No. 99-6615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF LEGAL ETHICS PROFESSORS AND THE STEIN CENTER FOR LAW AND ETHICS IN SUPPORT OF PETITIONER

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For The Fourth Circuit

MOTION OF LEGAL ETHICS PROFESSORS AND THE STEIN CENTER FOR LAW AND ETHICS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3(b), movants Kathleen Clark, Stephen Gillers, Bruce Green, Geoffrey Hazard, Susan Martyn, James Moliterno, Deborah Rhode, Ronald Rotunda, Charles W. Wolfram and Fordham University's Louis Stein Center for Law and Ethics respectfully request leave to file the attached brief *amicus curiae* in support of petitioner. Movants have sought consent to their appearance as *amici curiae* from Petitioner Michael Williams and Respondent John Taylor, Warden of the Sussex I State Prison. Although Petitioner has consented, Respondent has not consented.

Movants are nine law professors who are experts in legal ethics, and a university ethics center. Kathleen Clark, Professor at Washington University School of Law, has taught legal ethics since 1993. Stephen Gillers, Professor at New York University School of Law, has taught legal ethics since 1978, and is the author of a casebook, REGULATION OF LAWYERS (5th ed. 1998). Bruce Green, Stein Professor at Fordham University School of Law and Director of the Louis Stein Center for Ethics, has taught legal ethics since 1987.

Geoffrey Hazard, Trustee Professor at the University of Pennsylvania School of Law, has taught legal ethics since 1966, was the reporter for the Kutak Commission that created the ABA's MODEL RULES OF PROFESSIONAL CONDUCT, and is the co-author of a treatise, THE LAW OF LAWYERING, and a casebook, THE LAW AND ETHICS OF LAWYERING (3rd ed. 1999). Susan Martyn, Professor at University of Toledo College of Law, has taught legal ethics since 1977. James Moliterno, Professor at the Marshall-Wythe School of Law at the College of William and Mary and Director of its Center for the Teaching of Legal Ethics, has taught legal ethics since 1984, and is author of CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS (1999) and ETHICS OF THE LAWYER'S WORK (1993). Deborah Rhode, Ernest W. McFarland Professor at Stanford Law School and Director of the Keck Center on Legal Ethics and the Legal Profession, has taught legal ethics since 1979, is author of the casebook, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2nd ed. 1998) and co-author of the casebook, LEGAL ETHICS (2nd ed. 1995).

Ronald Rotunda, Albert E. Jenner Jr. Professor at University of Illinois School of Law, has taught legal ethics since 1974, and is co-author of the casebook, PROFESSIONAL RESPONSIBILITY (7th ed. 2000). Charles W. Wolfram, Charles Frank Reavis Sr. Professor Emeritus at Cornell Law School, has taught legal ethics since 1974, is the author of the treatise, MODERN LEGAL ETHICS (1986), and is the reporter for the RESTATEMENT OF THE LAW GOVERNING LAWYERS' CONDUCT (1999). The Louis Stein Center for Law and Ethics, based at Fordham University School of Law, sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, including issues of prosecutorial ethics.

The potential *Amici* have an interest in ensuring that this Court recognize the professional ethical obligation of prosecutors to disclose all exculpatory information, an obligation that is independent of prosecutors' duties under the Due Process Clause.

The brief of *Amici* will not address every point argued by the parties. Instead, *Amici* focus on a single issue: the ethical obligation of prosecutors to disclose all exculpatory information, even in post-conviction proceedings.

Based upon the above, movants respectfully request that the Court accept their attached brief for filing.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

The interest of *Amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae.*

STATEMENT OF THE CASE

PETITIONER'S TRIAL

Petitioner, Michael Wayne Williams, was indicted, *inter alia,* for the capital murder of Morris and Mary Keller. At Williams' trial, the uncontested facts were that on February 27, 1993, Williams and Jeffrey Alan Cruse decided to rob a house owned by Morris and Mary Keller. Mrs. Keller was sexually assaulted. Mr. and Mrs. Keller were each shot several times, and then were left for dead in a wooded area behind their home. *Williams v. Commonwealth,* 450 S.E.2d 365, 369 (Va. 1994).

The key contested issue at trial was whether it was Williams or Cruse who fired the shots that killed Mr. and Mrs. Keller. This issue was of critical importance because in Virginia, only the person who 'actually fired the fatal shot' can be guilty of capital murder. *See* VA. CODE ANN. § 18.2-31 (Michie 1994).

Cruse, who was awaiting his own trial for capital murder, testified for the Commonwealth at Williams' trial. Cruse testified that it was Williams' idea to commit the robbery; that Williams selected the Keller's home; and that Williams dictated all their actions once inside the Keller's home. Cruse also stated that he was unaware of any plan to kill the couple until moments before the first shots were fired. According to Cruse, Williams said "we'll shoot at the count of three," and then Williams shot Mr. Keller. After Williams said that he "didn't want to leave no witnesses," Cruse shot Mrs. Keller, and she "fell down." When Mr. Keller stood back up, Williams shot him again. As they were walking away, Williams shot the Kellers "a couple more times apiece."

Williams testified in his own defense. He admitted his part in the robbery, but maintained that it was Cruse who said they should murder the Kellers to eliminate witnesses. Williams said that it was Cruse who shot and killed Mrs. Keller. Williams

1. *Amici curiae* state, pursuant to SUP. CT. R. 37.6, that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

acknowledged that he shot Mr. Keller once, but said that Keller then got back up. After that, Cruse shot Keller several more times.

The jury convicted Williams on all counts, including capital murder.[2]

EXCULPATORY INFORMATION

Prior to trial, Williams' lawyer filed a *Brady* motion requesting, among other things, information regarding any "confessions or statements" made by Cruse, Joint Appendix 25 [J.A. 25] and any "psychiatric, psychological and mental health records" relating to Cruse. [St. App. 21] The trial court ordered the Commonwealth to produce any exculpatory information. [J.A. 30]

After conviction, Williams' lawyer in the state habeas proceeding wrote to Donald Curry, the Senior Assistant Attorney General in the Criminal Litigation Section, and specifically requested that Mr. Curry "review all materials and evidence in the possession, custody or control of the Commonwealth or its agents," including:

- "All psychological test [sic] or polygraph examinations performed upon any prosecution witness," and
- "A copy of all medical and psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable [sic] affected the witness's credibility, ability to perceive, or relate or recall events."

[J.A. 346-49]

Donald Curry, the Senior Assistant Attorney General in the Criminal Litigation Section, responded by stating:

> With respect to your request . . . that Warren and I "inspect and review" all materials "in the possession, custody or control of the Commonwealth" for the purpose of identifying material, exculpatory evidence, *we have no intention of doing so*. . . . This case . . . no longer is in a posture where the Commonwealth is a "prosecutor." You have filed a civil habeas corpus proceeding in which the Commonwealth is the defendant. *I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel.*

[J.A. 353 (emphasis added)] Mr. Curry did not disclose any of the information requested by Williams' state habeas counsel.

Later, in the federal habeas proceeding, an investigator hired by Williams' federal habeas lawyer discovered a report of a psychiatric examination of Cruse, the key prosecution witness.[3] The psychiatric report was prepared in September of 1993, several months prior to petitioner's trial, and stated:

> [Cruse] has little recollection of [the murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time.

[J.A. 495] The report also stated Cruse was generally unable to recall events that occurred when he had been "drinking excessively" or doing drugs. [J.A. 498] This psychiatric report was not disclosed in response to either the trial court's Brady order or state habeas counsel's request.

SUMMARY OF ARGUMENT

> It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
> — *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960).

2. Williams was convicted of capital murder, robbery, rape, and the abduction of Mary Keller; capital murder, robbery and the abduction of Morris Keller; statutory burglary, and arson. Williams contests only the capital murder convictions, not the other convictions.

3. Assistant Attorney General Donald Curry has acknowledged the significance of Cruse's testimony to the Commonwealth's case against Williams:

> The issue in this case . . . was a question of which defendant shot the victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury believed Williams' testimony, then Cruse fired all three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller. In short, the issue in this case was credibility . . . ."

[J.A. 366-67 (citation omitted)]

Because of a prosecutor's unique position in the law — part advocate and part representative of the sovereign with an interest in seeing that justice is done — prosecutors have special ethical duties of fairness recognized in all fifty states, including the Commonwealth of Virginia.

Pursuant to the applicable provision of the Virginia ethical code, the government lawyers had a continuing duty to produce *all* exculpatory information of which they were aware both before and *after* Williams' conviction. *See* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY (VIRGINIA CODE), DR 8-102(a). Williams, as a habeas corpus petitioner seeking relief from a capital sentence, had to be able to determine whether the Commonwealth kept exculpatory information from him in violation of his constitutional rights. This obligation to provide such information, if unfulfilled, represents an ethical violation by the Commonwealth's lawyers. Thus, this court should reverse the Appellate Court and remand this matter to the District Court for production of exculpatory information and an evidentiary hearing.

ARGUMENT

PROSECUTORS HAVE AN ETHICAL OBLIGATION TO DISCLOSE TO THE DEFENSE ALL EXCULPATORY INFORMATION, AND THAT ETHICAL OBLIGATION CONTINUES EVEN AFTER CONVICTION.

> My client's chief business is not to achieve victory but to establish justice.
>
> — Judge Simon E. Sobeloff as Solicitor General (*quoted in Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963)).

For more than a century, courts and other authorities have recognized that prosecutors have professional obligations that are distinct from, and more demanding than, those of lawyers for private clients. These obligations emerge out of the prosecutor's role unique in our system of justice. As a prosecutor, a lawyer must perform the dual role of effective advocate for his client, the sovereign, and as surrogate for that client — making many decisions that are usually left to the private client in other situations. The sovereign has an "obligation to govern impartially [that] is as compelling as its obligation to govern at all." *Berger v. U.S.*, 295 U.S. 78, 88 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960). The sovereign's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.; see also* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done."); ABA MODEL RULES OF PROFESSIONAL CONDUCT (MODEL RULES) Rule 3.8. cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *see generally*, Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612-18 (1999) (tracing history and development of prosecutor's obligation to see that justice is done).

It is thus well established that a prosecutor has a duty to seek justice and not simply win cases. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). In general, this duty to seek justice implies both an obligation to prevent the punishment of individuals who are innocent and an obligation to ensure that all individuals who come within the criminal justice system are accorded a fair process.

Traditionally, codes of professional conduct have identified a limited number of specific ethical obligations that are unique to prosecutors and that emerge out of the general goal to seek justice, but these codes make no attempt to define all of these obligations. *See* MODEL RULE 3.8. Other professional obligations have been identified by courts in their published opinions, by bar associations in other sets of guidelines, and by prosecutors in internal guidelines.

Of all the specific prosecutorial obligations arising out of the ethical duty to seek justice, the most firmly established is the obligation to disclose information that may help prove the innocence of an individual accused or convicted of a crime. This obligation reflects the duty both to prevent the punishment of innocent individuals *and* to accord all individuals a fair criminal process. The obligation to disclose evidence of innocence has found expression in every ABA model code of ethics beginning with the 1908 ABA CANONS OF ETHICS. But, independently of

whatever disciplinary rules may be in effect at any time, the obligation exists as an aspect of the prosecutors' role as a quasi-judicial officer.

A. Independent of Their Duties under the Due Process Clause, Prosecutors Have an Ethical Obligation to Disclose All Exculpatory Information to the Defense.

This Court has long recognized that prosecutors have an ethical obligation to disclose exculpatory information, even after conviction. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), after obtaining a death penalty in a murder case, a prosecutor discovered evidence tending to corroborate the defendant's alibi and tending to undermine the credibility of the prosecution's chief witness. *Id.* at 412. While none of the new evidence was conclusive of the defendant's innocence, the prosecutor presented this information to the Governor prior to defendant's scheduled execution date. *Id.* at 412-13. The prosecutor "explained that he wrote from a belief that 'a prosecuting attorney had a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented.'" *Id.* at 413 (quoting the brief on behalf of the prosecutor).

This Court then stated that prosecutors have:

> [a] duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his *office* to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility EC 7-13 . . . .

Imbler, 424 U.S. at 427 n.25 (emphasis added).

Further, the *Imbler* Court held that prosecutors are immune from liability under 42 U.S.C. § 1983 for their actions in initiating a prosecution and in presenting the State's case. In so deciding, the Court:

> emphasize[d] that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. . . . [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.

424 U.S. at 428-29 (citing ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (MODEL CODE) EC 7-13). Thus, in providing prosecutors with immunity from civil liability, this Court explicitly recognized the importance of holding prosecutors accountable for complying with their ethical obligations.

B. The Ethical Obligation to Disclose Exculpatory Information Pre-dates this Court's Decision in *Brady v. Maryland*.

1. The ABA Has Recognized Prosecutors' Ethical Obligation to Disclose Exculpatory Information Since 1908

More than fifty years before this Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), the American Bar Association (ABA) recognized that prosecutors have an *ethical* obligation to disclose exculpatory information. In 1908, the ABA adopted the ABA CANONS OF ETHICS, which stated:

> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

ABA CANONS OF ETHICS, Canon 5 (*reprinted* in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 265 (1999)).

In 1969, when the ABA replaced the CANONS OF ETHICS with the MODEL CODE, it made clear that a prosecutor's failure to disclose exculpatory information could subject the prosecutor to professional discipline.

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the

> defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

MODEL CODE DR 7-103 (B). The MODEL CODE also stated that "a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused." MODEL CODE EC 7-13. Furthermore, a "government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . ." MODEL CODE EC 7-14.

In 1983, when the ABA replaced the MODEL CODE with the MODEL RULES, it again reiterated prosecutors' ethical obligation to disclose exculpatory information.

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . .

MODEL RULE 3.8.

Today, nearly all of the states recognize prosecutors' ethical obligation to disclose exculpatory information, and have adopted the equivalent of MODEL CODE DR 7-102 or MODEL RULE 3.8. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger,* 65 N.C.L. REV. 693, 715 n.122 (1987).

2. Virginia Imposes on Prosecutors an Ethical Obligation to Disclose Exculpatory Information

Virginia prosecutors are bound by the VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY, which states that

> A public prosecutor or a government lawyer in criminal litigation shall . . . . Make timely disclosures to counsel for the

> defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

VIRGINIA CODE DR 8-102 (A).[4] Prosecutors who fail to disclose exculpatory information can be subject to discipline. *See, e.g., Eberhart v. Virginia State Bar,* VSB No. 93-031-1042 (Nov. 22, 1994) (imposing 18-month suspension on prosecutor who withheld and destroyed exculpatory information); *Office of Disciplinary Counsel v. Jones,* 613 N.E.2d 178 (Ohio 1993) (imposing 6-month suspension on prosecutor who failed to disclose exculpatory information); *see also Houston v. Partee,* 978 F.2d 362, 369 (7th Cir. 1992), *cert. denied,* 507 U.S. 1005 (1993) (directing clerk to send court's opinion to bar disciplinary authority for further investigation where prosecutors failed to disclose exculpatory information which was discovered after conviction).

The problem is that, despite the theoretical availability of professional discipline, prosecutors are nonetheless rarely sanctioned by the bar. *See, e.g.,* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.2 (1986); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger,* 65 N.C.L. REV. 693 (1987) (reviewing all reported cases and surveying disciplinary authorities in forty-one states, and finding only five examples of prosecutors being disciplined). Unfortunately, many prosecutors have misunderstood their role, apparently believing that their duty is to obtain or defend convictions, rather than seek justice. Recent news reports have documented hundreds of cases where murder convictions had been

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4. Effective January 1, 2000, Virginia's lawyers will be bound by the Virginia Rules of Professional Conduct. The new rule for prosecutors is substantially similar to the old rule, and states:

> A lawyer engaged in a prosecutorial function shall . . . make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; . . . .

Rule 3.8.

overturned for prosecutorial misconduct, but found that only a handful of those prosecutors were disciplined by bar authorities. See Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, Chi. Trib., Jan. 10, 11, 12, 13, 14, 1999 (reporting that since this Court's *Brady* decision, 381 homicide convictions have been overturned because of prosecutorial misconduct, but none of the prosecutors involved was disbarred). Thus, it is particularly important that courts, including this Court, reinforce that the lawyers appearing before them must comply with their ethical obligations.

C. THE ETHICAL OBLIGATION TO DISCLOSE INCLUDES *ALL* EXCULPATORY INFORMATION, REGARDLESS OF WHETHER THE INFORMATION IS "MATERIAL" FOR THE PURPOSES OF THE DUE PROCESS CLAUSE UNDER THIS COURT'S DECISION IN UNITED STATES V. BAGLEY.

While this Court has adopted a strict materiality standard in determining whether a prosecutor's failure to disclose exculpatory information constitutes a violation of defendant's constitutional rights under *United States v. Bagley*, 473 U.S. 667 (1985), no such materiality requirement exists under the professional rules. A "prosecutor has an ethical duty to make timely disclosure of exculpatory material and cannot avoid disclosure by attempting to determine the material's ultimate materiality." *Hughes v. Commonwealth*, 431 S.E.2d 906 (Va. Ct. App. 1993), *rev'd on other grounds*, 446 S.E.2d 451 (Va. Ct. App. 1994). The leading law review article on this issue reaches a similar conclusion:

> To fulfill ethical obligations the prosecutor must disclose all exculpatory evidence and must correct all false testimony, whether or not the evidence presented or omitted is important enough, in the context of all of the evidence presented at trial, to warrant a reversal of the conviction. An ethical violation can, and often will, be present even when due process is not violated.

Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 714 (1987) (footnotes omitted).

The ethical duty to disclose all exculpatory information stems from prosecutors' well-recognized quasi-judicial role. Prosecutors have an obligation to "seek justice," and to ensure that the accused is treated fairly. *See* Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 615-16 , 634-35 (1999). Imposing this ethical obligation on prosecutors also promotes public confidence in the legal system and the prosecution function. ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 61:616.

D. THE ETHICAL OBLIGATION TO DISCLOSE EXCULPATORY INFORMATION APPLIES IN POST-CONVICTION PROCEEDINGS.

This Court recognized in *Imbler v. Pachtman* that even "after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." 424 U.S. at 427 n. 25.

The ethical rule does not set out any time limit for when this disclosure obligation ends. *See* VIRGINIA CODE DR 8-102; MODEL CODE DR 7-103(B); MODEL RULE 3.8. Furthermore, the language of Virginia's rule makes it clear that this duty continues in post-conviction proceedings. By its very terms, the disclosure obligation applies not just to prosecutors, but also to "government lawyer[s] in criminal litigation," VIRGINIA CODE DR 8-102, a broader term that clearly comprehends the government lawyer in a habeas corpus proceeding.

In requesting that Senior Assistant Attorney General Curry disclose exculpatory information, Williams' state habeas counsel cited and quoted this ethical rule. [J.A. 346] Nonetheless, Mr. Curry stated in his response that he had no obligation to comply with this request because the Commonwealth was a "defendant" in a civil habeas corpus proceeding rather than a "prosecutor."

A lawyer in the Virginia Attorney General's office who defends a criminal conviction in state or federal habeas corpus proceedings is clearly a "government lawyer in criminal litigation." In fact, in the very letter where Mr. Curry tried to argue that he had no obligation to disclose exculpatory information

because he was not a "prosecutor," [J.A. 353], Mr. Curry identified himself as "Senior Assistant Attorney General, Criminal Litigation Section." [J.A. 354]

If Mr. Curry were aware of the psychiatrist's report, he clearly had an ethical obligation to disclose it. Petitioner has requested an evidentiary hearing on this and other issues, but the District Court and the Fourth Circuit denied that request. While it is always important to ensure that prosecutors act ethically, it is particularly important here, where the Commonwealth is seeking to execute a defendant based on a conviction that is tainted by the failure to disclose exculpatory information.

E. The Court Should Remand this Matter to the District Court to Allow the Commonwealth Attorneys to Fulfill Their Ethical Duties and to Provide Petitioner with a Full Hearing on His Claimed Entitlement to Exculpatory Information.

All government lawyers involved in Williams's criminal trial and post-conviction proceedings, including lawyers in the Commonwealth Attorney's Office and Attorney General's Office, had and continue to have an ethical duty to produce any and all exculpatory information to Williams, regardless of whether it is material. It is clear that the Attorney General's Office did not recognize that duty. [J.A. 353] The Commonwealth Attorney's Office and the Attorney General's Office never produced to Williams the psychiatric report regarding Cruse, an exculpatory document that was likely to change the result obtained here, nor did they search for any other exculpatory material.

As a result, this Court should reverse the decision of the Court of Appeals and remand this matter to the District Court. At that time, the government lawyers should be charged to produce all exculpatory information. Thereafter, Williams should be given a full hearing on his claimed entitlement to have received — before he was ever tried — the psychiatric report regarding Cruse, and any other exculpatory information that is produced after remand.

CONCLUSION

Under the VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY 8-102(A), the Senior Assistant Attorney General responding to petitioner's state habeas claim had an obligation to disclose exculpatory information. Instead, the Senior Assistant Attorney General disclaimed the responsibility entirely.

It is not the duty of the Commonwealth to convict and now seek to execute Petitioner; instead, it is its duty to see that justice is done. This Court should assure both that the Commonwealth's lawyers fulfill their ethical obligations and that Williams receives a fair and full habeas proceeding. No lawyer should be able to ignore the lawyer's ethical obligations, and violation of those obligations, in no event, should lead to petitioner's unwarranted conviction and punishment.

Respectfully submitted,

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