or understanding for McCully to work as an informant

with the task force in exchange for mitigating his sentence. (DC Ex 93 ¶¶ 44a, 48d, 56a, 56c). More important for Count I, respondent knew that Loggie's principal motive for cooperating was to help McCully at sentencing. Respondent knew why Loggie was "volunteering" because he approved Calleja's request to use Loggie to make controlled buys at Pure Wellness and received emails from him that Loggie was working on McCully's behalf. (DC Exs 89t, 89u). McCully's lawyer, Steve Fishman, advised respondent about Loggie's cooperation as well as his client's cooperation. (DC Exs 89dd, 89ee). He needed to make sure respondent kept his promise to consider both at sentencing. And respondent agreed to adjourn McCully's sentencing for months—until just after Loggie testified at Joslin's preliminary examination.

The final adjournment of McCully's sentence was from September 10, 2015 to January 7, 2016. The September 10 sentencing date was the day before Loggie's scheduled preliminary examination testimony—which was then rescheduled for November 3. Thus the effect of adjourning McCully's sentencing at that point was to maintain Loggie's motivation to testify. So, just a few weeks after respondent had secured Loggie's preliminary examination testimony (DC Ex 67a), he agreed with Fishman that "[y]es, I am ready to put this behind us on Jan 7th." (DC Ex 89kk). The only logical reason to adjourn McCully's sentencing was to lock in her cooperation, and to allow him to get "credit" for his own cooperation and Loggie's.

The Master concluded, without citing any specific evidence, that "the information regarding Loggie testifying because of McCully was unknown to Respondent as it didn't become available until after he left the Attorney General's office." (Report, 14). Apparently, the Master based his conclusion on the fact that Loggie only *admitted* her true motive to defense counsel after respondent's successor disclosed the discovery violations to Judge Kenny and Judge Kenny ordered Loggie to submit to an interview. The Master simply ignored the voluminous evidence that respondent knew about Loggie's intent to help McCully from the beginning, when he was the one who approved using her as an informant.

The Master also ignored that respondent's involvement was *essential* for McCully and Loggie to cooperate. Members of the task force were not allowed to make

any agreements, deals, or promises with defendants without approval of the prosecutor. (Tx Calleja, vol 8 at 1454/24-1455/11; Tx Zinser, vol 13 at 2273/1-12). So, when McCully could not serve as an informant in the Joslin investigation and offered Loggie to take his place, Calleja *had* to, and did, obtain respondent's permission to have Loggie do the job as a further sentencing benefit to McCully. (Tx Calleja, vol 8 at 1497/1-1498/8). That could not have happened without respondent's blessing.

As if that were not enough to demonstrate respondent's knowledge of Loggie's arrangement to benefit McCully, he was reminded of it by two emails from Calleja in January of 2015. (DC Exs 89t, 89u). In each email, updating respondent on McCully's informant work, Calleja explicitly stated that Loggie was working with the task force "on McCully's behalf." (DC Ex 89t, 89u). Respondent received and reviewed those emails. (DC Ex 93 ¶ 108(b)(3); Tx Cusick, vol 3 at 607/2-7)). He never contacted Calleja to question them (Tx Cusick, vol 3 at 512/3-517/12, 520/12-522/20), as he surely would have done were he not already aware of the arrangement. (Tx Cusick, vol 3 at 558/10-559/3). Yet the Master simply dismissed Calleja's emails as "not material to the Joslin case" without explaining how he reached that conclusion. (Report, 14).

Respondent's claims that he may have forgotten Loggie's role in McCully's drug organization by the time of Joslin's preliminary examination or forgotten that the January 2015 emails "connected" Loggie to McCully are implausible. (DC Ex 93, Bates 3353; Tx Cusick, vol 3 at 517/1-6). Respondent was intimately involved in the McCully, Joslin, and Berry investigations and prosecutions and was well aware of the relationship between Loggie and McCully. (Tx Cusick, vol 3 at 516/19-25, 558/10-559/14). Loggie was his central witness in *Joslin* (DC Exs 67a, 67b, 69; Tx Cusick, vol 5 at 859/9-860/4), and respondent adjourned McCully's sentence for the final time to a date just after Loggie testified at Joslin's preliminary examination. When he received Calleja's emails in January of 2015 he considered them significant enough to preserve them *twice* in his Legal File notes—one in the Legal File for *People v McCully* (DC Ex 88t) and the other in the Legal File for *People v Joslin*. (DC Ex 88u). But respondent did not save the January 16 email to the *McCully* Legal File until

June 29, 2015—the same day he contacted McCully for assistance in getting "a hold of Brandy Loggie." (DC Ex 88cc). The only plausible explanation for respondent to have saved that email to the *McCully* Legal File six months after he received it was to serve as a reminder to consider the sufficiency of McCully's and Loggie's work toward the mitigation of McCully's sentence.

Respondent's knowledge that Loggie was working for her boyfriend's benefit was also shown in an email exchange respondent had with Fishman. In an email on August 6, 2015, Fishman inquired about adjourning McCully's sentencing while noting that "[McCully] also tells me that his girlfriend Brandy Loggie has also been cooperating and may very well be a witness in one of your cases." (DC Ex 89dd). In responding to Fishman's email, respondent noted the value of McCully's cooperation *and* acknowledged that "Brandy Loggie is a *main witness* in another case that we have." (emphasis added). In another August 6 email (DC Ex 89ee), Fishman attached a spreadsheet to remind respondent of McCully's efforts to reduce his sentence—and he included specific information about Loggie's cooperation because that cooperation, secured by McCully, was for McCully's benefit.

The Master accepted respondent's claim that he never saw this spreadsheet. (Report, 14) That is not plausible. Respondent answered the email to which it was attached the same date it was sent. (DC Ex 89ee). And in an entry respondent made in the McCully Legal Files a little over one month later, respondent concluded that probation was an appropriate sentence for McCully based on everything he had done. (DC Ex 88b). If, in fact, respondent did not review the spreadsheet before making that determination, it is only because he was already familiar with its contents based on his intimate involvement with McCully and the Joslin and Berry investigations.

Even if McCully's sentence was not ultimately contingent on Loggie's testimony, Loggie *believed*, at the time of her testimony, that she was cooperating to help McCully and respondent *knew* Loggie believed that. The Master's report did not address the majority of the evidence that respondent knew this, causing him to reach the wrong conclusion.

As noted, though Loggie was respondent's main witness, he didn't disclose to Komorn, Joslin's lawyer, that Loggie was cooperating to help McCully. While questioning Loggie at the preliminary examination, respondent limited his questions to her buys of marijuana from Joslin on specific dates. (DC Ex 67a, Bates 1320/8-1331/2). He asked nothing about what he now claims Loggie told him on the morning of the preliminary examination—i.e., that she had "turned her life around" and that she was testifying because she was upset about Joslin selling marijuana to people who were already high and were then driving motor vehicles. (Tx Cusick, vol 4 at 759/8-751/8). The Master implicitly found that this was most likely Loggie's actual motive (Report, 7-8), but if respondent believed that to be true it would have been a natural thing for a prosecutor to bring out when Loggie testified, to enhance her credibility. More important, respondent also asked nothing about Loggie's personal relationship with McCully or about her involvement in the McCully DTO. He asked nothing about her motive for testifying, even though, as a prosecutor, he knew her motive was central to her credibility.

Loggie's false statements began at the outset of the cross-examination, when she denied she was appearing pursuant to a subpoena. (DC Ex 67a, p 18-19; Tx Cusick, p 772). The Master apparently believed that Loggie had not, in fact, been subpoenaed, so concluded that this was not a false statement. The Master stated that "no record of service" was produced and rested his conclusion on a statement by Calleja that Loggie may have been "served verbally." (Report, 5-6). But Loggie herself acknowledged having been served. At the public hearing she tried to explain her claim that she was not appearing pursuant to subpoena by claiming that she didn't think the subpoena was real. (Tx Loggie, vol 10 at 1938/17-21). And respondent knew full well *he* had prepared a subpoena for her appearance and *he* had forwarded it to the task force for personal service. (DC Ex 89jj; Tx Cusick, vol 5 at 803/15-804/25). In fact, he had done so each of the four times the Joslin preliminary examination was set for a hearing. (Tx Cusick, p 802; DC Exs 63, 89jj). Yet, when Loggie testified that she had not been subpoenaed, respondent didn't make any attempt to correct her testimony.

Here, it is helpful to examine Loggie's entire subsequent testimony when Komorn tried to learn more about her credibility. The Master's report found that on the critical questions, Loggie's testimony "bears the hall marks of truthfulness, not deceit." (Report, p 7). But any critical examination of her testimony shows a pattern of evasion and deception, aided by respondent's timely objections to questions that might have gotten at her motive to cooperate and testify:

> Q All right. And, your involvement with the police in terms of your becoming a confidential informant, was that --
> A Voluntarily
> *Q So you called the police with the intentions of wanting to get –*
> MR. CUSICK: *Your honor, I am going to object as to – he can obviously ask questions about what this witness did on September 4th, or 16th, or 17th, or 18th*. Any other issues in regards to 609 credibility, *but with regard to the under cover operation, how she became a confidential informant*.
> THE COURT: So, the nature of your objection is what?
> MR. CUSICK: Relevance.
> MR. KOMORN: *Well, it goes to motive and bias, and why she testified*, she is not subpoenaed to be here. And, she is –
> THE COURT: I just don't know where you are going with it, how far you have to go.
> MR. KOMORN: Well, not far, I am just trying to get –
> THE COURT: Well, I will give you a little leeway, but I don't want to get into details of other operations or anything.
> MR. KOMORN: I understand. Do you know when you contacted the police?
> A No, not off hand, no, it was in 2014.
> *Q Was there something that occurred that made you interested in contacting them?*
> *A No.*
> Q Okay. Did you know Amanda Joslin before you contacted the police?
> A No.
> Q You didn't know her at all?
> A No, I did not.
> Q You had never been to her store before?
> A I have been to her dispensary, yes, but I don't know what your question is. Like I wasn't – I didn't know her like that, no.
> Q You had never been in there selling vapor pens before?
> A Oh yes, I did sell her vapor pens.
> Q In fact, you were employed or you were employed at some point selling marijuana pens, is that right?
> A Yes.

Q And you went to dispensaries, and participated in selling that product to them, right?

MR. CUSICK: Your honor, objection, relevance.

MR. KOMORN: I mean, it goes to how he – how they – how she knows.

THE COURT: Okay, I will allow a little bit of this. I want to see you tie it in, though.

Q Okay.

A Yes, I did sell vaporizer pens to multiple dispensaries.

Q Okay. Are you still working for that entity?

A Yes, I do still sell vaporizer pens.

Q Okay. Do you go – are you participating as an informant for other dispensaries also?

MR. CUSICK: Judge, objection, that is not relevant.

THE COURT: Okay, I am going to sustain that.

Q All right. Did something happen in the selling of the pens at that location that made you adverse to my client?

A I don't know what you mean by that.

Q Well, you said there was – you didn't in any trouble with the police that made you want to –

A No.

Q You chose to call the police to complain, right?

MR. CUSICK: Judge –

THE COURT: Wait, wait, wait, is that a question? I Haven't heard testimony that would support that.

Q Well, at some point in time you said you contacted the police, correct?

A Yes, I did.

Q Okay. And what did you say when you contacted them?

A I – I don't – I don't know what you are asking.

Q I am asking what you said to the police when you contacted them.

THE COURT: When are we talking about, before she became involved in this entire operation?

THE WITNESS: Yeah.

MR. KOMORN: I will lay a foundation. You indicated that your reasons for being a confidential informant, working with the police, were because you decided to contact the police, right?

A Because it is dangerous for her to sell that amount of marijuana to people who are driving around on the streets, like it is not safe.[4]

Q Okay, so that is what I am asking. So, for some reason, was it that particular dispensary, that particular location that made you want to call the police?

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[4] In addressing whether or not Loggie lied, the Master's report oddly focused on whether it was literally Loggie who dialed the phone to reach the police or the other way around. (Report, 6). While focusing on that irrelevant triviality, the Master did not grapple with the heart of Loggie's falsehooed, which is exemplified in this response to Komorn's question.

A I don't know what you are asking – or how – what – I am confused. I am under oath here, so I don't want to speculate.

Q There is no reason to be –

THE COURT: Wait, wait, let her answer first of all.

MR. KOMORN: *She says she is confused, and I asked her to tell me why she is confused and I can restate the question, that's fine.*

THE COURT: *Do you have an objection?*

MR. CUSICK: *My objection is asked and answered.*

MR. KOMORN: I am going to rephrase it.

MR. CUSICK: You asked the question why she contacted the police, she answered. Mr. Komorn has indicated that he just wants to indicate a little bit of the background, that's the answer to your question.[5]

THE COURT: So has it been answered, Counselor?

MR. KOMORN: Okay, that was from before. And, I thought I asked another question that she didn't understand. It's fine, I will ask another question.

THE COURT: I will sustain it.

Q So, that is the reason you just said because of people driving around and what not, and I know that I didn't accurately say what you said, but something to that effect. And, it was for those reasons that you contacted the police, right?

A Yes.

Q And, when you contacted the police, did you call on the phone?

A Yes.

Q And, what did you say to them?

A I just said that there – that basically there was a woman selling marijuana just to anybody.[6]

(DC Ex 67a, Bates 1335/2-1340/5) (emphasis added).

In concluding that this testimony bore "hall marks" of truthfulness and was not false, inaccurate, and misleading, as alleged in the complaint, the Master made basic factual errors and ignored the substantial evidence to the contrary.

Off the bat, the Master concludes that "[t]he allegation contained in subparagraph "b" [of paragraph 116 of the complaint] that Ms. Loggie lied when she testified that she contacted the police about the Wellness Center was not

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[5] This objection makes clear that respondent was not merely a passive observer of Loggie's false explanation for her becoming an informant. He had heard Loggie's false explanation, and in this objection he represented to the judge that this false explanation was the answer to Komorn's question. The Master's report did not address this.

[6] This, too, was testimony that was flatly inconsistent with Loggie's motive for cooperating that the Master overlooked, apparently because he had focused on who did dialed the phone.

substantiated." (Report, p 6). What is his rationale? Because "Ms. Loggie literally did call the police." (Id.) But the allegations must be read together. The gravamen of the charge in subsections (a) through (d) of paragraph 116 is not that Loggie lied about having "*initiated contact*" with the police about Pure Wellness. It is that Loggie's entire description of her interaction with the police was grossly misleading. She led the court and defense counsel to believe that she voluntarily approached the police as a good citizen to report a medical marijuana business that was selling to "just anybody" and letting the customers to drive away intoxicated. In truth, she only communicated with the police and volunteered to buy marijuana from Pure Wellness after the task force asked McCully to do it and he said he couldn't, and after she was promised that her "cooperation" would benefit McCully at sentencing. Even if Loggie's testimony that she "initiated contact" with the police (i.e., made the first phone call after McCully asked her to work as an informant) was literally true, her entire testimony about why she reported the business was grossly misleading. Loggie's contact with the police was "initiated by" Calleja's and McCully's request that she become a CI, and by her desire to help mitigate McCully's sentence.

That Loggie's testimony was false is shown by Calleja's testimony (Tx Calleja, vol 8 at 1496/9-1499/5) and by Zinser's account of Loggie's testimony:

Q. Okay. As Ms. Loggie is testifying, do you have an impression as to the accuracy and completeness of her testimony?
A. Yes.
Q. What was that impression, sir?
A. That it was not complete.
Q. In what way was it not complete?
A. That she essentially randomly called us to report something.
Q. When you say us, are you talking about –
A. The task force, she called the police.
Q. So when you say randomly, in fact what was the truth?
A. She was prompted to call us.
Q. Prompted either by or through whom?
A. Sergeant Calleja.

* * *

Q. Was anyone involved in the, as you described, prompting of Ms. Loggie to contact Western Wayne?
A. It was my belief that Sergeant Calleja contacted Thomas McCully, who subsequently contacted Brandy Loggie.
Q. And that's how she contacted Western Wayne?
A. Yes.

(Tx Zinser, vol 13 at 2298/24-2299/13, 2999/24-2300/4). This was the gist of the allegation in paragraph 116 of the complaint—a gist the Master utterly missed in thinking that this was about who placed the phone call. Zinser certainly got the gist—it was at this very point in Loggie's preliminary exam testimony that he leaned over to respondent and told him that something in Loggie's testimony needed to be clarified or corrected. (Tx Zinser, vol 13 at 2300/14-2301/21).

Moving on, the Master asserts that

> [t]he specific assertions by Disciplinary Counsel in the Complaint in Paragraph 116 "c-e" bear the hall marks of truthfulness, not deceit. Paraphrasing those allegations, Brandy *Loggie said, there wasn't* a *specific reason she called the police, but there was* a *woman selling marijuana to just anyone and it was dangerous because of the amounts.* (Report, 7) (emphasis in original).

What was the Master's support for this conclusion? Calleja's testimony, on cross-examination, that Loggie had cited public safety concerns in their September 4, 2014, conversation about her becoming an informant that were consistent with her testimony at the preliminary examination. (Tx Calleja, vol 9 at 1698/24-1699/25). But the Master's reliance on this snippet of testimony ignores the substance and context of the whole conversation that Calleja related in his direct testimony:

> Q. When she signed this form -- and when I say "this form," I'm talking about the confidential source form – did she make any comments as to wanting to rid the community of Pure Wellness?
> A. She did.
> Q. What was that all about?
> A. She had said that Joslin was allowing people to buy, get high, and drive when they left there.
> Q. Did you know in any way, shape, or form that that was her motivation for working as an informant with you guys?
> A. No.

Q. I don't want you to guess as to why she was saying that. But have you worked with informants before in your capacity as a police officer?
A. Yes.
Q. Many times; correct?
A. Many, many.
Q. And is there something that, based on your experience as a police officer, caused you not to believe Ms. Loggie's comment that she wanted to get rid of Pure Wellness because Ms. Joslin was allowing people to purchase marijuana when they were high already?
A. Well, I knew that she had already agreed to do it in order to assist McCully. And there's many times snitches use -- and a snitch is someone who on the street, it gets looked on poorly. They don't want that stigma, and a lot of times they have other reasons for it to make them feel better. Had it many times for other reasons people say it.
Q. And is that a reason that you did not believe her on September 4th, 2014?
A. Yes.

(Tx Calleja, vol 8 at 1506/24-1508/5). When viewed in its proper context, Calleja's testimony can only support the conclusion that Loggie's true motivation for becoming an informant and testifying was to support McCully.[7] And no matter what Loggie said to Calleja, the circumstances that resulted in her working with the task force are what demonstrate her real motive to help McCully. As noted below, Loggie herself said she became an informant to help McCully at sentencing. The Master didn't address those circumstances.

From here, the Master moves on to the concept that witnesses may have more than one motive for agreeing to be a confidential informant and for testifying, citing testimony from Zinser, Judge Kenny, and Collins. (Report, p 8). That observation, while obviously true, begs the question by assuming that because one *might* have multiple reasons for becoming an informant that must have been the case for Loggie. But the evidence, and simple common sense, demonstrate that Loggie's original, central, and principal motive for becoming an informant was to help her boyfriend and father of her child. This is clear from the circumstances, it is clear from the

[7] Even if one of Loggie's motives was to rid the public of Pure Wellness, respondent knew it was not her only motive. It is enough that even one of Loggie's motives was to help with McCully's sentencing. By allowing Loggie to testify to one motive (ridding the public of Pure Wellness) without clarifying that she also had a motive to help McCully, respondent reinforced the false idea that helping McCully was *not* one of Loggie's motives.

testimony of Calleja and Zinser, and it is clear from Loggie's own testimony at the public hearing when she confirmed Calleja's account of how she came to be an informant and added:

- When she got involved in the Joslin investigation, she thought McCully was facing 5 years in prison on the McCully case. (Tx Loggie, vol 10 at 1829/6-199).
- McCully asked her to become an informant to help him in his sentencing. (Id, vol 10 at 1842/16-1843/18).
- She agreed to help him on his sentencing. That remained her objective throughout her work with Western Wayne. (Id, 1845/19-21, 1859/24-1860/4).
- Once she agreed, McCully called the police to tell them that she agreed and put her in contact with them. (Id., at 1846/16-1848/17).
- Loggie did not mention her "public safety" motive to Calleja until the day she signed the source card. (Tx. Calleja, vol 8 at 1499/1-4, 1503/1-4, 1506/24-1508/2).

Loggie's reason for becoming an informant was also documented in the source card she signed on September 4, 2014. (DC Ex. 55). On it, Calleja added a note that said: "assisting boyfriend, Thomas McCully (redacted informant number) on his charges." (Tx Calleja, vol 8 at 1504/19-1506/2). The Master discounts the significance of this note because it was added after Loggie signed the form and respondent didn't see it until after he became a judge. (Report, 8-9). But this misses the point. Calleja's note is a contemporaneous documentation of the reason for Loggie's cooperation. It corroborates Calleja's testimony that *this* was why Loggie became an informant, rather than the reason she gave at the preliminary examination. In fact, Loggie herself confirmed that Calleja's note on the source card accurately reflected the reason she became an informant. (Tx Loggie, vol 10 at 1853/4-1854/4). The Master disregarded that, also.

The evidence is clear that Loggie became an informant to help McCully, then lied in her preliminary examination testimony such that her testimony concealed the

circumstances and motivation for her cooperation and testimony, with the result that her testimony was false, inaccurate, incomplete, and/or misleading, exactly as alleged in paragraph 118 of the complaint.

Further, the evidence and circumstances show that respondent was well aware of Loggie's reason for cooperating and of her false and misleading testimony, stood by while it proceeded, and obstructed and interfered with Komorn's cross-examination when he tried to learn the truth about Loggie's motive, as alleged in paragraphs 118-120 and 125-126 of the complaint.

The transcript reveals exactly this. As soon as Komorn attempted to ask how Loggie got involved with the police, respondent objected:

> Q All right. And, your involvement with the police in terms of your becoming a confidential informant, was that --
> A Voluntarily
> Q So you called the police with the intentions of wanting to get –
> MR. CUSICK: Your honor, I am going to object as to – he can obviously ask questions about what this witness did on September 4th, or 16th, or 17th, or 18th. Any other issues in regards to 609 credibility, but with regard to the under cover operation, how she became a confidential informant.
> THE COURT: So, the nature of your objection is what?
> MR. CUSICK: Relevance.

(DC Ex 67a Bates 1335/2-16). Although inarticulate, respondent's objection clearly indicates he wanted to limit Loggie's testimony to the dates on which she made the controlled buys and to preclude any questioning "with regard to the under cover operation, how she became a confidential informant." And here Komorn very clearly stated the purpose of his questioning:

> MR. KOBORN [sic]: Well, it goes to motive and bias, and why she testified, she is not subpoenaed to be here.

The court agreed to give Komorn "a little leeway" and Komorn moved to the critical question, which Loggie answered falsely:

> MR. KOMORN: I understand. Do you know when you contacted the police?
> A No, not off hand, no, it was in 2014.
> *Q Was there something that occurred that made you interested in contacting them?*

A No.

(DC Ex 67 a Bates 1335/17-18). But there *was* something that occurred that led to Loggie's contact with the police. Respondent *knew* it – he had approved it – and Loggie concealed it. So Komorn persisted in seeking to explore Loggie's interest in, and connection to, Pure Wellness and her reason for contacting the police and respondent continued to object, despite Komorn's explanation that his intent was not to go into other investigations but to explore Loggie's "motive and bias" (DC Ex 67a Bates 1337/17)—the thing respondent had not disclosed in discovery. As Loggie's cross-examination progressed, respondent's continued objections prevented Komorn from getting at the true motive for Loggie's work with the police. (Tx Komorn, vol 14 at 2573/17-2574/17).

John Pallas, an appellate supervisor at the AG's office charged with defending respondent's actions on appeal if he could, observed that every time Komorn got close to the "million-dollar question" about Loggie's motive for becoming an informant respondent either objected or interrupted. (Tx Pallas, vol 15 at 2671/5-2672/4). Respondent stated to the Commission and at the public hearing that his objections to Komorn's questions were solely to prevent Komorn from going into other investigations. (DC Ex 93 ¶ 91(b); Tx Cusick, vol 5 at 853/7-11). That was clearly not so. Respondent's very first objection was to a question that had nothing to do with other investigations and had only to do with Loggie's motive.

How does the Master address respondent's obstruction of the cross-examination? In a single paragraph. (Report, pp 9-10). His points?

(1) *The cross went for forty-five pages.* But the length of the cross-examination is irrelevant to whether respondent obstructed Komorn's efforts to learn about Loggie's motive. In any event, that obstruction occurred only in the first eight pages of the cross. (DC Ex 67a Bates 1335/6-1343/4).

(2) *There were a total of eight objections, five of which were sustained; three overruled objections can't impede a forty-five page cross.* But the Master's focus on the number of objections completely misses the point. It was not their number, it was their nature and timing and success in derailing Komorn's effort to obtain the truth

about the information respondent had not disclosed to him. Nor were the *overruled* objections the problem—it was respondent's *successful* objections and interruptions that kept Komorn from asking the "million-dollar question."

(3) *"It is incomprehensible that sustained objections can be the basis of a complaint of ethical misconduct by an attorney."* To the contrary, it is quite comprehensible that objections made in bad faith, with the purpose of obstructing and preventing opposing counsel from getting at information they are entitled to regarding the motive and bias of a prosecution witness, are ethical misconduct even if sustained. The whole point of respondent's objections was to protect Loggie from answering the "million-dollar question" to which Komorn was entitled to an answer. The fact that his objections were sustained is especially meaningless since respondent had not informed the judge who sustained the objections that he had not disclosed required discovery material to Komorn, nor did respondent inform the judge of the real basis for his objections.

Moreover, and contrary to the Master's apparent premise, the basis for charging respondent with misconduct was *not* that he had objections sustained. Rather, the basis for charging him with misconduct was that he knew exactly why Loggie was testifying and he knew Loggie lied about her reason and he did not correct her lie. Respondent's objections were merely additional evidence that he was acting willfully to conceal Loggie's lie.

(4) *Judge Gerou interjected sua sponte to clarify Komorn's questions and protect the witness from badgering.* But this is wrong for at least two reasons. Judge Gerou did not "clarify" Komorn's questions about Loggie's motive—he sustained objections to those questions. And while some of Komorn's questions may have seemed "argumentative and confusing" to the Master, those were not the questions that matter here. With respect to the questions that matter here, Komorn was clearly, and only, attempting to get at the important issue of Loggie's motivation. Whether or not Judge Gerou understood that, respondent certainly did, and respondent's objections succeeded in preventing Komorn from getting there.

Contrary to the Master's finding (Report at 6), a clear preponderance of the evidence establishes that Loggie lied about her motivation to testify, respondent was aware of that lie, and respondent helped to conceal the lie rather than to disclose the lie,[8] all as charged in Count I. (DC Ex 67a Bates 1457/2-15, 1459/2-9 & 67D Bates 2038/24-2044/4l; Tx Zinser vol 13 at 2298/14-2301/3, 2303/10-12).

COUNT II: RELYING ON LOGGIE'S FALSE TESTIMONY IN 3RD CIRCUIT COURT

After Joslin was bound over to circuit court and respondent was aware that Loggie had lied about her motive to testify, respondent knowingly presented Loggie as a credible witness in motions before Judge Kenny. Judge Kenny relied on the preliminary examination transcript, which consisted primarily of Loggie's testimony, in denying Joslin's motion to quash the information. (DC Ex 76a; Tx Kenny, vol 17 at 3224/17-3225/11). Respondent also relied on Loggie's preliminary examination testimony in arguments on other motions before Judge Kenny (DC Exs 74a Bates 2116, 74b Bates 2126-2127, 74e Bates 2154, 74f Bates 2168), such as in his response to Joslin's Motion to Request a §8 Hearing, to Assert a §8 Defense, and to Dismiss. (DC Ex 74e Bates 2153). His reliance on Loggie's testimony in support of this response was established by the response's reference to "employees and defendant…following the policy of Pure Wellness that Defendant came up with, to sell to anyone with a medical marijuana card who wanted to purchase marijuana." (DC Ex 74e Bates 2154). Loggie testified to these facts during the preliminary examination (DC Ex 67a Bates 1325/1-1327/17) but they were not in any of the police reports (DC Ex 56), so respondent clearly obtained this important information from Loggie's testimony at the preliminary examination. When relying on Loggie's testimony respondent did not

[8] The Master minimizes the impact of respondent's concealment by referring to Zinser's answer—at the end of recross during the public hearing—that his concerns about Loggie's misleading testimony "were taken care of" at the preliminary examination. (Report at 6). That answer cannot fairly be read as broadly as the Master suggests. While Zinser's preliminary examination testimony, cited in the text, revealed some of the details of working with Loggie as an informant, he never testified how or why Loggie became an informant. So he *didn't* compensate for respondent's failure to give discovery. It may well be that he simply didn't understand respondent's counsel's question during the public hearing.

inform Judge Kenny that Loggie had lied, nor did he reveal that Loggie was testifying so McCully would get a benefit.

Count II charged respondent with knowingly relying on Loggie's false testimony in his arguments to Judge Kenny about *Joslin*. The Master concluded that this charge should be dismissed because it "relies solely on the assertion that Ms. Loggie's testimony at the preliminary examination was, '…false, inaccurate, incomplete, and/or misleading…'" which allegation the Master had rejected in his treatment of Count I.

As shown in the discussion of Count I above, the Master was wrong about Loggie's testimony. Hence his basis for recommending dismissal of Count II is incorrect as well. The evidence clearly shows Loggie lied, respondent knew she lied, and yet respondent still presented Loggie to Judge Kenny as a wholly credible witness without informing him that Loggie had lied. That conduct violated respondent's duty of candor toward a tribunal, MRPC 3.3(a)(1) and (3) and his special duty as a prosecutor to make timely disclosures to the defense and the court, MRCP 3.8(d). This count should be sustained.

COUNT III: WITHOLDING INFORMATION AND EVIDENCE FROM OPPOSING COUNSEL AND SUCCESSOR PROSECUTOR

Count 3 charges that respondent withheld important information and evidence in *Joslin* and *Berry* from defense counsel and Dianna Collins, his successor at the AG's Office, in violation of the law and his ethical duties as an attorney and a prosecutor. The complaint alleges that McCully's and Loggie's cooperation with the police, motivated by their desire to mitigate McCully's pending sentence, was information that should have been provided to the defense as well as to the prosecutor who succeeded respondent in prosecuting those cases. The complaint further alleges that respondent didn't turn over other relevant discovery material to the defense in *Joslin* and *Berry* nor disclose it to Collins.

The evidence leaves no doubt that there was an understanding between respondent, Fishman, and McCully that McCully would be given the chance to work as an informant and that his work would be considered to mitigate his sentence. In

fact, respondent *authorized* the task force to have McCully work as an informant under that agreement. The evidence shows that respondent also authorized the task force to use Loggie as an informant as an additional sentencing benefit for McCully. As discussed in detail *supra* p 5, respondent was well aware of the circumstances under which McCully and Loggie became informants, was continually apprised of the work they did in several cases, and was well aware of their roles as informants in *Joslin* and *Berry* while he was actively prosecuting those cases.

It is uncontroverted that respondent did not provide any discovery regarding McCully's and Loggie's cooperation to defense counsel, as the complaint alleges. (R's Ans. ¶¶ 67, 91, 138(b)(c)(d)(f), 146(b); Tx, Cusick, vol 4 at 753/3-755/18; Tx Komorn, vol 12 at 2067/1-2070/19, 2145/1-24). It is also uncontroverted that respondent did not disclose to Collins the existence or details of the McCully organization investigation or prosecutions, the relationship between Loggie and McCully, the reasons McCully or Loggie became informants, or that McCully was the informant in the *Berry* cases. (R's Ans. ¶142 (a)-(c), (e), (h); Tx Collins, vol 15 at 2798/15-2804/7).

Loggie was respondent's primary witness in *Joslin* and, as explained below, respondent had a legal and professional duty to disclose her motivation for cooperating and testifying. Respondent was similarly obligated to correct Loggie's false or misleading testimony about her motivation. In *Berry*, respondent was also required to disclose that McCully helped to initiate and investigate the crime and that he was a res gestae witness who participated in important events during the crime. Respondent's failures to disclose information pertaining to McCully, Loggie, their charges and arrests, and their motivations for becoming informants, prevented Collins from satisfying the AG's ongoing discovery obligations in a timely fashion and was prejudicial to the administration of justice.

A. Duty to Disclose in Joslin

Under *Brady v Maryland*, 373 U.S. 83 (1963), *Giglio v United States*, 405 U.S. 150 (1972), and MRPC 3.8, a prosecutor is required to disclose exculpatory information and evidence, including impeachment evidence, regardless of whether

the prosecutor believes the information will make a difference between a conviction and an acquittal. A prosecutor's suppression of evidence favorable to an accused violates due process. "Evidence is favorable to the defense when it is either exculpatory or impeaching." *People v Chenault,* 495 Mich. 142, 150 (2014). McCully's and Loggie's motivations to testify affected their credibility, so were impeaching information.

Respondent admits that before the preliminary examination in *Joslin* he did not give Komorn any information about the McCully organization, the relationship between McCully and Loggie, McCully's and Loggie's informant work with the task force, the pendency of McCully's sentencing, or the pendency of McCully's and Loggie's forfeiture cases. (R's Ans., ¶¶ 91, 137; Tx Cusick, vol 4 at 753/1-755/18; Tx Cusick vol 5 at 810/22-811/23, 814/2-18)pp 753-755, 810-811). Respondent further admits he did not disclose this discovery information to Komorn at any time *after* Joslin was bound over to circuit court for trial, and that he never corrected Loggie's false or misleading preliminary examination testimony. (R's Ans., ¶137).

As Judge Kenny ruled, in representing Joslin Komorn was entitled to the information regarding Loggie's involvement in the McCully organization and her motive for working with the task force (DC Ex 72a Bates 1785/3-1787/18)—that the father of her child faced a substantial prison sentence that Loggie could help reduce. Loggie's motive to produce results in *Joslin* affected her credibility as a witness, and her credibility was at the heart of her testimony in the *Joslin* preliminary examination and the heart of the whole *Joslin* prosecution. Loggie was the only witness respondent presented as to the activities that occurred inside Pure Wellness, including the alleged illegal sales. (DC Ex 67a, 67b, 69). Without her testimony, as the Court of Appeals later found, Joslin's conviction could not stand.

The information that Loggie was motivated to become an informant to help her boyfriend was important evidence that Komorn could have used to discredit her. As Collins aptly summarized:

> The problem is if you don't know why she's cooperating, you don't know to ask the questions ... what [Komorn] didn't know is that [Loggie] was

> working the case off for her boyfriend. That's the piece that was missing when he was cross-examining her at the prelim. So he would not have known to ask her about that because it hadn't been disclosed to him." (Tx Collins, vol 16 at 3002/17-18, 3016/8-12).

Collins also correctly observed that Komorn's ability to conduct a "proper examination" was impeded by suppression of that information. (Id, at 3002/20-22).

It is prosecutorial misconduct to suppress evidence that would allow an effective cross-examination. *See People. v. Torrez*, 90 Mich. App. 120, 125 (1979); *see also People v. Layher*, 238 Mich. App. 573, 578-579 (1999) ("the bias or interest of a witness is almost *always* relevant to the substantive issue of witness credibility") (emphasis in original). And notably, Joslin's counsel explicitly asked respondent for *Brady* material just days before respondent provided discovery (DC Ex 61), so he cannot claim his nondisclosure was inadvertent.

Respondent excuses his noncompliance by claiming a mental failure to connect Loggie to McCully's sentence mitigation. (Tx Cusick, vol 4 at 750/8-17). That is not credible. He knew about McCully and Loggie, approved using both as informants, and called Loggie as his main witness. Respondent violated *Giglio* and MRPC 3.8 by not disclosing important impeachment evidence about Loggie.[9] He also violated MCR 6.201(F), which required him to provide discovery within 21 days of being asked. The fact that he did this knowingly, and then compounded his offense by remaining silent while Loggie lied and misled the defense about her motivation to become an informant, turned his *Giglio* violation into misconduct as charged in Count III.

The Master starts his contrary analysis of Count III by asserting that:

> [i]t is important to focus on the date of the alleged exclusions, July 22, 2015, and to recall that the date of the preliminary examination was

[9] Respondent has argued that he had no obligation to disclose under *Brady* because that obligation does not arise until trial. PFOFCOL, at 70-71. To the contrary, as the California Court of Appeals has held, the prosecution's duty to disclose material evidence that is favorable to the defense precedes preliminary examination. *Stanton*, 193 Cal.App.3d at p. 267, 239 Cal.Rptr. 328 (striking an element of the charged offense because of "the prosecution's failure to disclose evidence material to defense cross-examination of eyewitnesses at a preliminary hearing"); *People v. Gutierrez*, 214 Cal. App. 4th 343, 348–49, 153 Cal. Rptr. 3d 832, 835–36 (2013), as modified on denial of reh'g (Apr. 9, 2013), cert. denied, *California v. Gutierrez*, 571 U.S. 1086, Dec. 02, 2013.

> November 3, 2015, and Respondent's separation from the Attorney General's office in November of 2016. (Report, p 12).

Although the Master does not elucidate the significance of this observation, it seems to suggest that if respondent only learned of the missing discovery after he initially provided discovery on July 22, 2015, or maybe learned of it after he left the AG's office, then he cannot be faulted for not having provided it prior to the preliminary examination or prior to becoming a judge. Or perhaps the Master is suggesting that respondent simply forgot about the missing discovery between the time of production and the preliminary examination. The Master does not explain.

Either way, the Master's analysis is wrong—the discovery obligation is, as any prosecutor knows, a continuing one. Also, the Master's focus on the specific date of any "exclusion" is misplaced—the complaint explicitly alleges that respondent failed to provide this discovery at *any* time before he left the AG's office. (FC ¶ 137). And as is explained below, it is completely implausible that respondent "forgot" about the missing discovery.

The Master then notes that respondent's supervisor, William Rollstin, said that respondent had a "very robust docket."[10] (Report, pp 12-13). But Rollstin's observation is not further developed or explained, and nobody testified or suggested that respondent was overburdened to the point that he had to neglect his basic ethical obligations or his cases. Indeed, though the Master buttressed his suggestion that respondent was too busy to keep track of his duties by referring to a homicide case that respondent tried for three weeks in October of 2015 (months after his discovery obligation first arose and more than a year before he left the AG's office) (Report, p 13), respondent testified that this trial did *not* cause him to neglect any of his other matters. (Tx Cusick, vol 7, at 1345/5-18).

And importantly, the McCully organization was not some minor case on respondent's docket. (Tx Cusick, vol 4 at 766/1-6). He considered it one of his most significant cases: it was the most significant of the task force's cases, it involved

[10] Rollstin merely claimed that respondent's docket was "robust" – the Master added "very."

multiple police departments and federal agencies, it was a big and complex investigation, and it won national recognition as most outstanding marijuana investigation for a High Intensity Drug Trafficking Area. (Tx Tennies, vol 11 at 1968/21-1969/3, 1970/8-22, 1986/5-18). This is corroborated by the fact that whatever his other duties, respondent was "accessible and engaged" in the investigation; it was one of his primary cases. (Tx Tennies, vol 11 at 1989/2-1990/25). These facts make it unlikely that respondent was unaware of important facets of the McCully and related investigations, including Loggie's involvement, her relationship with McCully, McCully's motivation for cooperating and generating cases, and Loggie's motivation for cooperating to benefit McCully, all as fully explored above. What is *not* reasonable, on the basis of this record, is to believe that respondent's "robust caseload" caused him to neglect or be unaware of those facts and his obligations.

The Master then proceeds to accept a snippet of respondent's testimony – that when he dismissed the 36th District Court *Berry* case (a case that had nothing to do with *Joslin*), he did not "believe that McCully had been involved in the Joslin matter in any way, shape, or form." (Report, p 13). The Master says that "[t]he only evidence on the record that suggests more of a McCully involvement [than what respondent claimed to recall] are two emails from Calleja and McCully's defense attorney Mr. Fishman." (Report, p 14).

This conclusion simply disregards the great weight of the evidence. Specifically, the Master disregarded the evidence that when McCully could not serve as an informant in the Joslin investigation and offered Loggie to take his place, Calleja obtained *respondent's* permission to have Loggie do the job as a further sentencing benefit to McCully (Tx Calleja, vol 8 at 1499/1-1500/22) – as Calleja *had* to do in order for Loggie to work as an informant or to help McCully. Also, though the Master acknowledges Calleja's two emails to respondent about Loggie in January of 2015 (DC Exs 89t, 89u), he dismisses them without explanation, apparently not recognizing their significance. The purpose of the emails was to update respondent on McCully's informant work, and in them Calleja explicitly referred to "an ongoing MJ dispensary case that McCully generated and his girlfriend (Loggie on McCully's

behalf) has done some informant work on." (DC Exs 89t, Ex 89u). Respondent received and reviewed those emails. (DC Ex 93 ¶ 108(b)(3); Tx Cusick, vol 3 at 607/2-7).

The fact that respondent authorized Loggie's informant work and was updated about that work by Calleja's emails is strong evidence already of respondent's knowledge, but there's much more. In June 2015, when respondent was preparing to charge *Joslin* and just weeks before he provided discovery, he spoke with his supervisor who told him he should call "the CI" (Loggie), apparently to verify her willingness to testify. (DC Ex 88bb). So respondent reached out to Calleja on June 25 and asked for contact information "because I need to contact her before we can charge." Calleja responded with a telephone number at which Loggie could be reached: *McCully's* cellular number. (DC Ex 89y Bates 2843). Respondent contacted McCully to ask for his assistance in getting "a hold of Brandy Loggie" just four days later—the same day he saved one of Calleja's January emails about Loggie's cooperation to the *McCully* Legal File. (DC Exs 88u, 88cc). This further cements respondent's knowledge of Loggie's work as an informant and the connection between that work and McCully. The Master's report didn't address this evidence before accepting respondent's claim that he was unaware of McCully's connection to *Joslin*.

And still more: as described earlier (*supra* p 4), Fishman continually apprised respondent of the extent of McCully's cooperation and included Loggie's cooperation. That includes the emails on August 6, 2015, that respondent acknowledged, in which Fishman noted, in the context of evaluating McCully's cooperation, that Loggie was cooperating. (DC Exs 89dd, 89ee). The Master's report didn't address this evidence.

The Master also notes that when Loggie was interviewed in Judge Kenny's jury room she said she had not discussed her cooperation agreement with respondent, and from that concludes that "[t]he information regarding Loggie testifying because of McCully was unknown to Respondent as it didn't become available until after he left the Attorney General's office." (Report, p 14). This is a large and unwarranted leap. Assuming that Loggie was accurate, she had no reason to discuss her cooperation agreement with respondent because it was McCully and Calleja who dealt with her.

And even if Loggie never discussed her cooperation with respondent directly, that does not detract at all from the other evidence above that shows respondent's personal involvement in that agreement.

A clear preponderance of the evidence establishes that respondent was well aware of the circumstances of Loggie's cooperation and that he knowingly withheld relevant information about those circumstances from discovery in *Joslin* in violation of his ethical responsibilities.

B. Duty to Disclose in Berry

Komorn was also defense counsel in *Berry*. Respondent did not disclose to him that McCully was a res gestae witness or reveal to him the *Giglio* information that McCully was the informant in the Berry investigation, that he was awaiting sentencing in his own criminal case, or that he was motivated to cooperate in the Berry investigation to mitigate his own sentence.

MCL 767.40a(1) requires prosecutors to provide 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 purpose is to notify the defense of the witnesses' existence and their "res gestae" status. *People v. Lawton*, 196 Mich. App. 341, 347 (1992); *People v. Gadomski*, 232 Mich. App. 24, 36 (1998).

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. *People v. Hadley*, 67 Mich. App. 688, 690 (1976). That describes McCully to a "t."

As respondent agrees, the Livingston County charges were based on Berry's agreement to deliver and the actual delivery of three fully grown marijuana plants to Lowes. (R's Ans. ¶ 65). McCully provided the information that started the *Berry* investigation in July 2014. (DC Ex 41 Bates 934). Then, on August 6, 2014, it was McCully who introduced Berry to undercover officer Lowes. (R's Ans. ¶ 58c; DC Ex 39 Bates 731). During that meeting, *in the presence of McCully*, Berry sold Lowes a small amount of marijuana and discussed selling him whole marijuana plants. (R's Ans. ¶¶ 58e, 58f; DC Ex 39 Bates 731; Tx Lowes, vol 11 at 2220/6-2021/25, 2029/2-

5). Included in those negotiations were discussions about Berry's marijuana grow operations, the required $500 per-plant deposit, the buyer's right to inspect the plants selected, and the various shipping methods. (DC Exs 39 Bates 735-736, 40a).

A month later, on September 5, 2014, McCully accompanied Lowes again, this time to Berry's grow field in Livingston County, where he witnessed Lowes and Berry discussing the grow progress of his marijuana fields, the kind of plants still available, the per-plant price, and the potential yield of processed marijuana from 72 plants he was selling for $125,000. McCully also witnessed Berry escort Lowes into the grow field to select the plants he was purchasing and issue a receipt for Lowes's $3,000 deposit for six plants. (DC Exs 39 Bates 735-736, 40a Bates 905).

On September 24, 2014, Lowes returned to Berry's grow operation, this time without McCully, to inspect the marijuana plants he had put a deposit on. While they were checking on the plants, Lowes asked if the 72 plants were still for sale. Berry offered to sell him 70 plants. (DC Ex 29, Bates 738; Tx Lowes, vol 11 at 2030/20-2031/21). Lowes subsequently took possession of three plants on October 13, 2014.

McCully was a res gestae witness to the continuum of this criminal transaction—that is, Berry's conducting of a criminal enterprise for financial gain, delivery of marijuana, and conspiracy to deliver marijuana. (DC Exs 39 Bates 731-739, 43 Bates 952-953). The charge respondent brought against Berry encompassed all these events:[11] conducting a criminal enterprise (manufacturing marijuana in several locations for financial gain, which amounted to or posed a threat of continued criminal activity); delivery of marijuana; and conspiracy to deliver marijuana. (DC Ex 43 Bates 952-953). McCully was a witness to the continuum of acts—sales, negotiations, offers to sell, and a deposit on marijuana plants—for which Berry was criminally charged.

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[11] Respondent argued that he charged only deliveries that occurred on October 13 and later, after McCully was no longer present, and therefore McCully was not a res gestae witness to the crime respondent charged. (DC Ex 52 Bates 1058/13-20, Bates 1068/6-17, Bates 1069/1-6). But the October 13 delivery didn't happen in a vacuum. It was a culmination of the initial negotiation and Lowes putting down a deposit—part of the continuum of the crime and acts for which McCully *was* present.

Respondent himself testified that he believed McCully was a res gestae witness for the events on August 6. (Tx Cusick, vol 4 at 668/14-18). This testimony is consistent with his March 4, 2016 Legal File notes. Respondent charged Berry in Wayne County based on the August 6 transaction, but as noted in the Background, dismissed that charge because McCully was a res gestae witness.[12] Although respondent denies McCully was a res gestae witness in the Livingston County case, his denial is inconsistent with his prior admission and with the law.

In the course of rejecting the evidence that respondent violated his obligation to disclose a res gestae witness, the Master praised respondent for protecting McCully as an informer. (Report, 16). The praise was misplaced. The "informer's privilege" does not allow prosecutors to withhold the identity of an informant, when:

> the disclosure of an informer's identity, or of the contents of his communications is relevant and helpful to the 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, *People v. Perry*, 460 Mich. 55, 64 (1999).

As noted, McCully was a participant in the underlying transaction rather than a mere supplier of information, so the informer's privilege does not apply.

Respondent admitted that McCully was a res gestae witness in the Wayne County case when he contacted Fishman about McCully's appearance at the 36th District Court preliminary examination. (Tx Cusick, vol 4 at 656/24-657/2; Tx Fishman vol 20 at 3847/19-23). He also admitted, and the evidence has established, that it was McCully's status as a res gestae witness and Fishman's concern for his client's safety that caused him to dismiss the Wayne County Berry case. (DC Ex 88jj; R's Ans. ¶ 148; Tx, Fishman, vol 20 at 3847/10-3848/10; Tx Cusick, vol 4 at 680/15-681/1). There is no plausible way McCully was a res gestae witness in the Wayne County case but not in the Livingston County case.

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[12] Respondent"s Legal File note stated: "There was a nolo prosequi today in [the Wayne County] case . . . because it came to our attention that the informant is also a res gestae witness." (DC Ex 88jj).

As Fishman testified, in situations in which an informant is also a res gestae witness the prosecutor must choose between disclosing the informant's identity and dismissing the case. (Tx Fishman, vol 20 at 3846/10-3847/14, 3849/2-5 & 20-23). Respondent did neither in *Berry*.

The Master nonetheless posits that McCully was not a res gestae witness because he was not a participant, but "merely an informant who introduced officer Lowes to a grower and seller of marijuana plants." (Report, p 6). The Master relies on *People v. Paredes-Meza,* an unpublished decision (Docket No. 291067, July 8, 2010). But in *Paredes-Meza* the defendant argued he was denied a fair trial when the trial court refused to order the prosecution to disclose the identity of an informant who merely happened to be present when the defendant was arrested. The Court of Appeals found no evidence that the informant witnessed any events leading to defendant's arrest and thus, that the informant's testimony would not have aided in fully developing the facts.

Here, and critically contrary to the Master's description, McCully was not "merely an informant who introduced Lowes to a grower and seller of marijuana plants," nor was he present at Berry's arrest. In addition to introducing Lowes to Berry, McCully was present for their initial transaction, was present for and observed the discussions at that time about selling plants, then went with Lowes to the subsequent meeting at which Lowes gave Berry a deposit for the plants and Berry discussed his other plants that were available for purchase. In other words, 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 observed Lowes and Berry discussing a large number of marijuana plants that were available to purchase for a significant sum of money. McCully was, without question, a res gestae witness in both the Wayne and Livingston County cases against Berry, as Fishman, McCully's attorney, testified. (Tx Fishman, vol 20 at 3847/19-3849/5).

To comply with his legal and ethical obligations as a prosecutor respondent had to disclose McCully's res gestae status along with the reason McCully became an

informant—to mitigate his sentence—as well as the relevant discovery material identified in Count III. He did not do so, and thereby violated his ethical duties as charged in Count IIIB.

C. Nondisclosure to Successor Prosecutor

Respondent's failure to inform Collins, his successor prosecutor when he became a judge, is described in Count IIIC of the complaint. That lapse compromised Collins's ability to meet her own discovery obligations and to prosecute the case. But disciplinary counsel concede that this failure was not an independent ethical violation. Rather, respondent's failure to inform Collins is important because it is additional evidence that his concealment of McCully's and Loggie's roles was willful.

Collins did not know there were unfulfilled discovery obligations in *Joslin* when the case was assigned to her. Even though Loggie was going to be Collins's main witness in *Joslin*, respondent never told her about the *McCully* case, the McCully-Loggie relationship, or the fact that they were both working as informants to mitigate McCully's sentence. Respondent did not share this essential history with her when he transferred his files to her, and he had not made it explicitly apparent in the file. (R's Ans. ¶ 142(a)-(c), (e), (h); Tx Collins, vol 15 at 2798/5-2804/14).

On the eve of the *Joslin* trial Collins learned of the McCully connection from Calleja and reviewed the *Joslin* preliminary examination transcript. She realized immediately that the state had not met its discovery obligations and took prompt remedial actions (DC Ex. 89aaa; Tx Collins vol 16 at 2853/14-2854/24), as discussed above at pp 7-8. Ultimately Judge Kenny barred Loggie's testimony as a result and because Loggie was the only witness who could connect Joslin substantively to the alleged criminal activity, the state was unable to prove the allegations.

The Master addresses respondent's failure to inform Collins by observing the "tight administration," "close supervision," and "professional caliber of the staff" of the Attorney General's office. He suggests there wasn't enough time for respondent to provide the information Collins needed. He suggests that all of the necessary

information was available to Collins in the files she received.[13] (Report, pp 19-20). None of these rationales excuse respondent's failure.

Yes, as the Master notes, Loggie disclosed at the preliminary exam that she was an informant and Collins had the transcript. *But the critical fact Loggie had not disclosed was her motivation*! That is the central fact that also seems to have eluded the Master with respect to Count I. Collins could not have learned of Loggie's motivation from the transcript because Loggie had lied about it and respondent had never corrected her lie—actually, had helped conceal it.

Loggie's motivation was *not* readily apparent anywhere else in the files Collins had access to—which did not include the *McCully* file, because that case was finished and was not reassigned to her and respondent did not tell her about the link between *Joslin* or *Berry* and *McCully*. She didn't learn about Loggie's motivation until Calleja told her about it, *after* her initial interview with Loggie. (Tx. Collins, vol 15 at 2811/3-22).

By not telling Collins about the history and connections between the cases, respondent compounded the *Brady* issues he had created by not disclosing essential discovery about McCully and Loggie to Komorn. Respondent deprived his successor of the information she needed to properly conduct the prosecutions she inherited.

COUNT IV: OBSTRUCTING DEFENDANT BERRY'S ACCESS TO RELEVANT INFORMATION ABOUT McCULLY

Count IV alleges that prior to the *Berry* preliminary examination respondent failed to disclose that McCully was a res gestae witness, that he had worked with the police in exchange for a sentencing benefit, and that during the Berry investigation he had a pending forfeiture matter. (FC, ¶¶ 146, 147). Count IV also alleges that in the *Berry* preliminary examination respondent intentionally limited his questions and interfered with and obstructed Komorn's attempts to discover the identity and

[13] The Master also questions the motivation for the charge. (Report p 19). It was motivated by concern for respondent's failure to fulfill his duty to Collins to ensure that she could meet her and the state's ethical obligations, with the resulting impact on the fair administration of justice. Though we now conclude that the ethical foundation of the duty as applied to a colleague is a little too unclear to pursue as misconduct in light of the other charges here, the concern remains.

motivation of the informant (McCully), knowing that Komorn was entitled to this information because McCully was a res gestae witness. (FC, ¶¶ 149, 150). The preponderance of evidence established these allegations.

As discussed with respect to Count IIIB, McCully was a res gestae witness in the Livingston County *Berry* case and respondent failed to disclose him as such. (R's Ans. ¶ 146(a); Tx Komorn, vol 12 at 2145/22-24). Respondent also didn't disclose the circumstances under which McCully became an informant or the pendency and resolution of his forfeiture case. (Tx Komorn, vol 12 at 2144/13-2145/24, 2152/23-2153/2). The evidence also showed that respondent interfered with Komorn's cross-examination and made factual misrepresentations to 53rd District Court Judge Carol Sue Reader to continue to conceal this information from Komorn. (DC Ex 52 Bates 1053/10-1059/14, 1064/21-1069/22, 1072/3-11).

In his direct examination of Lowes in the *Berry* preliminary examination, respondent avoided the events of August 6 and September 5, 2014, even though they were the foundation for the charge. (R's Ans. ¶ 65). Even when Lowes mentioned that on September 24, 2014, he went to Berry's house to inspect the "marijuana plants *[he] had previously purchased,"* (emphasis provided) respondent avoided asking any follow up questions about the circumstances that led to Lowes's "previous" purchase, and redirected Lowes to the September 24 inspection. (DC Ex 52 Bates 1023/12-1025/15). He continued the direct examination by reminding Lowes that he was "just speaking specifically about September 24, 2014." (DC Ex 52 Bates 1030 /9-10).

On cross-examination respondent objected the moment Komorn asked any question about the informant (DC Ex 52 Bates 1053/10-15), claiming that the informant was not "charged for anything that happened;" that his "questioning did not deal with" the informant; and that he "specifically did this so [he] wouldn't get into the informant." (DC Ex 52 Bates 1054/9-12). Respondent continued his objections, claiming that the informant was "not being charged…for August 6th of 2014. He could have been, but he wasn't because we don't release that ID of the informant." (DC Ex 52 Bates 1055/23-1056/4). Following a bench conference, respondent made it clear that he was objecting "to any information with regards to any informant or any

transactions that occurred while the informant was present." He claimed this information was "not a part of this case in chief," that "the defendants are not being charged with that," and represented that the information was "irrelevant to what happened on the date in question in the complaint." (DC Ex 52 Bates 1058/13-19).

These statements were based on a totally crabbed and misleading reading of the charge respondent himself had brought—that the start date of the offense was September 28 and delivery occurred on October 13—and so because McCully wasn't present on those dates he wasn't a res gestae witness. Although it's true that Lowes did not pick up the three plants until October 13, that event cannot be separated from the introduction on August 6, the September 5 selection of the plants and $3000 deposit, and the negotiations and discussions that occurred on those dates. The evidence concerning them virtually had to be a part of respondent's case-in-chief. Respondent's own Request to Initiate Litigation recited the events of August 6 and September 5 as part of the factual basis for the charges of conspiracy and conducting a criminal enterprise that he brought. (DC Ex 41 Bates 934-35).

When Komorn inquired why Lowes needed another person (McCully) to take him to the August introductory meeting and accompany him for the September meeting at which the deposit was made, respondent again objected and represented that Lowes "has already testified when he made the purchase, the person wasn't with him." (DC Ex 52 Bates 1065/7-11). This, too, was misleading—as respondent knew well, Lowes had begun to negotiate the purchase and had paid the deposit when McCully *was* present.

Respondent's objections effectively precluded Komorn from testing Lowes's credibility and memory regarding Berry's grow fields, availability of large quantities of marijuana plants, price of each plant, and shipping methods. Testimony regarding these facts was relevant to the Livingston County charges. And circumventing the statutory requirement that respondent disclose the identity of a res gestae witness was part and parcel of preventing inquiry into these relevant facts.

Respondent has claimed that the informer's privilege allowed him to withhold McCully's identity and justified his April 7, 2016 objections. (Tx Cusick, vol 4 at

645/19-646/12). As discussed with respect to Count III, respondent is mistaken. When the informant was a participant in the underlying transaction rather than a mere supplier of information, as McCully was here, he is a res gestae witness and the informer's privilege does not apply.

The Master's entire analysis of Count IV is this: "This count stands or falls based on whether Thomas McCully is deemed a res gestae witness. He was not." The Master reached this conclusion in his discussion of Count IIIB, so his analysis here rises or falls on whether the Master was correct in that discussion. He was not, for the reasons already stated in this brief's discussion of Count IIIB, above at pp 34-38, The preponderance of evidence establishes the violations charged in Count IV.

COUNT V: MISREPRESENTATIONS TO THE COMMISSION

Respondent made serious and material misrepresentations to the Commission during the course of the investigation in his answers to the Commission's request for comments and the Commission's 28-day letter. He falsely claimed that:

1. At the time Brandy Loggie testified at the *Joslin* preliminary examination he was not aware "that [she] was working under some sort of agreement for the benefit of Mr. McCully." (DC Ex 93 Bates 3353).
2. "During the Joslin case" he did not recognize the "potential importance of Ms. Loggie's connection to Mr. McCully." (DC Ex 93 Bates 3358).
3. Thomas McCully's sentence was "in no way contingent on Ms. Loggie's cooperation or testimony." (DC Ex 93 ¶ 86(d)(2) Bates 3412).
4. He "litigated the Joslin matter believing that Attorney Komorn had all the discovery he had requested and was entitled to receive." (DC Ex 93 ¶87d Bates 3413).
5. He was "not aware of untruthful or inaccurate testimony at the November 3, 2015 preliminary examination concerning why Ms. Loggie became an informant for the [task force]." (DC Ex 93 ¶105 Bates 3431).

The evidence establishes that all of these claims are false and respondent knew they were false when he made them.

1. Respondent *was* aware that Loggie was working under some sort of agreement for the benefit of Mr. McCully.

As detailed above in various places (*see*, *e.g.*, pp 3, 9), throughout the McCully investigation respondent was in regular contact with the task force (R's Ans. ¶10; Tx Cusick, vol 1 at 186/20-187/11; Tx Tennies, vol 11 at 1985/4-1986/4; Tx Calleja, vol 8 at 1433/11-1434/9) and knew the details of Loggie's involvement with McCully and his organization. (Tx Cusick, vol 2 at 245/13-246/1, 256/7-11). After McCully's guilty plea it was respondent who agreed to allow McCully to work as an informant with the task force in exchange for consideration towards his sentence. (Tx Calleja, vol 8 at 1499/22-1500/19).

Beginning in July of 2014 respondent received regular updates from the task force and from Fishman regarding Mr. McCully's progress as an informant. Among those was a phone call from Calleja asking for approval to use Loggie's informant work *for McCully's benefit*. (Tx Calleja, vol 8 at 1499/22-1500/19). It was *respondent* who approved that arrangement as well (Tx Calleja, vol 8 at 1500/14-22), and over the course of the next 18 months he received several notifications that confirmed Loggie was working for McCully's benefit.

For example, in January of 2015 respondent received two separate emails in which Calleja reminded him that Loggie was working as an informant and that her work was "on McCully's behalf." (DC Exs 89t, 89u). Respondent admitted that at the time of these emails he knew who Loggie was. (Tx Cusick, vol 3 at 512/19-516/25).

In June of 2015 respondent knew to contact *McCully* when he wanted to reach Loggie to have her testify. He did not question the August 2015 email in which Fishman, while discussing McCully's impending sentence, noted the work that McCully *and Loggie* had done for the task force. (DC Ex 89dd; Tx Cusick, vol 3 at 558/10-559/3). On the same day, Fishman provided respondent with a spreadsheet, prepared by McCully, listing 30 investigations that Fishman wanted respondent to consider when evaluating the appropriate sentence for McCully. No fewer than six of

those cases were attributed to Loggie's informant work. (DC Ex 89ee). At no time did respondent question the presence of Loggie's cases on that spreadsheet. Indeed, in his emailed reply, respondent *acknowledged* that Ms. Loggie was a witness in one of his cases. (DC Ex 89dd).

In short, it can hardly have escaped respondent's attention that Loggie was working for the benefit of McCully.

2. Respondent *was* aware of the potential importance of Loggie's connection to McCully

Respondent testified that he was proficient in drug investigations and prosecutions, that he was experienced and proficient in trial work, that he was familiar with his ethical obligations, and that he was very detail oriented. (Tx Cusick, vol 1 at 173/2-174/5, 184/18-25)). As an experienced prosecutor he was certainly aware that a witness's motive to cooperate with the police and to testify are crucial to her credibility.

Respondent learned of the personal and criminal connection between Loggie and McCully starting in early 2013, when he was assigned the McCully investigation and began to receive reports from the task force. (Tx Cusick, pp 254-257; DC Ex 5). He learned more in May 2013 when he attended a PowerPoint presentation that noted Loggie's shared residence and relationship with McCully, detailed Loggie's role and connection with McCully in the February 2013 deliveries of marijuana to Lexington Kentucky, and included Loggie's photographs. (R's Ans. ¶¶ 10,12; DC Exs 3, 5; Tx Cusick, vol 1 at 257/9-259/2). And he learned more from the arrest interview of Ms. Loggie on July 9, 2013, in which she described her romantic relationship with McCully, their cohabitation, and the fact that he was supporting her financially during her current pregnancy. (DC Ex 5 Bates 190).

Any doubt that respondent was fully aware of the relationship between Loggie and McCully is further dispelled by the emails he received from Calleja in January of 2015 (DC Exs 89t, 89u) and from Fishman in August of 2015. (DC Exs 89dd, 89ee). Further, when he needed to speak with Loggie in June of 2015 regarding Joslin, respondent sought assistance from McCully—and did so, successfully. (DC Exs 88cc, 99 Bates 4049-4050; Tx Cusick, vol 4 at 738/12-740/4).

Respondent's knowledge and awareness of the importance of Loggie's connection to McCully were also shown in his email exchange with Fishman on August 6, 2015. Fishman noted that McCully's "girlfriend Brandy Loggie has also been cooperating and may very well be a witness in one of your cases" and asked whether they should adjourn the September 10 sentencing. Respondent acknowledged that "Brandy Loggie is a main witness in another case that we have" and said "[l]et's adjourn it one more time (and I mean just one more time)." (DC Ex 89dd).

It is implausible to suggest that respondent did not know the importance of Loggie's connection to McCully.

3. Respondent *was* aware that McCully and Loggie believed McCully's sentence *was* in some way contingent on Loggie's cooperation or testimony

As is noted above at pp 4-5 and 20, shortly after the start of the Joslin investigation the task force asked McCully to make controlled buys from Joslin's facility. (Tx Calleja, vol 8 at 1495/23-1496/4). McCully declined (Tx Calleja ,vol. 8 at 1496/14-22) but offered Loggie. (Tx Calleja, vol 8 at 1497/1-6; Tx Loggie, vol 10 at 1841/18-1843/18, 1845/19-24, 1887/10-15). After establishing that Loggie indeed wanted to help McCully, Calleja obtained *respondent's* approval to use Loggie as a further benefit to McCully. (Tx Calleja, vol 8 at 1499/22-1500/22). That began respondent's awareness that McCully's sentence was in some way contingent on Loggie's cooperation or testimony. Respondent's awareness was reinforced over the next year by the updates he received from the task force, by Calleja's emails in January 2015, and by Fishman's updates on McCully that included Loggie's cooperation, something that made no sense unless Loggie's cooperation was assisting McCully.

Respondent denies that he consented for the task force to use Loggie for McCully's benefit, or even knew that Loggie was doing so. (Tx Cusick vol 4 at 720/24-721/17). That claim is refuted by Calleja's and Fishman's emails explicitly notifying him that Loggie was working on McCully's behalf. (DC Exs 89t, 89u, 89dd, 89ee). It is also refuted by the fact that there was no one other than respondent who would logically be the one to approve Loggie's work for McCully, and even if there were, it

is inconceivable that as the case prosecutor, respondent would have been unaware that someone else had done that. As noted previously, respondent did not question the emails from Calleja or the emails and spreadsheet from Fishman, as he surely would have done as a detail-oriented prosecutor, had he not already understood and agreed with having Loggie work to mitigate McCully's sentence at the time he received the emails.

Respondent's claim that he did not consent is also refuted by the objections he raised during Loggie's November 3, 2015 cross-examination – objections that made no sense unless he was trying to conceal that Loggie was working for McCully's benefit. Clearly, Loggie's informant work was an additional factor in mitigating McCully's sentence. There was no reason for Fishman to highlight that work in his communications with respondent that kept respondent informed of McCully's sentence credits unless Fishman understood that respondent considered that work a point in McCully's favor.

Respondent could not possibly have lived with the McCully case for almost three years, and with Loggie's cooperation in connection with that case for well over a year, without being aware that McCully's sentence was in some way contingent on Loggie's assistance.

4. Respondent *was* aware that Komorn did not have all the discovery he had requested and was entitled to

The Office of the Attorney General had a discovery policy that required its attorneys to obtain exculpatory evidence from investigating agencies and provide it as part of discovery. (Tx Pallas, vol 15 at 2676/21-2677/5). Although neither the AG's policy nor respondent's constitutional and ethical discovery obligations require a request from defense counsel to trigger the requirement to disclose, Ms. Joslin's two attorneys both demanded discovery, including exculpatory material, from respondent shortly before he provided it. (DC Exs 61, 62).

It was respondent who *personally* selected the documents to be sent as discovery in *Joslin*. (Tx Hamilton, vol 8 at 1411/7-10). He admitted he received the Joslin police file, reviewed it, and made a copy of the documents he intended to

provide as discovery. He also admitted that he did not include in that discovery any information about Loggie's relationship with McCully and his marijuana organization, their agreements to work as informants with the task force, or their forfeiture matters – all information that was in that file of which he was aware. (R's Ans. ¶ 91; Tx Cusick, vol 4 at 753/3-755/18). In light of respondent's knowledge of the details of the McCully organization investigation, the relationship between McCully and Loggie, the cooperation understandings he had approved with both of them, the various updates he received about Loggie's cooperation, Loggie's critical role in the Joslin investigation, and the fact that he was a detail-oriented prosecutor, it is inconceivable that he either forgot Loggie's connection with the *McCully* case or believed that information about her arrangement to help McCully was not subject to discovery under either the policy of his office or respondent's constitutional and ethical requirements.

Even if it somehow escaped respondent's notice that he had omitted any information about Loggie's cooperation from the discovery he provided in July 2015, it is inconceivable that during the entirety of the *Joslin* case after that he never became aware of Loggie's cooperation and never became aware that the discovery he had provided was incomplete. His entire conduct of the Joslin investigation and case took place within a framework of reminders that Loggie was working to help McCully, as detailed above at pp 5, 14-15, and 43. Respondent knew that Komorn was entitled to know the circumstances and agreement that led Loggie to cooperate and testify, but he included none of that information in discovery.

5. Respondent *was* aware of Loggie's "untruthful or inaccurate testimony concerning why [she] became an informant."

As detailed above at pp 5, 17, and 24, Loggie's preliminary examination testimony claimed that nothing occurred that made her interested in contacting the police, and that she initiated contact with the task force because she was concerned that marijuana was being sold to people who were already high and who then drove vehicles. For the reasons stated in the discussion of Count I, above, that testimony was clearly false, inaccurate, and misleading.

Respondent's continuous, central, and intimate involvement in the McCully and Joslin investigations as detailed throughout this brief makes it inconceivable that he was not aware of the false and dissembling testimony that Loggie gave.

For one thing, he was acutely aware of the details of the McCully organization and Loggie's relationship with McCully and his organization. (R's Ans. ¶¶ 10, 14, 15; DC Exs 1, 2, 3, 5, 12,13; Tx Cusick, vol 2 at 256/4-257/12).

For another thing, respondent knew (but never disclosed to Komorn) that in her 2013 post-arrest interview Loggie had initially lied by denying any involvement in the McCully organization. (DC Ex 5 Bates 191; Tx Cusick, vol 2 at 273/5, 275/7-276/3 & vol 4 750/25-751/13). He was therefore forewarned that Loggie could not necessarily be trusted to tell the truth.

Against this backdrop, during the November 3, 2015 preliminary examination, Loggie testified falsely that there "[w]as [no]thing that occurred that made [her] interested in contacting [the police.]" (DC Ex 67A Bates 1336/5-7), that she called the police because "it is dangerous for [Ms. Joslin] to sell that amount of marijuana to people who are driving around on the streets, like it is not safe" (DC Ex 67A Bates 1328/14-16) and that when she contacted the police, she told them that "there is a woman selling marijuana just to anybody." (DC Ex 67A Bates 1340/4-5). *While this testimony was happening*, Zinser told respondent that it contained "discrepancies" and was "inaccurate." (Tr., Zinser, vol 13 at 2998/14-2301/3; DC Ex 72d Bates 2038/12-2041/3, 2045/14-2048/19). Respondent was already well aware from his own work on the case that Loggie's testimony was false and misleading, but if he was somehow not paying attention during her cross-examination, Zinser's comments were a red flag that would have restored his focus.

In short, respondent could not have been blind to the falsehoods in Loggie's testimony.

This section has detailed the evidence that shows how each of these five statements alleged in Count V was false and that respondent knew they were false. Among other standards of conduct, this was conduct contrary to justice, ethics, and honesty in violation of MCR 9.104(3),contrary to MRPC 3.3, which prohibits false

statements of material fact to a tribunal, contrary to MRPC 8.4(b), which prohibits a lawyer from engaging in conduct involving dishonesty or misrepresentation, and contrary to Canons 2(A) and 2(B), which prohibit irresponsible and improper actions and actions that undermine public confidence in the judiciary.

The Master's report does not address the substance of any of the false statements respondent is charged with making to the Commission. Rather, the Master merely questions in general terms the credibility of some of the witnesses. It is important to note that none of his criticisms of the witnesses are based on their demeanor while testifying. Rather, his criticisms are entirely based on his analysis of the evidence, and as such, are entitled to no greater deference than is any other aspect of his analysis of the evidence.

Thus, the Master quotes at length some inconsequential testimony by Collins in which she was "confused" about the timing of a conversation between Collins, Komorn, and McCully that was secretly recorded by Komorn. (Report, pp 25-26). Whether or not Collins was able to remember the timing of this conversation, the recording of which she was unaware at the time, says nothing about the reliability of her memory with respect to *material* events in the case.

The Master then quotes a portion of Calleja's cross-examination in which he did not recall a particular statement McCully allegedly made[14] in that secret recording—in 2017, *after* the *Joslin* trial—that McCully's reason for cooperating was that "[i]t was an opportunity for me not to be the person I was before." (Tx Calleja, vol 9 at 1658/3-15). This statement was not admitted as substantive evidence at the public hearing: it was allowed only to purportedly impeach Calleja. (Tx Calleja, pp. 1652/13-19, 1653/20-24). Further, the purported quote by respondent's counsel was entirely lacking in context, and respondent never offered as an exhibit the recording or its transcript.

[14] Respondent's counsel apparently quotes from the recording during his cross-examination, but the recording itself, or any record of the conversation, is not part of the record. Certain audio clips were played at the hearing, but none were transcribed. (Tx Calleja vol 9 at 1653/11-1658/19).

The Master nonetheless uses the statement as substantive evidence that established McCully's purported statement as reality, and on the basis of doing so, concludes that "McCully's statement is a critical fact because it mirrors Ms. Loggie's reason for cooperating," and then proceeds to the assumption that "perhaps both were trying to get their lives together." (Report, p 27). That is, the Master draws two completely unwarranted inferences from this testimony: 1) that Calleja was an unreliable witness because he did not recall this purported statement; and 2) that McCully's statement corroborates Loggie's preliminary examination testimony about her reason to cooperate and demonstrates that she was not lying when she testified that she was cooperating against Joslin because she was concerned about safety.

Even taken at face value, McCully's statement is hardly inconsistent with the fact that his true and primary motivation for cooperating was to mitigate (and hopefully avoid) a prison sentence—a hope that was achieved when his and Loggie's cooperation bore fruit at his sentencing in January 2016. (DC Ex 29). Were they "trying to get their lives together," as the Master hypothesizes? (Report, p 27). If so, step one would obviously be to mitigate McCully's sentence, and that is why they agreed to cooperate.

More importantly, it was irrational for the Master to accept McCully's self-serving after-the-fact statement about his motive at face value and reject the overwhelming contemporaneous evidence that McCully cooperated to get his sentence reduced, as detailed in multiple places above.

The Master also questions Calleja's credibility because he does not recall this statement as counsel quoted it. Contrary to the Master's apparent skepticism, it certainly does not undermine Calleja's credibility that he could not recall a statement by McCully long after the events relevant to prosecuting Joslin were over.

The Master also quotes with disfavor another snippet of Calleja's cross-examination in which he was asked to confirm Zinser's testimony that "he wasn't told what the deal was," and responds "[c]orrect. There was no deal." (Tx Calleja, vol 9 at 1704/3-12). It's entirely unclear what Calleja's answer means in the context in which it was given, but the Master interprets it to mean that "there was no agreement with

Loggie." (Report, p 28). Whatever Calleja actually meant – and he was never asked to explain – the Master's interpretation—that there was no understanding that Loggie was cooperating to benefit her boyfriend—makes no sense, and is completely contrary to the great weight of the evidence.

The Master also goes on to quote at length, and to find fault with, Calleja's testimony on cross-examination in which respondent's counsel argues with him about whether, at McCully's guilty plea, the fact that McCully intended to cooperate to mitigate his sentence would make "everybody on that transcript a liar" (Tx Calleja, vol 9 at 1601/5-1603/21) because they had said there were no promises of a defined benefit. (Report, pp 29-30). This is another inference the Master drew that does not survive even casual scrutiny. What the transcript in question reveals most clearly is that respondent's counsel was successful in confusing things during his cross-examination. But looking at this in the light most favorable to respondent, the event about which respondent was asking was McCully's guilty plea, which took place *before* McCully entered into an informal understanding with respondent. The transcript also shows that Calleja may not have been legally sophisticated enough to articulate the difference between a "deal" and an unstated expectation of potential benefit from cooperation. Calleja may also have been too unsophisticated to avoid the timeworn trap for a witness that is set by an attorney asking whether someone who says something different than what the witness believes is a "liar" rather than merely someone with a different understanding. But none of that comes close to justifying the Master's disregard for Calleja's testimony altogether, especially given all of the circumstances and corroboration of that testimony previously discussed.

On the basis of the selective, out-of-context, and immaterial statements noted above, the Master concludes that Calleja was "confused of forgetful from time to time" and that "his cynical view of the legal process" may have "colored his testimony." (Report p. 28). On that slender reed the Master concludes that Calleja "cannot be relied upon to refute the Respondent, Judge Groner, Mr. Fishman, and McCully." (Report, p 30). The Master's statement is not only an unwarranted rejection of Calleja's credibility, it is confounding in its own right. Calleja's testimony was not

inconsistent with *anyone's* testimony other than respondent's. In fact, Fishman's testimony is consistent with there being an understanding between him and respondent that McCully would cooperate with the hope and expectation of benefit at sentencing, just as Calleja testified. (Tx Fishman, vol 20 at 3833/17-19, 3834/12-21). And McCully did not testify or submit any statement that was admitted on the record.

Calleja's testimony about Loggie's and McCully's cooperation was reliable, was consistent with the normal course of investigations supervised by a prosecutor, consistent with common sense, and consistent with the contemporaneous documentary evidence. On the other hand, respondent's denials that there was an understanding or that he was aware of an understanding were consistent with none of those things.

The Master's analysis of the evidence at the hearing was simply wrong. He seems to have developed a favorable impression of respondent and then discounted or ignored any evidence that was inconsistent with that impression. The evidence established the allegations in Count V of the complaint by well more than a preponderance, as well as the allegations in Counts I-IV as discussed previously.

SANCTIONS

The misconduct established by a preponderance of the evidence includes that respondent made false statements to the Commission, misled judges before whom he was litigating, and violated his ethical obligations as a lawyer and prosecutor. Respondent committed the misconduct over the course of three years as a prosecutor with the Attorney General's office, then continued with his false statements to the Commission during the investigation and while he was a judge. For the reasons stated below, disciplinary counsel believe the appropriate sanction is to remove respondent from the bench.

The Supreme Court's "primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public." *In re Ferrara,* 458 Mich. 350, 372 (1998). The Court established guideposts for determining an appropriate sanction in *In re Brown*, 461 Mich. 1291,

1292-93 (2000). *Brown* specified seven factors to consider when determining a sanction:

(1) ***Misconduct that is part of a pattern or practice is more serious than isolated instances of misconduct.***

The evidence established that respondent committed a continuum of misconduct that centered on concealing McCully's and Loggie's cooperation and their motivations for cooperating in the *Joslin* and *Berry* investigations and prosecutions. To that end, respondent did not provide the defense with required discovery of their cooperation. In *Joslin* he observed his principal witness give false and misleading testimony about how she came to be an informant and cooperating witness at the preliminary examination, and rather than correct comply with his obligation to correct her testimony he used objections and interruptions to obstruct defense counsel from discovering the truth. Respondent continued to rely on Loggie's testimony in later proceedings in circuit court without revealing that she had lied. And when he left the Attorney General's Office he did not tell his successor counsel about Loggie's motivation to be a witness or her false testimony at the preliminary examination.

In *Berry* respondent did not provide counsel with a required notice that McCully was a res gestae witness, even though he had recognized in a related case that that was so. Respondent then made misleading statements to the judge presiding over the *Berry* case to conceal McCully's status and obstructed defense counsel's efforts to learn of McCully's presence at important events in the case.

Respondent's course of misconduct continued when, years later, he gave false answers in response to the Commission's request for comment and in his answer to the complaint.

In short, respondent's misconduct was not an isolated instance.

(2) ***Misconduct on the bench is usually more serious than the same off the bench.***

Respondent did not commit his misconduct while he was on the bench.

(3) *Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.*

Respondent's misconduct was clearly prejudicial to the actual administration of justice. His actions in *Joslin* and *Berry* violated the fundamental obligation of the prosecutor to seek justice – an obligation the United States Supreme Court articulated eloquently: the government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935)). He did that by violating his obligation under *Brady* and *Giglio* and MRPC 3.8 to disclose impeachment information to the defense in a criminal case, and his obligation under MCL 767.40a to disclose res gestae witnesses. Respondent's concealment also violated MRPC 3.3, which prohibits a lawyer from providing false statements of material fact or law to a tribunal and requires a lawyer to correct false statements of material fact previously provided to a tribunal. Respondent's violations of his constitutional, ethical, and legal obligations was prejudicial to the actual administration of justice.

(4) *Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.*

Not applicable here.

(5) *Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.*

Respondent's misconduct was deliberate and premeditated, not spontaneous. He knew that Loggie, his principal informant and witness in the *Joslin* case, was motivated by her desire to help mitigate McCully's sentence, yet he did not provide this information in discovery. When Loggie gave false and misleading testimony at the preliminary examination he did nothing to rectify her prevarication, despite being given notice that something was wrong with that testimony. To the contrary, he deliberately obstructed the cross-examiner's attempts to elicit her motive for cooperating. And in *Berry* he failed to identify McCully as a res gestae witness in the Livingston County case; even though he had dismissed another case in which McCully had a *less* significant role because McCully was a res gestae witness in that

other case. Just as in *Joslin*, he then obstructed the cross-examiner's effort to learn the identity and motivation of the cooperating witness. In addition, he had all the time he needed to think about his answers to the Commission's questions, yet he gave answers that were false, knowing they were false.

(6) ***Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.***

The intent of respondent's misconduct was to prevent the discovery of the truth in two criminal cases: to conceal the truth of Loggie's motivation to cooperate and testify in *Joslin*, and to conceal the circumstances of her agreement to cooperate and McCully's role in obtaining that cooperation for his own benefit; and to conceal McCully's status as a res gestae witness in *Berry*, to prevent him from being examined regarding the events he observed, his role in setting up and participating in those events, and his background and motivation for acting as an informant.

It was pure happenstance that McCully drove Loggie to her interview with Collins to prepare for her testimony at the *Joslin* trial, which is what led Calleja to remark that had Loggie not worked as an informant for her boyfriend's benefit the task force may have been unable to make its case on Joslin. But for that happenstance, which occurred *after* respondent was no longer involved, Loggie's deception would not have been revealed. Until that moment Collins knew nothing about the McCully case, much less that McCully's exposure in that case had caused her principal witness to cooperate in *Joslin*.

Respondent's misconduct was not calculated to "merely delay" discovery of the truth; it was calculated to undermine the ability of the justice system to ascertain that truth in the first place.

(7) ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.***

This factor is not in issue in this case.

In sum, the *Brown* factors support a strong sanction. Other considerations demonstrate that the sanction should be removal. In particular, the Michigan Supreme Court has repeatedly found that misrepresentations, lies, and deceitful testimony are a basis for removal from office. In *In re Justin,* 490 Mich. 394 (2012), the Court reiterated:

> [o]ur judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. *When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.*
>
> * * *
>
> The vast majority of misconduct found by the Judicial Tenure Commission is not fatal; rather, it reflects oversight or poor judgment on the part of a fallible human being who is a judge. *However, some misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.*
>
> *…Lying under oath, as the respondent has been adjudged to have done, makes him unfit for judicial office.*

Id. at 424 (emphasis original), quoting *In re Noecker*, 472 Mich. 1, 17-18 (2005)(Young, J. concurring); *see also In re Brennan,* 504 Mich 80, 83 (2019); *In re McCree*, 495 Mich. 51, 70-71 (2014); *In re Adams*, 494 Mich. 162, 178-79 (2013).

In *In re Green*, 2023 WL 4874407 (Mich 2023), the Michigan Supreme Court imposed a sanction less than removal when it found that a judge made false statements to the Commission. The rationale on which the Court relied to distinguish Judge Green's false statements from those false statements that had led to removal of other judges was that Judge Green's false statements to the Commission were not under oath. (*Id.* at p 13). In reaching that result the Court appears to have relied on *In re Simpson*, 500 Mich 533 (2017).

However, there was a significant change in the court rules between *Simpson* and *Green* that the *Green* opinion did not address. In 2019 the Court amended MCR 9.221(B) to provide that "[t]he respondent must sign the response [to a request for comments], and that signature shall serve as the respondent's attestation as to the veracity of the respondent's response." An oath is an attestation of veracity. Respondent in this case answered the Commission's questions after the Supreme Court amended MCR 9.221(B), and accordingly, his answer was under oath. For this reason, respondent's lies to the Commission should be analyzed under the Supreme Court's precedents that address lies under oath, and that precedent dictates that removal is the only proper sanction.

CONCLUSION

For all the reasons stated in this brief, disciplinary counsel ask that the Commission find that respondent committed misconduct as charged in Counts I-V of the complaint. Based on that finding, disciplinary counsel also ask that the Commission recommend that the Supreme Court remove respondent from office.

Respectfully submitted,

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