VIRGINIA:

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BEFORE THE FOURTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
VIVIEN J. COCKBURN

VSB Docket No. 14-041-096801

SUBCOMMITTEE DETERMINATION
(PUBLIC ADMONITION WITHOUT TERMS)

On May 14, 2014, a meeting in this matter was held before a duly convened Fourth District Subcommittee consisting of Paul H. Melnick, member, Robert C. McCarthy, lay member, and Jonathan S. Gelber, chair presiding.

Pursuant to Part 6, § IV, ¶ 13-15.B.4 of the Rules of the Supreme Court of Virginia, the Fourth District Subcommittee of the Virginia State Bar hereby serves upon the respondent Vivien J. Cockburn ("Respondent"), the following PUBLIC Admonition Without Terms:

I. FINDINGS OF FACT

1. At all times referenced herein, Respondent Vivien J. Cockburn (Respondent) was an attorney licensed to practice law in the Commonwealth of Virginia.

2. At all times referenced herein, Respondent was also admitted to practice law in the District of Columbia, albeit in an inactive status.

3. At all times referenced herein, Respondent was an Assistant United States Attorney with the Department of Justice (DOJ).

4. Respondent was the prosecutor assigned to the case, *United States v. Joseph Harrington*, 2007 CFI 022855, from grand jury through trial.

5. Mr. Harrington was accused of first-degree felony murder and other charges in relation to the August 18, 2007 stabbing death of Charles Smith (also referred to as the "victim").

Mr. Smith died from a single stab wound to the chest with an estimated depth of four and one half inches.

6. Two children playing in the park saw a black male stab a second black male (the victim) in the chest while standing on a bridge. The attacker then ran off with the victim's backpack, leaving the victim lying on the bridge.

7. R.M., also referred to herein as Shaun, was the government's key witness. In her statement to a detective, R.M. stated that she was with another witness, "Re-Re," when Mr. Harrington exited the park with the victim's backpack. R.M.'s statement to the detective was misplaced until shortly before trial.

8. In her grand jury testimony, R.M. testified that:

   a. She had been with Mr. Harrington in the park where the murder occurred, and she had seen him with a knife.

   b. She saw Mr. Harrington walking in the park with the victim after Mr. Harrington told her that he was going to see whether the victim had money.

   c. She saw Mr. Harrington leave the park with the victim's backpack while "(w)e were sitting there talking." Respondent did not ask R.M. to identify with whom she was talking when she saw Mr. Harrington leave the park with the victim's backpack.

   d. Mr. Harrington approached R.M. in an agitated state carrying the victim's backpack. Mr. Harrington told R.M. that he needed to talk to her, and R.M. asked Mr. Harrington what was wrong. Mr. Harrington responded, "I don't know why I did that, he's just laying there. Two kids saw me."

9. Respondent presented "Re-Re" to the grand jury. Re-Re testified that:

a. She had left the park before the stabbing and did not come back to the park until after the police arrived. Upon her return to the park, Re-Re saw R.M. coming from the park.

b. R. M. was nervous and disheveled. "Her dress was – scared. She couldn't stay still."

c. R.M. had a four or five-inch flip knife, which Re-Re had seen before, clipped to the top of her (R.M.'s) dress in between her strap and dress. Re-Re asked R.M., also known as Shaun, "You didn't have that in your dress before. Why you have it in your dress now? Shaun, what did you do? Did you have something to do with what happened over there on the bridge?" R.M. replied "I can't tell you. All I can tell you is self-preservation is the first rule of law." Re-Re then asked R.M. what she was talking about to which R.M. replied, "I can't tell you. Because if I tell you, then that means that they will come over here from over there." Re-Re asked R.M. what happened over there, and R.M. responded, "I can't tell you. I can't tell you."

10. In her grand jury testimony Re-Re also provided a different description of the defendant's shirt on the day of the murder than that provided by R. M. and the two children who witnessed the stabbing.

11. Respondent did not present Re-Re as a witness at trial. As a result, the defense was unaware of the information disclosed in Re-Re's grand jury testimony until after the trial.

12. Respondent asserts that she did not detect and, as a result, did not disclose the contradictions between the grand jury witnesses to the defense. For example, with respect to the different descriptions of defendant's clothing on the date of the murder, Respondent argues that

while Re-Re's testimony of the defendant's shirt differed from R.M. and the two children who witnessed the stabbing, according to the record, both Re-Re and R.M. identified Mr. Harrington by facial recognition and nickname.

13. Respondent did not disclose that Re-Re testified that R. M. had in her possession a knife approximately four to five-inches long shortly after the murder.

14. On April 17, 2009, the District of Columbia Superior Court ordered a new trial on the ground that the government failed to disclose material exculpatory evidence.

15. Because Respondent's conduct is in connection with a proceeding in D.C. Superior Court, pursuant to Va. Rule of Professional Conduct 8.5(b)(1), D.C.'s Rules of Professional Conduct apply to this disciplinary proceeding in Virginia. Va. Rule of Professional Conduct 8.5(b)(1) provides as follows:

RULE 8.5 – Disciplinary Authority; Choice Of Law

(b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;

II. NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of the following provisions of the D.C. Rules of Professional Conduct:

RULE 3.8 – Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall not:

(e) Intentionally 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 tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

RULE 8.4 – Misconduct

It is professional misconduct for a lawyer to:

(d) Engage in conduct that seriously interferes with the administration of justice;

III. PUBLIC ADMONITION WITHOUT TERMS

Accordingly, it is the decision of the subcommittee to impose a PUBLIC Admonition Without Terms, and Vivien J. Cockburn is hereby so admonished. Pursuant to Part 6, § IV, ¶ 13-9.E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

FOURTH DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By: _____
Jonathan S. Gelber
Subcommittee Chair

CERTIFICATE OF MAILING

I certify that on May 19, 2014, a true and complete copy of the Subcommittee Determination (PUBLIC Admonition Without Terms) was sent by certified mail, return receipt requested to Vivien J. Cockburn, Respondent, at 2001 Spruce Drive NW, Washington, DC 20012, Respondent's last address of record with the Virginia State Bar, and by first class mail, postage prepaid to Frank Gordon Lee, counsel for Respondent, at 6333 Karmich Street, Fairfax Station, VA 22039-1622.

Renu Mago Brennan
Assistant Bar Counsel