

No. 10-8145

**In The
Supreme Court of the United States**

—◆—
JUAN SMITH,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

—◆—
**On Writ Of Certiorari To
The Orleans Parish Criminal
District Court Of Louisiana**

—◆—
**BRIEF OF AMICUS CURIAE NATIONAL
DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF RESPONDENT**

—◆—
JAN SCULLY
District Attorney
ALBERT C. LOCHER
Counsel of Record
Assistant District Attorney
COUNTY OF SACRAMENTO, CALIFORNIA
BONNIE DUMANIS
District Attorney
LAURA TANNEY
Deputy District Attorney
COUNTY OF SAN DIEGO, CALIFORNIA
NATIONAL DISTRICT
ATTORNEYS ASSOCIATION
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
Phone: (703) 549-9222
Email: lochera@sacda.org

Attorneys for Amicus Curiae

QUESTION PRESENTED

The Constitution of the United States preserves the rights of the individual states to regulate the practice of law within its boundaries. The ABA, however, has promulgated its own ethical standards for prosecutorial discovery that are broader than those required by the Constitution, standards that have not been adopted by all fifty states. The question presented and addressed in this brief is whether this Court, in considering whether petitioner Juan Smith was denied due process by the actions of the police and prosecution agencies in Louisiana, should recognize, as proposed by the American Bar Association, that a prosecutor's pre-trial ethical disclosure obligations are separate from and broader than the *Brady* constitutional standards.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
I. THE AMERICAN BAR ASSOCIATION DOES NOT REPRESENT THE VOICE OF PROSECUTORS	4
II. REGULATION OF ATTORNEYS’ CON- DUCT IS RESERVED TO THE STATES ...	8
III. ABA MODEL RULE 3.8(D) HAS NOT BEEN UNANIMOUSLY ADOPTED BY THE STATES	8
IV. DISCLOSURE OF “ALL INFORMATION” MAY UNNECESSARILY JEOPARDIZE SAFETY OF WITNESSES, INTEGRITY OF INVESTIGATIONS AND PRIVILEGED IN- FORMATION	12
V. ABA MODEL RULE 3.8(D) CREATES OB- LIGATIONS THAT RUN CONTRARY TO STATUTORY DISCOVERY SCHEMES	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

<i>Baylson v. Disciplinary Board of Supreme Court of Pa.</i> , 975 F.2d 102 (3d Cir. 1992)	14
<i>Bobby v. Van Hook</i> , 558 U.S. ___, 130 S.Ct. 13 (2009).....	6, 7
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	<i>passim</i>
<i>Disciplinary Counsel v. Kellogg-Martin</i> , 124 Ohio St.3d 415 (2010)	12
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983).....	8
<i>United States v. Agurs</i> , 427 U.S. 97 (1976).....	18
<i>United States v. Alvarez</i> , 358 F.3d 1194 (9th Cir. 2004)	19
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	14
<i>United States v. Cerna</i> , 2009 U.S. Dist. LEXIS 85281 (N.D. Cal. Sept. 16, 2009)	19
<i>United States v. Ruiz</i> , 536 U.S. 622 (2002).....	10, 18
<i>United States v. Simpson</i> , 927 F.2d 1088 (9th Cir. 1991)	14
<i>Wallace v. City of Los Angeles</i> , 12 Cal.App.4th 1385 (1993).....	15, 17
<i>Weatherford v. Bursey</i> , 429 U.S. 545 (1977)	18

STATUTES

18 U.S.C. § 3432	19
18 U.S.C. § 3500	19

TABLE OF AUTHORITIES – Continued

	Page
California Evidence Code § 1042(c)	17
California Penal Code §§ 1054-1054.10	18
California Penal Code § 1054.1	18
California Penal Code § 1054.7	18
 RULES	
California Rule of Professional Conduct 5-220	10
California Proposed Rule of Professional Con- duct 3.8(d)	10, 11
District of Columbia Rule of Professional Con- duct 3.8(e)	11
New Jersey Rule of Professional Conduct 3.8(d)	12
Ohio Disciplinary Rule 7-103(B) (former rule)	11
 CONSTITUTIONAL PROVISIONS	
U.S. Constitution, Tenth Amendment	8
 OTHER AUTHORITIES	
American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA. (1992)	5
American Bar Association Model Rule 3.8(d) <i>passim</i>	
Arizona Bar Ethics Opinion 94-07	13

TABLE OF AUTHORITIES – Continued

	Page
Cox, “Anti-Death Penalty Stance Only Latest Evidence; How the ABA became a Left-Wing Lobbying Group”	5
Gillers, Simon and Perlman, <i>The Regulation of Lawyers: Statutes and Standards</i> , Aspen Publishers (2010 Ed.).....	12

STATEMENT OF INTEREST

The National District Attorneys Association (NDAA) respectfully submits this brief as amicus curiae on behalf of respondent.¹

The National District Attorneys Association (NDAA) is a nonprofit corporation and is the oldest and largest professional organization representing criminal prosecutors in the world. Its members come from the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations in every state and territory of the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and amicus curiae activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People."

NDAA is dedicated to promoting justice by enhanced prosecutorial excellence. NDAA advocates the highest professional standards by prosecutors, including but not limited to, education and training,

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, amicus states that counsel of record for all parties have consented in writing to the filing of this brief.

effective advocacy, integrity, and compliance with constitutional and other legal mandates.

NDAA has a significant interest in this case, particularly with respect to the issue raised by the American Bar Association as amicus curiae in this proceeding in support of petitioner. The ABA amicus brief expressly declines to address the merits of petitioner's claims in this case, but instead asks this Court to recognize prosecutor ethical standards for disclosure of evidence greater than those established by this Court under *Brady v. Maryland*, 373 U.S. 83 (1965), and its progeny. The ABA specifically points to its Model Rule 3.8(d), which sets a standard for disclosure of evidence by prosecutors that is broader than the *Brady* line of cases requires. NDAA, on behalf of all prosecutors, has an interest in any ruling by this Court that would apply to the Orleans Parish District Attorney's Office a standard different from that which is enunciated under *Brady*.

NDAA, and its members, have a compelling interest in the court's determination of this issue because state regulation of the practice of law and prosecutorial ethics are matters of critical importance to this country's prosecutors. Local prosecutors are responsible for the overwhelming number of criminal cases in this country and the standards enunciated by the Court have an enormous impact on their practice. It is ultimately the members of NDAA who will bear the [impossible] burden created by the American Bar Association should this court accept its invitation to "recognize that a prosecutor's pre-trial ethical disclosure obligations, [which are established by the

attorney regulatory body of the highest court of the prosecutor's state or jurisdiction,] are separate from and broader than the Brady constitutional standards." (See amicus curiae brief for the American Bar Association in this proceeding (hereafter "ABA Amicux Brief").)



SUMMARY OF ARGUMENT

This case presents the issue of whether the failure by law enforcement and prosecution officials in Louisiana to disclose certain evidence deprived petitioner of due process and a fair trial. Amicus curiae National District Attorneys Association presents this brief not to analyze the details of the underlying factual and evidentiary points, which have been addressed by respondent. Amicus presents this brief specifically to address the proposal, put forth in the amicus brief filed by the American Bar Association in support of petitioner, that this Court should go beyond the constitutional obligations for prosecutors already recognized, and adopt some sort of supplemental standard under guise of the ABA's proposed model ethical rules, that would serve to regulate the conduct of the Orleans Parish District Attorney's Office in this case, and thereby bind prosecutors throughout the country. The regulation of attorneys, and the rules of professional conduct governing them, is a matter that is appropriately left to the individual states. The ABA, a private organization which does not speak for prosecutors, has suggested that this

Court recognize a rule of conduct for prosecutors, for which it puts forth the ABA's own Model Rule 3.8(d). That rule has not been universally adopted by the states, and fails to fully take into account factors affecting disclosure of information by law enforcement and prosecutors, such as the integrity of ongoing investigations and the safety of witnesses. In addition, the ABA's proposed standard would interpose disclosure obligations for prosecutors that are contrary to the precedents of this Court, and would contradict the discovery obligations and procedures inherent in statutory criminal discovery rules.

◆

ARGUMENT

I. THE AMERICAN BAR ASSOCIATION DOES NOT REPRESENT THE VOICE OF PROSECUTORS

The American Bar Association is the nation's largest attorney organization and among the oldest. It is a private organization. The people of the United States have no voice in the election of its officers or in the determination of its policies. While at times it has been given deference as the voice of America's lawyers, or has been cited as such, the ABA has its own interests and its own agenda.

The ABA consistently supports the defendant against the prosecution whenever it appears in this Court in a criminal case. Nearly twenty years ago an

ABA committee warned of the danger of such persistent partisanship:

The American Bar Association historically has been an umbrella organization, representing a wide variety of viewpoints from all aspects of the legal profession. Its ethical rules, criminal justice standards, and other contributions to American law have traditionally represented the consensus product of the most experienced and responsible members of the profession. The ABA's unique status, however, is in grave danger, at least as to criminal justice issues. Prosecutors have been increasingly alienated from the ABA, and many are publicly rejecting not merely the ABA's policies but the very legitimacy of the organization's role in promulgating those policies. Reduced to its simplest terms, most prosecutors now perceive that the ABA has become captive to the narrow adversarial interests of the criminal defense bar.

(American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA (1992))

The ABA has even been criticized as having become a left-wing lobbying group that has "adopted policy positions that are blatantly partisan, outside its area of expertise, or both, triggering a massive loss of membership." (See Christopher Cox, "Anti-Death Penalty Stance Only Latest Evidence; How the ABA became a Left-Wing Lobbying Group" House Policy Committee, *Policy Perspective*, <http://www.pro>

deathpenalty.com/ABA.htm (webpage last accessed 9/27/11).) As pointed out by Mr. Cox, the ABA has voted to place a moratorium on the execution of violent criminals; endorse funding for the National Endowment of the Arts; endorse single-payer health care plans; oppose regulatory reform; oppose medical malpractice reform; oppose product liability reform; oppose securities litigation reform; and oppose mandatory minimum sentences for drug and firearm offenses. As amicus curiae, the ABA has urged this court to accept its position on the advisement of immigration consequences, unanimous verdicts, pretrial release standards, relief from procedural requirements for prisoners filing federal lawsuits, federal funding for representation of indigent defendants, and habeas procedures. Whatever may be the merits of the various positions taken, it is fair to observe that they fall beyond the stated ABA goals of promoting the professional growth of attorneys, improving the legal profession, eliminating bias, enhancing diversity, and advancing the rule of law.

Recently, in *Bobby v. Van Hook*, 558 U.S. ___, 130 S.Ct. 13 (2009), Justice Alito stated in his concurring opinion:

I join the Court's per curiam opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special

relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

(Bobby v. Van Hook, supra 130 S.Ct. at 16-17 (Alito, J., concurring.)

In the present case, once again, the ABA attempts, in effect, to persuade this Court to grant their standards constitutional significance by asking the Court to recognize that prosecutorial ethics require broader pre-trial disclosure obligations than those required to ensure due process to the defendant and to judge the conduct of the Orleans Parish District Attorney's Office on the basis of those standards, putting forth the ABA Model Rule 3.8(d).

II. REGULATION OF ATTORNEYS' CONDUCT IS RESERVED TO THE STATES

The Tenth Amendment to the United States Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus, the States have the power to regulate the practice of law. Unless those regulations infringe upon the constitutional rights of others, or create other federal issues, this Court should not intervene.

This Court has already established the constitutional minimums related to the prosecutor’s pre-trial disclosure obligations in *Brady* and subsequent cases, as acknowledged by the American Bar Association in its amicus curiae brief in this case (hereafter “ABA Brief”). As this Court stated with respect to the effective assistance of counsel, ABA standards do not determine the constitutional minimum. (See *Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983).) Thus, this Court should refrain from entering the sovereign domain of the states with respect to the ethical obligations of their lawyers and allow the states to regulate their attorneys’ conduct as they see fit.

III. ABA MODEL RULE 3.8(D) HAS NOT BEEN UNANIMOUSLY ADOPTED BY THE STATES

ABA Model Rule 3.8(d) requires a prosecutor to

“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.”

This rule leaves the requirement that disclosure be “timely” open to interpretation and creates a vague standard for prosecutors attempting to navigate ethically through their criminal prosecutions. The rule also broadens the disclosure requirement beyond that required by the Constitution to include favorable information whether or not material to the outcome of the case.

The ABA makes no secret of the fact that Model Rule 3.8(d) is meant to establish a broader ethical obligation for prosecutors than this Court has enunciated under the *Brady* line of cases. The ABA Amicus Brief here includes ABA Formal Opinion 09-454, issued July 8, 2009, which interprets Model Rule 3.8(d) and expressly states that it is inaccurate to conclude that rule simply codifies *Brady*. The ABA opinion goes on to describe several hypothetical scenarios where a prosecutor could fully comply with the constitutional obligations this Court has outlined under *Brady*, but still be in violation of the standard of Model Rule 3.8(d). See ABA Amicus Brief, pages 3a-21a. Of particular note is the ABA conclusion that a prosecutor in the plea bargain setting who fully complied with

the rule this Court set forth in *United States v. Ruiz*, 536 U.S. 622 (2002) (a unanimous result from this Court, with eight justices joining the opinion of the Court, and one justice concurring in the result) would nonetheless be in violation of Model Rule 3.8(d).

The ABA, with a membership of 408,000, suggests that it is the voice of the legal community. But ABA's view in Model Rule 3.8(d) as to what standards prosecutors should follow, going beyond what the law requires, has not been uniformly accepted as the ethical standard.

The California State Bar, with a membership of over 200,000, has not adopted ABA Model Rule 3.8(d). In California, the California Rules of Professional Conduct govern the conduct of the state's attorneys. Rule 5-220 states, "[A] member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce." Thus, with respect to disclosure obligations, a prosecutor's obligation is to disclose evidence and is no broader than to disclose what is required by established law.

The California State Bar recently approved its own Proposed Rule of Professional Conduct 3.8(d). The proposed rule has not yet been adopted by the California Supreme Court and thus is not currently in effect. Even then, California's Proposed Rule 3.8(d), while modeled after the ABA Model Rule, is significantly different insofar as California's version starts with the qualification that prosecutors "*comply with*

all constitutional obligations, as defined by relevant case law, regarding. . .” (See California Proposed Rule of Professional Conduct 3.8; Special Responsibilities of a Prosecutor. <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=U9iZgIwKhjk%3d&tabid=853>.) Thus, even under the Proposed Rule, a California prosecutor’s obligation is no broader than the obligation to comply with the Constitution, as defined by relevant case law.

Other states as well have either declined to adopt ABA Model Rule 3.8(d) as written, adopted variations of the rule or limited its application. District of Columbia Rule 3.8(e) for example provides that the prosecutor in a criminal case shall not “[I]ntentionally fail to disclose to the defense, *upon request and at a time when use by the defense is reasonably feasible*, any evidence or information that the prosecutor knows or reasonably should know. . .” (*Emphasis added.*) Comment 1, accompanying the District of Columbia rule, clarifies that Rule 3.8 is “not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.”

The Ohio Supreme Court declined to construe former Disciplinary Rule 7-103(B), which essentially mirrors its current rule and ABA Model Rule 3.8(d), as requiring a greater scope of disclosure than *Brady* and Ohio statutory law require. The court held that “DR 7-103(B) imposes no requirement on a prosecutor to disclose information that he or she is not required to disclose by applicable law, such as *Brady*

v. Maryland or Crim.R. 16,” further stating that “such a rule would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure. This would in effect expand the scope of discovery currently required of prosecutors in criminal cases.” (*Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415 (2010))

New Jersey Rule 3.8(d) requires timely disclosure to the defense of all “evidence,” but does not include the term “information” which is part of the ABA Model Rule. (See “*The Regulation of Lawyers: Statutes and Standards*” (2010 Ed.) Steven Gillers, Roy D. Simon and Andrew M. Perlman.) This standard (as ABA opinion 09-454 makes clear) is not as broad as the ABA model rule.

IV. DISCLOSURE OF “ALL INFORMATION” MAY UNNECESSARILY JEOPARDIZE SAFETY OF WITNESSES, INTEGRITY OF INVESTIGATIONS AND PRIVILEGED IN- FORMATION

Prosecutors often have other important responsibilities that must be taken into consideration when determining what information must be disclosed to the defense during a criminal prosecution. Often, these considerations must be balanced against the due process rights of the defendant. Where the information in possession of the prosecutor is immaterial to the outcome of the case and therefore does not

implicate the due process rights of the defendant, these other considerations may very well weigh in favor of withholding the information. Prosecutors should have the flexibility to do so without the fear of losing their licenses. Such considerations include the safety of witnesses, the integrity of ongoing-investigations, and privileges associated with the information.

ABA Model Rule 3.8(d) fails to account for these situations, requiring disclosure of not just “evidence,” but all favorable “information,” whether material or not, at the risk of discipline sanctions, unless a protective order is obtained. States that recognize this and the incredible resources that would be required to get the judiciary involved in reviewing every piece of marginally favorable yet immaterial information known by the prosecution in order for prosecutors to comply with their ethical requirements should have the ability to avoid this through establishing their own disciplinary rules, as is their right.

Although the Arizona Bar adopted ABA Model Rule in its entirety, one committee member in dissenting to Ethics Opinion 94-07: Prosecutor’s Duties; Candor, articulated some of the other problems associated with the ABA Model Rule.

. . . The issue which is of considerable concern to me is the proposal that Ethical Rule 3.8(d) is coextensive with the Constitution. Such an opinion would confer greater rights to defendants than the Constitution does and has the effect of creating a super-exclusionary rule. It would be elevating the opinions of

this committee and the Ethical Rules above decisions of the Supreme Court of Arizona and the Supreme Court of the United States, with the power to create substantive rights for defendants not existing in the Constitution. This is not within the province of this committee; and it may well be a violation of the separation of powers doctrine of the Constitution (*U.S. v. Simpson*, 927 F.2d 1088, 1090-1091 (9th Cir. 1991)); and a violation of the Supremacy Clause of the United States Constitution if applied to federal prosecutors. (*Baylson v. Disciplinary Board of Supreme Court of Pa.*, 975 F.2d 102, 111-113 (3rd Cir. 1992).)

Additionally, the practical realities should be considered. What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint? This weapon is certainly more effective than the existing exclusionary rule which merely excludes inadmissible evidence. One might expect that such an opinion would be used as a weapon by defense counsel to threaten that the government must now open its entire file despite the fact that the Constitution, as interpreted by the Arizona and United States Supreme Courts, does not require such a result. Prosecutors will be chilled by the thought of defending a bar complaint to the detriment of law enforcement. As the Supreme Court of the United States, in establishing the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), stated in *United States v. Bagley*, 473 U.S. 667 (1985): An interpretation

of *Brady* to create a broad, constitutionally required right of discovery ‘would entirely alter the character and balance of our present systems of criminal justice. . . .’ [Citation omitted.] Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interests in the finality of judgments.

What is more, such open discovery provides the possibility of subornation of perjury, harassment and witness tampering. Many witnesses in criminal investigations involving public and organized crime figures would never cooperate if they knew their information would be prematurely disclosed.

This opinion does violence to well-established constitutional law, and creates adverse consequences to law enforcement. Therefore, I dissent. . . .”

Some state authorities, as well as federal decisional and statutory law also demonstrate the recognition of competing responsibilities of prosecutors.

In *Wallace v. City of Los Angeles*, 12 Cal.App.4th 1385 (1993), though not a case involving discovery, the court recognized the duty of law enforcement to protect the safety of witnesses stating,

As our society becomes increasingly violent in its daily human interactions, more

and more people are called upon to be witnesses in the prosecution of those causing the violence. Yet, as the number of these potential witnesses grows, so also does the likelihood that they, or their families will be subjected to violence by the very criminal defendants against whom they will give testimony. Thus, the old phrase “violence begets violence” takes on a new meaning. The threat to the safety of these witnesses is very real, especially when the defendant has gang or drug trafficking affiliations. Unfortunately, the lack of safeguards for such witnesses is also very real.

Society reaps enormous benefits when a witness’s testimony succeeds in getting a criminal off the streets and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness *and* his family, for the threat of violence against a witness’s family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide the information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.

If the result which we reach in the case before us brings about a greater level of official concern and action promotive of witness safety, and an appropriate devotion of public

resources to that end, the long term result surely will be an increase in both the effectiveness of the criminal justice system and the level of public confidence in it. The attainment of that result is certainly a public policy goal of very high priority.

(*Wallace*, supra, 12 Cal.App.4th at 1405-1406; overruled on other grounds in *Adkins v. State*, 50 Cal.App.4th 1802 (1996))

The concerns cited in *Wallace* apply equally to the disclosure of information that jeopardizes the safety of such individuals. Thus, in the interest of witness protection, a prosecutor should be able to evaluate the materiality of the information in possession of the prosecution, before disclosing that information at the risk of human lives.

Under California Evidence Code section 1042(c), evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the narcotics offense charged, is admissible on the issue of reasonable cause to make an arrest or search *without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied*, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

The failure of ABA Model Rule 3.8(d) to adequately address these issues is further reason why

this Court should not adopt it as some extra constitutional obligation.

V. ABA MODEL RULE 3.8(D) CREATES OBLIGATIONS THAT RUN CONTRARY TO STATUTORY DISCOVERY SCHEMES

The considerations as to state regulation of prosecution disclosure requirements which may be different from ABA Model Rule 38(d) are all the more pertinent if the state has a comprehensive statutory scheme regulating criminal discovery. Turning again to California as an example, that state has a statutory criminal discovery act which specifies what each party must provide the other as discovery in criminal cases, as well as the timeline for disclosure. See California Penal Code sections 1054 through 1054.10. When a prosecutor does not intend to call a particular witness, the prosecutor need not turn over evidence from that witness, even if exculpatory, until 30 days before trial (absent court order). California Penal Code sections 1054.1, 1054.7.

This is certainly within constitutional requirements. This Court has stated that there is no general federal constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The limited discovery obligation under *Brady* is a fair trial right, not linked to pre-trial proceedings. *Id.*; *United States v. Agurs*, 427 U.S. 97, 108 (1976); *United States v. Ruiz*, *supra*, 536 U.S. at 631-632. By contrast, ABA Model Rule 3.8(d), as interpreted in

opinion 09-454, makes it clear that “timely” disclosure for purposes of the rule may be much earlier than the constitutional obligation requires. See opinion 09-454, specifically those sections of the opinion in the ABA amicus brief at pages 17a-18a. Thus, a California prosecutor could comply fully with applicable *Brady* precedent, as well as the California statutory discovery scheme, but still be subject to an ethical violation under the ABA model rule.

Similarly, in federal prosecutions, the defense has no right to a list of prospective witnesses, except in death-penalty cases – and even then only three days before trial and subject to security restrictions of 18 U.S.C. § 3432. Likewise, under the Jencks Act, 18 U.S.C. § 3500, “witness statements” (as statutorily defined) may be withheld and not disclosed until after the direct testimony of the witnesses. The *Brady* problem then must be dealt with via continuances. (*United States v. Cerna*, 2009 U.S. Dist. LEXIS 85281 (N.D. Cal. Sept. 16, 2009); see also, *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004). According some level of constitutional recognition to ABA Model Rule 3.8(d) would thus put the ethical requirements for federal prosecutors at odds with federal statutory discovery law.

The ABA should not be in the business of dictating to the individual states or the federal government discovery policies and procedures that go beyond those adopted in a comprehensive statutory scheme. Yet under Model Rule 3.8(d), that is precisely what the ABA has done, attempting to accomplish through

the tool of an ethical obligation what was rejected in the legislative process. Through its amicus brief in this matter, the ABA has asked this Court to aid and abet their endeavor.

◆

CONCLUSION

This Court has already established the constitutional obligations related to the prosecutor's pre-trial disclosure obligations in *Brady* and subsequent cases. The ABA standards should not serve as some sort of constitutional supplement to expand those standards. This Court should refrain from opining that Orleans Parish District Attorney's Office is bound by ethical duties broader than those required by the United States Constitution, and continue to allow Louisiana and the other states to regulate their own attorneys' conduct.

Dated: October 3, 2011 Respectfully submitted,

ALBERT C. LOCHER
Counsel of Record
Assistant District Attorney
COUNTY OF SACRAMENTO

LAURA TANNEY
Deputy District Attorney
COUNTY OF SAN DIEGO

Attorneys for Amicus Curiae
National District
Attorneys Association