

SUPREME COURT OF LOUISIANA

No. 2019-B-1779

IN RE: EUSI HEKIMA PHILLIPS

ATTORNEY DISCIPLINARY PROCEEDING

JOHNSON, C.J., would remand to disciplinary board and assigns reasons.

I find the Committee erred in dismissing the formal charges against respondent. In my view, this court would benefit from consideration of this matter by the disciplinary board and I would remand the matter to that board for further review.

The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963). The record of this matter demonstrates that respondent withheld from the defense evidence that a crucial witness expected to obtain benefits from testifying, and then elicited trial testimony that the witness was testifying “out of the goodness of my heart” and “can’t get nothing out of it.” Specifically, respondent was aware of multiple letters written by the witness in which he addressed issues of leniency, transfer to another jail facility, and his receipt of Crimestoppers reward money. Nevertheless, respondent did not turn over this evidence to the defense counsel before a trial for second degree murder, where the defendant faced life in prison without parole, and then misled the jury by presenting the witness as disinterested. I would find respondent’s violation of Rule 3.8(d) of Professional Conduct has been proven by clear and convincing evidence, warranting review by the disciplinary board.

Fifteen years ago, this Court upheld a suspended suspension for another Orleans Parish prosecutor—Roger Jordan—who suppressed favorable information in a capital case. *In re Jordan*, 04-2397 (La. 6/29/05), 913 So. 2d 775. No prosecutor in Louisiana has been disciplined for failure to disclose favorable information since, despite numerous published opinions finding *Brady* violations and high-profile exoneration cases.

As I noted in my concurrence in *Jordan*, although the law gives prosecutors absolute immunity from civil suit, even where they suppress exculpatory information, the United States Supreme Court has identified the legal community's responsibility for maintaining the integrity of prosecutors and deterring prosecutors from violating standards of the legal profession. In *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976), the Supreme Court expressed that “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.” Our court has never hesitated to impose discipline on attorneys who are guilty of misconduct involving financial or trust account issues. Yet, the actual injury caused by prosecutorial misconduct is much greater. A loss of a liberty interest is undoubtedly more valuable than financial loss. As I explained in *Jordan*, “the court’s function in dispensing disciplinary action is critical both for upholding the highest ethical and professional standards among prosecutors and ensuring fundamental fairness for defendants.” 913 So. 2d at 787 (Johnson, J. concurring in part, dissenting in part). In another case of Orleans Parish prosecutors violating *Brady*, the United States Supreme Court also reiterated the role of the lawyer disciplinary process for prosecutors in preventing “recurring constitutional violations.” *Connick v. Thompson*, 563 U.S. 51, 66 (2011).

We have a duty to use our lawyer disciplinary system to ensure fundamental fairness for defendants and prevent repeated constitutional violations by prosecutors. If we have trepidation about disciplining prosecutors whose deliberate misconduct sends people to jail, we have abdicated our responsibility.