THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER ONE

In the Matter of:	:	
	:	
JENNIFER KERKHOFF MUYSKENS,	:	
	:	
	:	Board Docket No. 24-BD-038
Respondent.	:	Disc. Docket No. 2018-D218,
	:	2018-D262, & 2018-D300
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 475353)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER ONE

Respondent, Jennifer Kerkhoff Muyskens,[1] is alleged to have violated Rules 3.3(a), 3.4(a), (c), and (d), 3.8(d) and (e),[2] and 8.4(a), (c), and (d) of the District of

[1] At the time of the conduct in question, Respondent was known by her maiden name, Jennifer Kerkhoff, and she is referred to as Kerkhoff throughout the record. For reasons of convenience and clarity we, likewise, refer to her as Respondent or Kerkhoff.

[2] On April 7, 2025, the District of Columbia Court of Appeals adopted several amendments to the Rules of Professional Conduct, including to Rule 3.8. *See* Order M284-24, https://www.dccourts.gov/sites/default/files/2025-04/No284-24-ORDER-Adopting-Proposed-Changes-to-DCRules-of-Professional-Conduct-04-2025_0.pdf (corrected version issued July 21, 2025). In addition to substantive amendments, the Court reordered the subsections of Rule 3.8, making former subsection 3.8(e) into new subsection 3.8(d) and vice versa. For clarity's sake, we identify the Rule subsections at issue in this Report as the Rule that was in effect at the time of Respondent's alleged conduct. Likewise, we apply the substantive Rules

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

Columbia Rules of Professional Conduct (the "Rules"), arising from her conduct as the lead prosecutor in cases brought against over 200 alleged participants in a riot that took place in Washington, D.C. surrounding President Donald Trump's first inauguration on January 20, 2017.

Following the hearing about this matter, Disciplinary Counsel filed a post-hearing brief in which the Office withdrew the allegations relating to possible violations of Rules 3.4(a), (c), and (d) and Rule 8.4(a). *See* Disciplinary Counsel's Post-Hearing Brief at 48 n.2. Disciplinary Counsel contends, however, that the evidence demonstrates that Kerkhoff committed the remaining charged violations of Rules 3.3(a), 3.8(d) & (e), and 8.4(c) & (d). As a result, Disciplinary Counsel argues that Kerkhoff should be suspended from the practice of law for a period of six months as a sanction for her misconduct. By way of answer, Respondent contends that Disciplinary Counsel failed to prove any Rule violations by clear and convincing evidence and thus, that no sanction is warranted.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has proven certain violations of Rules 3.3(a), 3.8(e), and 8.4(c) & (d) by clear and convincing evidence. The Committee also finds that allegations of a violation of Rule 3.8(d) and other alleged violations of Rules 3.3(a) and 3.8(e) have not been

---

as they were in force at the time of Kerkhoff's alleged actions, without reference to the amendments that have since been adopted.

proven. As a sanction, the Committee recommends that Respondent be suspended from the practice of law for three months.[3]

I. PROCEDURAL HISTORY

On July 16, 2024, Disciplinary Counsel served Respondent with a Specification of Charges. After the Superior Court of the District of Columbia authorized the disclosure of certain sealed grand jury material, the Specification was made public, and Respondent filed an Answer on September 2, 2024. Thereafter, Respondent filed a motion to compel third-party discovery on January 10, 2025, which was denied.

A hearing was held on March 11-14, 2025, before Hearing Committee Number One (the "Hearing Committee"). Disciplinary Counsel was represented at the hearing by Assistant Disciplinary Counsel Sean O'Brien, Esquire, and Mariah Shaver, Esquire. Respondent was present during the hearing and was represented by Adam S. Hoffinger, Esquire, Michael Sklaire, Esquire, David Barger, Esquire, and Christian Burne, Esquire.

---

[3] On July 24, 2025, after the hearing in this matter was conducted but before this Report and Recommendation were completed, Attorney Member Jay Brozost was appointed by the Court of Appeals to the Board on Professional Responsibility. The Chair directed Respondent and Disciplinary Counsel to file written statements indicating whether they had any objection to Mr. Brozost continuing to participate in this matter. Neither party objected to his continued participation.

During the hearing, Disciplinary Counsel submitted DCX[4] 5, 12, 18, 20-22, 26, 29, 34, 41-43, 47, 49, 51-53, 55-57, 59, 63, 65, 67-70, 72-73, 74-75, 78-82, 84-85, 88-91, 94, 96-98, 102-103, 105, 106, 110-117, 121, 123, 125-127, 131-133, 135, 142-146, 150-151, 154-155, 157-162, 166, 168-173, 177, 181, 183, 185, 188, 192-193, 195-209, 211-212, 215-220, 223-225, 230, 233-247, 249-250, 260, 267, 285, and 286, all of which were admitted into evidence without objection. Disciplinary Counsel called as witnesses three defense counsel from the underlying criminal matters: Sara Kropf, Esquire, April Downs, Esquire and Roy Austin, Esquire.

Respondent submitted RX 1-2, 4-5, 8-16, 21-22, 24-26, 30, 32, 34-35, 37, 39-41, 43-44, 46, 48, 51, 53, 56-57, 59-62, 76(A), 77, 79-80, 84, 86-87, 89-96[5], and 98-99, all of which were admitted into evidence without objection. Kerkhoff testified on her own behalf and did not call any additional witnesses.

Upon conclusion of the evidentiary portion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the violations set forth in the Specification of Charges. Tr. 1132; *see* Board Rule 11.11. In the sanctions phase of the hearing, Respondent submitted three character reference letters, marked RX 101-103, which were admitted without objection.

---

[4] "DCX" refers to Disciplinary Counsel's exhibits. "RX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held on March 11-14, 2025.

[5] Following the hearing, the Board Chair granted Respondent's consent motion to place under seal RX 95, an audio recording of a voicemail message, on the basis that it disclosed Respondent's home address and might subject her to threats.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on April 17, 2025, and Respondent filed her Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on May 2, 2025. Disciplinary Counsel filed its Reply on May 9, 2025. After Respondent moved to strike Disciplinary Counsel's Reply as non-conforming, Disciplinary Counsel moved for leave to file an Amended Reply Brief. In an Order dated May 23, 2025, leave was granted to file the Amended Reply.

While the Hearing Committee was evaluating these allegations, the Court of Appeals decided *In re Haines*, 341 A.3d 611 (D.C. 2025) (per curiam), a decision that impacted the Hearing Committee's consideration of issues presented in this case. Accordingly, the Chair allowed the parties to express their views on the impact of *Haines* on our recommendations. Each party filed a supplemental brief addressing that question on September 9, 2025.[6]

II. SUMMARY OF THE REPORT

Because this Report is extensive and addresses a voluminous amount of evidence involving a course of conduct that spans more than a year, which is alleged to have violated multiple Rules, the Hearing Committee deems it useful to provide the following summary as a means of orienting the reader. This summary is not intended to substitute for the detailed recommended findings of fact and conclusions

---

[6] Disciplinary Counsel's supplemental brief was timely filed without a certificate of compliance. A conforming copy with the requisite certificate was filed on September 10, 2025.

of law that follow. It is intended, rather, as a useful guide to the contents of this Report.

On January 20, 2017, Donald Trump was inaugurated as President for the first time. Many people gathered in the District of Columbia to protest this event. One part of that protest, known as the Anti-Capitalist Bloc (or "ACB"), resulted in substantial violence and destruction. Over 230 people were arrested in connection with the violence, and Respondent was assigned as the lead prosecutor for the criminal cases arising from that violence.

All of the defendants in those cases were charged as part of a conspiracy to riot, along with substantive rioting and other violent offenses. The overall theory of the government's case was that, notwithstanding any difference in individual actions during the riots, all defendants had unlawfully joined the conspiracy and were criminally liable for the violence that resulted. Many of the defendants, in turn, responded that they had joined only a peaceful protest and did not intend to participate in or conspire to do acts of violence.

As a result, one of the salient questions (though not the only factual dispute) was the nature of any pre-riot planning that might have occurred. As part of the proof of defendants' violent intent, Respondent introduced a set of videos (known as the "Planning Videos") that had been taken by an undercover member of Project Veritas. These videos, from a meeting on January 8, 2017, were offered by the government as evidence of prior planning for violent acts.

The questions at issue in this case revolve, principally, around Kerkhoff's responsibility for the editing of these Planning Videos and for her failure to disclose other Project Veritas videos (taken on January 14, 15, and 17, 2017, and known collectively as "Action Camp" or "Spokes Council" videos)[7] which contained arguably exculpatory information, in the form of training on non-violent conduct and de-escalation techniques, that might have buttressed the peaceful protest defense. Defendants later argued that Kerkhoff's decision to edit and/or not disclose these videos constituted the purposeful concealment of exculpatory evidence.

After investigating Kerkhoff's actions, Disciplinary Counsel filed a Specification of Charges relating to the following events, in which Respondent:

- Did not disclose that Project Veritas (an organization known for its anti-left viewpoint) was the origin of the January 8 tapes. Disciplinary Counsel contends that the identity of the source of the tape was materially relevant to the defense;
- Was responsible for editing the January 8 tapes turned over to conceal the identity of an undercover Metropolitan Police officer; to obscure the existence of a Veritas undercover operative; and to delete a part of one tape that contained allegedly exculpatory information about defendants' lack of knowledge about the "upper echelon" of the protest organization;

---

[7] The parties dispute the name and characterization of the meetings that are depicted in these videos. The Committee thinks these disputes are not relevant to its ultimate recommendations. For simplicity's sake, we refer to them collectively as the "Action Camp" videos.

- Did not disclose other portions of the January 8 tapes;
- Did not disclose the Action Camp tapes, which showed planning for non-violence;
- Edited a court-ordered disclosure relating to the Action Camp/Spokes Council videos to conceal the exculpatory nature of the videos; and
- Failed to correct her statements to the Court about the mistaken identification of one defendant in front of the grand jury.

Of these various acts, two of them (the edit of the "upper echelon comment" and the failure to disclose the Action Camp videos) were held by then Chief Judge of the D.C. Superior Court Robert E. Morin to be violations of Respondent's obligation under *Brady* to disclose exculpatory material to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963) (finding a Constitutional requirement to disclose exculpatory evidence). Judge Morin later concluded that the Respondent's withholding of the evidence was not willful. Ultimately, in part because of these violations, the government chose to dismiss any charges that had not been resolved and remained pending against more than 50 criminal defendants.

The main substance of Kerkhoff's defense does not involve factual disputes about what occurred (though, to be clear, there are several factual disputes to resolve). Rather, Respondent principally disputes Disciplinary Counsel's characterizations of the facts and their legal import. The most significant of these disagreements relates to Respondent's decision not to disclose the exculpatory Action Camp videos. The nature of the disagreement is threefold:

- First, Kerkhoff notes that she had been ordered by D.C. Superior Court Judge Lynn Leibovitz during discovery to limit the volume of cell phone information disclosed to defendants to avoid overwhelming the defendants with evidence. Respondent contends that the ruling on cell phone disclosures guided her as to the other video evidence (like the Action Camp videos) and that her understanding of the order was reasonable.
- Second, Respondent contends that a disclosure order issued on April 6, 2018, before the trial of the second group of defendants, requiring her to turn over "the entirety" of the videos that were alleged to have been improperly edited to conceal exculpatory information, required only the disclosure of the previously undisclosed portions of the January 8 Planning Meeting video. Respondent argues that, given the context, she was reasonable in acting on her understanding that the order did not cover the other Action Camp videos and thus her responses to the disclosure order were consistent with its requirements.
- And, finally, Respondent expressed a continued belief (including, up to and through the hearing in this matter, *see* Tr. 1079, 1095) that the de-escalation training in the Action Camp videos was not exculpatory. By implication, Respondent contends that Judge Morin was wrong in concluding otherwise.

As set forth more fully below, the Hearing Committee, having reviewed the evidence presented, does not believe a reasonable prosecutor would have taken the position that Respondent did with respect to the Action Camp tapes. Kerkhoff's

disregard of the exculpatory nature of the videos in question is not the action of a reasonable prosecutor, and her stated justifications for doing so are unpersuasive.

In addition, Respondent's failure to make full disclosure of the videos to Judge Morin was, in our judgment, a willful act of omission. Finally, a majority of the Committee concludes that Respondent's failure to disclose that Project Veritas was the origin of the videos in question is also a violation of the Rules.[8]

As to other issues, the Committee credits Kerkhoff's testimony as to the reasons for the undisclosed grand jury misidentification, and her lack of awareness of the "upper echelon" edit of one tape. Accordingly, as to those charges, we recommend a finding that Disciplinary Counsel has not proven a violation of the Rules by clear and convincing evidence.

III. FINDINGS OF FACT

The following findings of fact ("FF") are based on the testimony and documentary evidence admitted at the hearing, and these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the fact sought to be established").

---

[8] As set forth in his separate statement, Hearing Committee Chair Rosenzweig disagrees with this conclusion. He otherwise joins the Committee's Report in full, including the recommended sanction.

1. Respondent Jennifer Kerkhoff Muyskens is an attorney admitted to practice in the District of Columbia and assigned Bar number 475353. Answer ¶ 1.

2. Kerkhoff worked as an Assistant United States Attorney ("AUSA") for the District of Columbia from June 2006 until March 15, 2019. RX 62 at 1-2; Tr. 594, 826. During her tenure, Kerkhoff held many positions, including as the Chief of the Felony Major Crimes Trial Section and Chief of the Violent and Repeat Offenders Unit. RX 62 at 2. She also served as an AUSA in the United States Attorney's Office for the District of Utah from March 2021 through November 2024. Tr. 594-95.

3. As a supervisory attorney in the District of Columbia office, between 2013 and 2019, Respondent was responsible for training new attorneys in the office, which included training them on "discovery and *Brady* practices." Tr. 597-99.

A. More than 230 individuals were charged with felony rioting at DisruptJ20's "Anti-Capitalist March."

4. A group called "DisruptJ20" planned various protests for President Donald J. Trump's January 20, 2017 Inauguration, including civil disobedience protests they called "direct actions." DCX 115 at 48; DCX 116 at 22-23; Tr. 613-15, 647, 656. The direct-action protests included early-morning "checkpoint blockades" to prevent Inauguration ticketholders from attending. Tr. 712, 967; DCX 168 at 2 ("7am"); RX 80 at 1-2.

5. One aspect of the events on January 20, 2017, involved a crowd of approximately 500 persons who gathered at Logan Circle in Washington, D.C., to participate in an "Anti-Capitalist Black Bloc March." Tr. 611-15. The crowd was

predominantly dressed in all black and wore face coverings, Tr. 611-13, making individual identification of participants difficult, if not impossible.

6. During the march, several participants engaged in destruction of property: smashing store and car windows, graffitiing, and smashing parking meters with bricks. Tr. 616-19. Participants vandalized a BP gas station, an Au Bon Pain bakery, and dumped trash cans and newspaper stands into the streets. Tr. 617, 619, 1084. During the march, individuals would run from the larger crowd, engage in acts of destruction, and then run back into the "bloc," preventing law enforcement from identifying the responsible individuals. Tr. 611-12.

7. The on-scene Metropolitan Police Department ("MPD") supervisor, Commander Deville, declared the march a riot after the crowd traveled multiple city blocks, smashed the windows of a limousine, and used a flare to set a limousine on fire. Tr. 614, 617, 623, 1083-85; RX 93; DCX 75 at 95-108.

8. Eventually, the police attempted to "kettle" those individuals remaining in the group so that everyone could be detained and arrested. DCX 75 at 37-38, 102. The police released individuals they deemed had less involvement in the violence, such as media and legal observers, and approximately 70 individuals forced their way past police lines and fled the scene. DCX 67 at 15-16; DCX 75 at 102-03. Ultimately, MPD arrested approximately 230 individuals who were part of the march. DCX 5 at 10-11; DCX 127 at 65-66; Tr. 632.

B. Staffing of the resulting prosecutions.

9. Respondent was assigned to be the sole lead prosecutor on all of the cases from their inception on January 21, 2017, until the end of May 2018. Tr. 643, 665, 818-19. She was supervised by AUSA Richard Tischner. Tr. 606-09, 644-47. Given the large number of defendants, the charges in the case were split into several groups for trial based on their alleged level of participation in violent acts. Tr. 674. Respondent tried the first two defendant groups that went to trial. Detective Greggory Pemberton was assigned full-time to the case. Tr. 608, 644-45.

10. AUSA John Borchert worked on the case from its inception until April or May 2017. Tr. 643, 1109. He primarily assisted in grand jury presentations. Tr. 1108-09. AUSA Rizwan Qureshi was added to the case in October 2017 to assist at the first trial in November 2017. Tr. 646, 1109. He also participated in the second trial in May 2018 and remained on the case until the charges were dismissed. Tr. 1109-1110. AUSA Ahmad Baset was assigned to assist on the cases in February 2018 and remained involved until the cases were dismissed. Tr. 1110. AUSA Brittany Keil was assigned to the case in May 2018. *Id.* There was no consistent paralegal support assigned to the case. Tr. 1110-11. Paralegal Lauren Siciliano later assisted on some discovery tasks and other standard pretrial tasks around the time of the first trial. Tr. 1112.

C. Overview of the government's charging decisions and theory of the case.

11. The United States Attorney's Office originally decided to seek a single indictment charging all the rioters in a single case, alleging a felony riot. The grand

jury returned the first indictment on February 8, 2017. RX 1. A second grand jury convened and heard evidence on April 18, 21, 25, and May 30, 2017. Tr. 926-27. The government obtained a second superseding indictment from a subsequent grand jury on April 27, 2017. RX 8. The second superseding indictment charged Inciting a Riot (Count I), Rioting (Count II), Conspiracy to Riot (Count III), Destruction of Property (Counts IV-IX), Misdemeanor Assault on a Police Officer (Counts X-XI), and Felony Assault on a Police Officer (Counts XII-XIV). RX 8 at 13, 22, 30, 37, 39-40, 42, 44, 46, 48-49.

12. The decision to charge all the individuals who were involved in violence similarly was partially the result of the black bloc tactics that obscured everyone's identity. Because of this tactic, Kerkhoff advised the U.S. Attorney's Office and her supervisor, Mr. Tischner, that the government could not determine which individuals were responsible for the destructive behavior. Tr. 609-610, 632-34; RX 62 at 4. As a result, the U.S. Attorney's Office decided to charge all indicted defendants with felony rioting. Tr. 632-34.

13. The government's theory was that "the destruction and violence was planned." DCX 53 at 13; *see also* DCX 69 at 98-100 (Respondent asserting that planning for violence preceded January 20). Respondent argued that as to all defendants, the evidence of the use of the "black bloc" tactic for an extended period of time, the preparation to participate in the black bloc by wearing specific clothing and carrying certain items, and the evidence of visible violence would contribute to establishing each defendant's conspiratorial agreement. DCX 53 at 13-14. Kerkhoff

further argued that the evidence at trial showed that the defendants' conduct was "consistent with the instructions provided by co-conspirators at earlier planning meetings." DCX 53 at 14; *see also* Tr. 97-98, 180-81 (Kropf).

14. The first trial of six defendants began in November 2017. *See* DCX 74. None of the defendants who went to trial was alleged to have personally engaged in violence or attended any planning meetings. Tr. 83-84, 97-98 (Kropf); DCX 151 at 6.

15. In addition to evidence of individual conduct, at trial Respondent offered evidence to prove that the riot was planned before January 20. This evidence included: (i) a January 8 "Planning Meeting Video," and (ii) testimony from Undercover MPD Officer Bryan Adelmeyer, who sponsored the video at trial and testified about hearing discussions about property destruction at other planning meetings. *See, e.g.*, DCX 74 at 64-65 (Opening); DCX 90 at 32-33 (Closing); Tr. 98, 113-14, 117 (Kropf).

16. Consistent with its theory of the case, the government argued to the jury that the Anti-Capitalist Bloc march was planned to be a riot—not a protest—and that the defendants on trial "got the memo" about using a black bloc to facilitate violence and destruction by acting as a cover and "getaway car" for the violent perpetrators. DCX 90 at 32-33, 82, 84; *see also* DCX 74 at 52, 61, 65.

17. Defendants argued in their defense that "other people" committed the violent acts, and the government was trying to hold the "peaceful protesters" liable for the others' misconduct. Tr. 88-89 (Kropf); *see also* DCX 74 at 110.

18. Defendant Brittne Lawson, for example, was an oncology nurse who attended the march as a "street medic." Tr. 82-83, 96 (Kropf); DCX 91 at 17. Lawson's attorney, Sara Kropf, argued to the jury that the Anti-Capitalist march was meant to be a "peaceful protest" and a "demonstration against Donald Trump," and her presence as a medic was consistent with legitimate, non-violent protest. Tr. 143-45 (Kropf); DCX 91 at 8-9. *Compare* DCX 285, *with* RX 93.

19. The government responded that Lawson was guilty of felony rioting and felony destruction of property based upon the evidence of her actions (including what she wore and brought to the march and her decision to stay with the group after violence began), which were consistent with instructions from the planning meetings. Tr. 84, 87, 96-97, 200-01, 236 (Kropf). The government cited the planning meeting as "circumstantial evidence" of her alleged "intent to join an illegal conspiracy," Tr. 118-20 (Kropf), and further argued that as a member of the conspiracy, she was liable for the violent acts of her co-conspirators. Tr. 200-01, 236 (Kropf).

20. Based on: (i) the planning meetings and how the defendants "showed up prepared" to "fight" for and acted "consistent" with the black bloc plans; and (ii) how the defendants chose to stay with the group even after there was violence, the government argued that the jury could infer the existence of a plan for violence and each defendant's individual knowledge of and intent to join in that plan. DCX 90 at 53, 60-61, 64, 82; DCX 74 at 65; DCX 22 at 22. During closing, Respondent's co-counsel argued that the "[d]efendants and their co-conspirators

agreed to destroy your city and now they're hiding behind the First Amendment." DCX 90 at 32; *see also* Tr. 115 (Kropf).

21. Similarly, at the second trial in May 2018, the government conceded that defendant Casey Webber's personal conduct was non-violent. *See* DCX 154 at 1, 34-35. The government alleged he was guilty based on his participation in the planning for the event, DCX 154 at 34-35; DCX 166 at 213, as well as evidence that Webber moved with the group of rioters from Logan Circle wearing black and could be observed in videos. Consistent with this theory Respondent argued, "This riot, it was planned. You're going to have evidence of planning meetings," and Mr. Webber "receiv[ed] information about the plans." DCX 154 at 35; DCX 166 at 213.

D. The discovery process.

22. Respondent conducted discovery conferences with every defense counsel who requested a conference, during which she helped the defense understand the government's theory of the case and identified the evidence against each defendant. RX 62 at 8-9, 15, 18.

23. Evidence collected as part of the case included hundreds of videos and photographs. *See* RX 24. The videos included police officer body-worn camera videos, traffic camera videos, aerial surveillance videos, trailer camera videos, business security camera videos, and publicly available videos discussing or portraying the riot. *See id.* The evidence also included MPD use of force investigative reports, arrest photos, 911 calls, cell phone reports from the phones of 89 of the defendants, lists and photos of property seized, and over nine hours of radio

runs. *See id.* Critically, for purposes of this proceeding, the evidence also included videos provided by a third-party, Project Veritas. As set forth more fully below, the Project Veritas videos provided included a planning meeting on January 8 (*see* FF 27-29, 31-33), and other meetings (sometimes known as Action Camp or Spokes Council meetings) that occurred on January 14, 15, and 17 (*see* FF 55-57).

24. As to each individual defendant, during discovery Respondent and Detective Pemberton identified videos and photographs of the riot (by time stamp/screen shot capture) where the government believed it could identify the defendant. *See* RX 24 at 9, 18; RX 62 at 8-9. The scans featured screenshots from the videos where the government believed each defendant could be identified in the riot and were marked by video name and with a time stamp so defense counsel could locate the evidence. RX 24 at 9.

25. During a discovery conference held in April 2017 to consider the disclosure of data from defendants' cell phones, Judge Leibovitz cautioned the government not to "dump-truck" discovery on the defense. RX 9 at 1, 43. Respondent expressed her concern that the Court's instruction to balance the defendants' privacy interests and her disclosure obligations would place her in a "*Brady* trick bag." RX 9 at 49. Judge Leibovitz responded: "I understand the concern, and I think we just need to try and zero in on a middle ground here." *Id.*

26. Ultimately, Respondent concluded that the Action Camp videos (*see* FF 57-58) were not relevant and not subject to defense discovery under either Rule

16[9] or *Brady*. Tr. 1093-95; *see also* DCX 166 at 158-161; DCX 200 at 5 (describing Kerkhoff's review of evidence).

E. Project Veritas provided the government with videos of DisruptJ20 planning meetings for its Inauguration protests.

27. Respondent understood that Project Veritas had infiltrated and recorded DisruptJ20's planning meetings and might have videos that could be helpful to the government's investigation. Tr. 908; DCX 5 at 21.

28. She also understood that Project Veritas was a "can of worms," wanted to "subvert" DisruptJ20, was biased, and had a reputation for manipulating or distorting evidence. Tr. 920; DCX 5 at 21, 23-24 (discussing bias and credibility issues with the grand jury).

29. In February or March 2017, Respondent and Pemberton obtained a Project Veritas hard drive with videos of various DisruptJ20 planning meetings. Tr. 703-04. Project Veritas's operatives used hidden "button" cameras to capture footage of DisruptJ20's planning meetings and provided the government with footage they recorded. Tr. 705, 720.

F. Respondent and Pemberton edited Project Veritas's videos before providing them to the defense.

30. Respondent and Pemberton initially focused on a meeting led by Dylan Petrohilos, a DisruptJ20 organizer, about the Anti-Capitalist march. *See* Tr. 726, 795. That meeting—a small-group "breakout" session that was part of a larger

---

[9] Federal Rule of Criminal Procedure 16 requires the government to produce to the defense, *inter alia*, recordings of statements made by the defendant.

January 8, 2017 DisruptJ20 meeting—included discussion of DisruptJ20's various direct actions. Tr. 725-27. When reviewing Project Veritas's videos, Respondent and Pemberton recognized that MPD Undercover Officer Adelmeyer was present at the January 8 meeting. Tr. 707-08, 919. Because Kerkhoff understood that Veritas had a particular "political view[] and belief" that she wished to exclude from consideration at trial, she decided not to identify Veritas as the source of the video and to use Adelmeyer to authenticate the video segments showing the Anti-Capitalist breakout. Tr. 705-06, 719-720, 919-920, 1004, 1116.

31. At Respondent's direction, Pemberton made redactions to three of Project Veritas's seven original video segments from the January 8 DisruptJ20 meeting to prepare the segments for disclosure to defense counsel. Tr. 705-07, 711-12, 720-21, 935-36, 1016; *see* DCX 211 at 1.

32. In making disclosures, Respondent and Pemberton did not disclose the first three video segments. S*ee* DCX 211 at 1; Tr. 720-21, 732. *Compare* DCX 242, *with* DCX 243. The omitted videos contained around 50 minutes of footage from the general assembly part of the DisruptJ20 meeting, including DisruptJ20 organizers discussing their plans for each direct action, amongst which was the Anti-Capitalist march. DCX 73 at 2-3; Tr. 719-720. The last omitted video segment ended with the Project Veritas operative going into the bathroom and adjusting his hidden camera. DCX 242.

33. Respondent relabeled the four remaining segments, "*Planning Meeting Video 1–4*" after Pemberton made the edits. Tr. 712-13.

a. *Edit to Planning Meeting Video 1* (original "201302").

The unedited video picks up where the third omitted video segment ends—with the Veritas operative adjusting his hidden camera in the bathroom. DCX 242. As the operative leaves the bathroom, the video briefly shows his face. (0:25; 20:13:28). It then shows him walking to the Anti-Capitalist breakout where Dylan Petrohilos was speaking. The operative passes Officer Adelmeyer, (marked as "UCO") who is attending a breakout group called Stand-Up for Racial Justice ("SURJ"). (0:56; 20:13:58).[10]

Pemberton redacted the first minute and nine seconds of the video, removing the footage of both the operative in the bathroom and Adelmeyer with SURJ. *Compare* DCX 242 (original) (1:09; 20:14:11), *with* DCX 243 (edited) (0:00; 20:14:11).

[10] The screen captures reproduced in this Report are also reproduced in Attachment A to Disciplinary Counsel's Post-Hearing Brief.

b. *Edit to Planning Meeting Video 3* (original "204911").

As the Anti-Capitalist meeting ended, the camera panned around and Adelmeyer could again be seen with SURJ:

Pemberton again redacted the video to protect the identity of Adelmeyer. *Compare* DCX 242 (original) (06:42; 20:55:54–7:29; 20:56:41), *with* DCX 243 (edited) (06:42; 20:55:54–7:29; 20:56:41).

c. *Edit to Planning Meeting Video 4* ("210716").

The unedited footage of Video 4 showed the operative's interviews with two individuals about DisruptJ20 and a labor organization called International Workers of the World ("IWW"). Afterwards, the operative zipped his coat over his hidden camera and left the church. Pemberton clipped the video at this point. *Compare* DCX 242 (original) (11:02; 21:18:19), *with* DCX 243 (edited) (11:02; 21:18:19). This omitted a recording of a telephone call between the operative and another person from Project Veritas, which occurred approximately a minute and a half later on the tape, in which the operative said: "I was talking with one of the organizers

from IWW. I don't think they know anything about any of the upper echelon stuff." DCX 242 (12:39; 21:19:56); DCX 218 at 5-6.

34. Although Pemberton made the edits, Respondent was aware that he was cutting footage of the Project Veritas operative and Adelmeyer and omitting the video segments showing the general assembly part of the meeting, which Pemberton did at her "direction." DCX 188 at 34-35; Tr. 706-07, 711-12, 933-36. During the first trial, Respondent assured the Court that both she and Pemberton had reviewed the videos, and she explained to the Court how they had redacted the "individual putting on the button cam" and "walking into the meeting" and "the officer's visible presence." DCX 78 at 64, 75, 79.

35. Respondent was unaware of the edit to Video 4, removing the "upper echelon" statement and clipping the final segment from the fourth video until presented with the information in front of Judge Knowles in May 2018. DCX 162 at 1, 11; Tr. 936-37.

36. On March 16, 2017, Respondent posted the four edited video segments to the government's "USAfX" discovery portal in a folder labeled "*Planning Meeting Videos*." DCX 185 at 1; Tr. 706, 712.

37. The next day, Kerkhoff attended an arraignment hearing. DCX 12. In response to a defense lawyer saying that he intended to make "a formal discovery demand," Judge Leibovitz announced that the government was providing "discovery to everyone by means of a portal and is giving everybody a hundred percent of the

video footage they have." *Id.* at 4-5. She also announced that defense counsel could issue "subpoenas for videotapes and other materials from private entities." *Id.*

G. Respondent and Pemberton did not disclose Project Veritas's role when they obtained a superseding indictment that charged a conspiracy.

38. Also on March 17, Respondent discussed with Pemberton "reindicting the defendants" to add a felony destruction of property charge. Tr. 923-24. By adding a charge for conspiracy to riot, Kerkhoff understood the government could pursue felony charges for destruction of property based on a "*Pinkerton* theory of liability." Tr. 637-38, 925 (referring to *Pinkerton v. United States*, 328 U.S. 640 (1946)). In other words, Kerkhoff argued that once a defendant joins a conspiracy to riot, he or she is liable for any subsequent destruction of property because it was foreseeable.

i. MARCH 2017 SEARCH WARRANT (DYLAN PETROHILOS)

39. A week later, Respondent and Pemberton prepared and signed a detailed search warrant affidavit for the home of Dylan Petrohilos. *See* DCX 249; Tr. 957. The warrant was partially based on Petrohilos's statements at the January 8 meeting, DCX 249 at 4-5, as well as earlier podcast statements made by Petrohilos and information obtained from cell phone data regarding Petrohilos's involvement. DCX 249 at 3, 6; RX 12 at 16, 19.

40. The affidavit stated that an undercover officer (subsequently identified as Officer Adelmeyer) was present and "reported" about Petrohilos's statements and the January 8 planning meeting. DCX 249 at 3-4. Pemberton also stated that a "third-party (non-law enforcement)" provided "unedited video footage of portions

of the same January 8, 2017, meeting," which Pemberton said was "consistent with [Adelmeyer's] statement." DCX 249 at 5.

41. During subsequent trial testimony, Adelmeyer testified that he was with another breakout group, 20 to 30 feet away from the Petrohilos meeting. DCX 78 at 91. The footage Pemberton had clipped from the videos showed that Adelmeyer was not with the Anti-Capitalist group; he was standing 20 to 30 feet away with SURJ. *See* FF 33.

42. Respondent did not turn over Pemberton's March 2017 search warrant affidavit in her *Jencks*[11] disclosures before trial. *See* DCX 72. Kerkhoff did disclose a second search warrant affidavit filed in July 2017 for disruptj20.org. *Id.*; DCX 250 at 1-2. That affidavit did not refer to "third-party" video. *See* DCX 250 at 11-12.

ii. THE SECOND GRAND JURY AND FINAL SUPERSEDING INDICTMENT

43. In April 2017, the government sought a superseding indictment, adding Conspiracy to Riot and felony Destruction of Property counts against all defendants and charging Petrohilos for the first time. RX 8; Tr. 636-38; RX 1; RX 2.

44. The government presented evidence to a second grand jury over three days: April 18, 21, and 25, 2017, to obtain the superseding indictment. DCX 18; DCX 20; DCX 22. Respondent presented evidence only on April 25, which was

---

[11] "Jencks" material includes, *inter alia*, "a written statement made by [the] witness and signed or otherwise adopted or approved by him" and "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." 18 U.S.C. § 3500(e).

also the only time the government presented its January 8 videos. *See* DCX 22; Tr. 643, 749, 794-95, 907-910, 926-27.

45. On April 25, Pemberton testified that even though Petrohilos did not attend the Anti-Capitalist march, he was responsible for planning and organizing it. DCX 22 at 21-22, 30. Pemberton testified that "there was a number of things that they [*i.e.*, the people at the January 8 meeting] talked about" that "led the officer [*i.e.*, Adelmeyer] to believe that there was going to be destruction." *Id.* at 22. Respondent advised the grand jury that Petrohilos could be charged if he was involved in planning the riot and that he did not "have to be present" on the day of the riot. DCX 21 at 13-15; *cf.* RX 12 at 4-5.

46. Respondent presented the January 8 videos as recordings of a planning meeting at which an undercover officer was present. DCX 22 at 22-23, 27. During this presentation, the government did not disclose Project Veritas's role in the creation of the January 8 videos. *See* DCX 22 at 23-35 (presenting video without identifying origin). A grand juror asked if the undercover officer was "getting footage of people," and whether the police were required to warn people "that these actions are going to be illegal?" *Id.* at 33. Respondent replied, "I believe that's a legal question that I will address." *Id.*

47. Respondent did not disclose the April 25 transcript of Pemberton's grand jury testimony in her *Jencks* disclosures at trial, which was the only grand jury presentation of the government's January 8 videos. DCX 72; *see* DCX 18; DCX 20;

DCX 22; Tr. 749, 907-910; *see also* FF 135-144 (describing the subsequent production and discovery of the April 25 transcript).

48. On April 27, 2017, the grand jury returned a superseding indictment against all the defendants, including Petrohilos. RX 8.

49. The next day, Judge Leibovitz ordered Respondent "to preserve all video and other evidence such that it can be made available." RX 9 at 42. Respondent represented, "I have preserved it in the fashion we received it." *Id.*

H. Respondent understood that evidence of any defendant's participation in DisruptJ20's planning meetings might constitute evidence to be disclosed under Rule 16 or *Brady*.

50. Respondent understood that there were different levels of activity among the 200+ defendants. Tr. 673-75. Kerkhoff was also aware that proof of a lack of involvement in planning for the march could be exculpatory as to those defendants for whom there was no record of participation. *See, e.g.*, RX 9 at 44-46 ("To say if you've got eight or nine people that were involved in planning or organizing, and the fact that these 100 or so other defendants appear nowhere on their phones at all" is exculpatory).

51. Respondent also understood that evidence about a particular defendant's planning to attend DisruptJ20's peaceful protests was potentially exculpatory. *See* Tr. 647-48, 656-662; *cf.* DCX 26 at 17-18, 30 (evidence that some organizers planned to recruit legitimate protesters as a cover for the "mob" was inculpatory for those organizers but would be exculpatory for defendants who

planned or expected to attend a legitimate protest); DCX 90 at 123 (closing argument about a defendant being the "patsy," or the "fall guy").

52. Respondent developed categories of information from each defendant's cell phone that she understood the government was required to disclose to all defendants as Rule 16 or *Brady* evidence. Tr. 837-840; DCX 41 (July to October 2017 filings with categories); DCX 42 at 15; DCX 43 at 3. One of her designated categories was "All images or videos" relating to "attending, preparing for, or participating in the black bloc, DisruptJ20 events, or other events on January 20, 2017." *See, e.g.*, DCX 43 at 3 (No. 9).

53. In an August 2017 pre-trial hearing, a defense lawyer asked about this category of evidence because she thought the evidence had already been disclosed. DCX 47 at 24. Judge Leibovitz explained that the government had not yet disclosed all the cell phone information but had disclosed "videos of all this stuff that they got from wherever they got them." *Id.* Since the cell phone evidence was the only evidence that was already in the government's possession that had yet to be turned over, Judge Leibovitz explained it "would be a problem" if it were not disclosed. *Id.* at 24-25.

54. In September 2017, Judge Leibovitz asked Respondent about hypothetical evidence such as a "videotaped or audiotape[d] discussion on one defendant's phone in which a different defendant is saying, I didn't want to be in a riot today. All I wanted to do is come out and say what I think about democracy." DCX 49 at 23. Respondent acknowledged that evidence that a defendant may have

had "either a dual purpose or another purpose, in part,"—*i.e.*, to legitimately protest—would be exculpatory information. *Id.* at 24.

I. Respondent reviewed Project Veritas's hard drive and did not disclose videos of DisruptJ20's other meetings.

55. DisruptJ20 conducted meetings to plan for its Inauguration Day events. Several such were Action Camp meetings at American University and other meetings including Spokes Council meetings. *See, e.g.*, Tr. 956-57; DCX 18 at 13; DCX 73. Respondent understood that DisruptJ20's Action Camp consisted of umbrella training classes for all its Inauguration protests. Tr. 656, 725-27, 775-79; DCX 115 at 87-88; *see* DCX 69 at 106; DCX 73 at 2, 4; DCX 155 at 159-60, 195; Tr. 364-65 (Downs). Respondent understood that Spokes Council general assembly meetings were large-group, umbrella meetings (around 300 people) about the direct actions that included, at the end, a "formal" Spokes Council meeting among representatives of the affinity group participating in each action. Tr. 947-951, 962-63; DCX 69 at 94-95, 105-06; DCX 155 at 122-23, 161-62; DCX 168 at 3 (January 17 Spokes Council). DisruptJ20's January 14 meeting—a quasi-Spokes Council meeting that lacked the "formal" representatives—was one of several meetings Adelmeyer attended where he said there was discussion of property destruction. DCX 73 at 4-5; DCX 123 at 9-10 (No. 5, Column 3 and 4); DCX 131 at 67.

56. In August or September 2017, Respondent reviewed Project Veritas's hard drive videos for "what else is in our possession that we might have to disclose under the structures of Rule 16 and *Brady*." Tr. 971, 1074-75. She took notes on the content of the videos that she later used to summarize them. Tr. 764, 970-73.

Her summaries, therefore, are evidence of some of the information that she understood about the withheld videos. *Id*.

57. Respondent knew that she had recordings of DisruptJ20's D.C. Action Camp training sessions and other meetings that had not been disclosed to defense counsel, including:

- Jan. 14, 2017. [DCX 233]
  Action Camp trainings at American University.
- Jan. 14, 2017. [DCX 239]
  Action Camp trainings at American University.
- Jan. 15, 2017. [DCX 235]
  Action Camp trainings at American University.
- Jan. 15, 2017. [DCX 240]
  Action Camp trainings at American University.
- Jan. 17, 2017. [DCX 237]
  Other meeting, including mention of "block" activities.

See DCX 168; DCX 211.[12] Respondent initially did not disclose these recordings. DCX 168 at 1.

58. Respondent still does not regard videos of a defendant participating in "de-escalation actions at Action Camp" as exculpatory information. Tr. 1079.

---

[12] The parties dispute whether the January 17 meeting was a Spokes Council meeting or simply another meeting that occurred during the DisruptJ20's preparation for the inauguration. In the end, the Committee sees no material import from the label applied and does not resolve this factual dispute.

J. The undisclosed videos of DisruptJ20's Action Camp and other meetings contained exculpatory evidence.

59. Respondent knew that Petrohilos, the government's alleged "lead planner and organizer for the anticapitalist march," could be seen on the undisclosed videos of the Action Camp staging area at American University, where DisruptJ20 organizers had set up tables and welcomed attendees. Tr. 928, 1069-1072.

60. Respondent did not disclose recordings of Action Camp training classes that Officer Adelmeyer attended on January 14, 2017. *See* DCX 73; DCX 168. The recordings showed multiple training classes on "de-escalation." *See, e.g.*, DCX 168 at 2 (¶¶ 4, 5); DCX 233 (RECO-0008) (15:50:14–15:56:13); DCX 234 at 23 (transcript of RECO-0008); DCX 239 (FNN-*200219*) (24:55; 44859–27:12; 48961). Respondent's summary notes of her review of the videos include a citation to "guidance" that "if you see violence, you should report it to the ACLU and sometimes to law enforcement." DCX 168 at 2, ¶ 4; *see* DCX 241 at 10, 12 (transcript of videos).

61. Chief Judge Morin later found a *Brady* violation based in part on the import of the de-escalation training, which was mentioned in Respondent's summary disclosure of videos from the Action Camp training sessions. *See* FF 113; DCX 215 at 4-5, 5 n.7 (text of Judge Morin's ruling). Judge Morin noted that the videos Respondent withheld tended to rebut Adelmeyer's testimony about planning for destruction and were therefore "relevant to the jury's understanding as to the totality of what occurred at the planning meetings. DCX 215 at 5 n.7. The videos of DisruptJ20's Action Camp training sessions on de-escalation contrasted with the

planning meetings where Adelmeyer heard attendees participating in discussions of property destruction. *See* DCX 115 at 87-88; DCX 215 at 4 n.6 (evidence related to planning non-violent activities or "non-confrontation" is *Brady* information).

62. At the second trial, Officer Adelmeyer identified defendant Webber as being present at a meeting he attended, but he did "not know which meeting it was." DCX 155 at 169-170; *see* Tr. 342-43, 360 (Downs). His attorney, Downs, "was animated" that Adelmeyer "should not be able to identify" Webber unless he could say which meeting "because some of them were more peaceable, and others might discuss more aggression." Tr. 343. The undisclosed videos showed Webber attending one of the Action Camp training classes on January 14, 2017, the same day Adelmeyer attended. Tr. 362-63 (Downs) (discussing DCX 233).

63. During some of the sessions on January 14, trainers were discussing "de-escalation" and "peacekeeping" for the Inauguration direct actions. Tr. 133-35 (Kropf). At other sessions on the same day, trainers similarly instructed attendees about de-escalation and discussed how they should plan to contact the police "if a Trump supporter showed up with a gun." Tr. 274-77 (Kropf); *see* DCX 168 at 2 (reporting violence to the police).

64. This evidence was, in the opinion of defendant Lawson's defense counsel, "directly contrary" to the government's theory that defendants were planning violence, destruction, and provocation with the police. Tr. 134-35 (Kropf). As Kropf testified, "I would have hammered the jury on this." Tr. 135. It was also potentially exculpatory of defendant Webber because the government was in

possession of video evidence that his planning and preparation included DisruptJ20's training classes for de-escalation and non-violent protesting at the Inauguration events. Tr. 365, 379, 398 (Downs).

65. In addition, the "clipped" footage of the Project Veritas operative discussing IWW members not knowing about "upper echelon" stuff was at least potentially exculpatory information for Webber, who was a member of IWW. *See* FF 33c; Tr. 328 (Downs). It suggested he was not part of any "upper echelon" decisions and distanced him from the conspiracy allegations. Tr. 344-45 (Downs); DCX 166 at 145-47; *accord* RX 35 at 74 ("I do find that it's a *Brady* violation.") (Judge Morin).

66. The videos Pemberton created of the January 8 meeting were limited to a "breakout" for the Anti-Capitalist march meeting. *See* FF 30-34. The government's disclosure was one part of the meeting from the Project Veritas hard drive and omitted the complete January 8 meeting. The other, undisclosed January 8 "meetings . . . were more peaceful." Tr. 380-81 (Downs); *see* RX 35 at 65. Defense counsel at the first trial were of the view the existence of undisclosed edits and undisclosed video segments would have been "very powerful" to "undermine [Pemberton's] credibility." Tr. 150, 153-54, 252-53 (Kropf) (difference between disclosed and undisclosed edits).

K. During the first trial, Respondent did not disclose Project Veritas's involvement and the existence of undisclosed footage.

67. In September 2017, Respondent disclosed videos from three meetings: (i) the four "Planning Meeting Video" segments, (ii) a video of a December 29, 2016

meeting about "Deploraball," and (iii) a "Cantu" video taken in New York that related to defendant Aaron Cantu. Tr. 761-62, 852-53, 1017-18; DCX 185 at 1.

68. On October 10, 2017, Respondent requested a protective order to prevent the defense from publicizing or posting online "non-public" videos, which focused mostly on police body-worn camera but also included "third party" videos from planning meetings. DCX 55 at 1, 64-66. Judge Leibovitz denied Respondent's request for a protective order for the non-law enforcement videos of planning meetings because "[i]t's a video of events that happened in a place where nobody had a reasonable expectation of privacy." *Id.* at 67-68, 93-94; Tr. 988-89.

69. The next day, defendant Macchio requested the identities of the "person(s) who recorded each video produced (or that will be produced)" pertaining to "the planning of protests relating to the Inauguration or pre-Inauguration Events." DCX 56 at 4-5. She requested the identities of all persons visible or audible on the meeting videos, if known, and she also requested "a complete, accurate, and unedited copy" of each video, and "a complete explanation of how each such video was redacted or edited, where applicable, and how the Government came to be in possession of each such video." *Id.*

70. Respondent "decline[d] to provide [her] any information about who recorded the meetings or the circumstances under which they were recorded." DCX 59, ¶ 8. She also did not provide a "complete" or "unedited" copy of the videos or explain how the government obtained and "edited" them. *Id.*

71. A week later, Respondent replied to several inquiries about what redactions the government made to its videos:

> The only redactions/edits that have been made by the government to any videos that are on those two portals are to the "Planning Meeting 1" video – (in which the first part of the video was edited out to remove the identity of the individual who wore the video equipment), and "Planning Meeting 3 video" – (in which a portion of the video was cropped to conceal the identity of an undercover officer . . . .

DCX 63 at 1-2.

72. On October 31, 2017, the defendants from the first trial group moved to exclude the "*Deploraball*" video, the four January 8 "*Planning Meeting Video*" segments, and the "*Cantu*" video. DCX 65. The defense shared their belief that the videos came from Project Veritas, did not "reflect the full meetings," and appeared "to have been edited." *Id.* at 2-4. The defense noted that Respondent had "refused to provide information on the 'chain of custody'" and whether the videos "were edited" in a "misleading and prejudicial way." *Id.* They argued that the rule of completeness prohibited admitting the videos "out of context," which would "misrepresent[] the whole of the statement by only introducing part of it." *Id.* at 5-6 n.10 (quoting *Cox v. United States*, 898 A.2d 376, 381 (D.C. 2006)).

73. During Officer Adelmeyer's testimony at trial, defense counsel questioned the source of the video:

> MS. HEINE: The Government hasn't identified who that is. We believe it was provided by –
>
> MS. KERKHOFF: Objection. Who provided it is irrelevant.

DCX 78 at 71.

74. Defense counsel proffered that they believed the video came from a biased organization, which made the video "particularly susceptible to manipulation and adulteration" because the organization had "a motive to bring this group down and, therefore, motive to possibly adulterate the video," and the video itself was "not the full, complete meeting, and there have been some redactions." *Id.* at 72-74.

75. Respondent admitted she had not disclosed the "identity of the tapers," falsely stating that no one "ever asked." *Id.* at 74; *see* FF 69 (defendant requests identity of "persons(s) who recorded each video produced").

76. Judge Leibovitz asked, "have you disclosed the nature of the organization?" DCX 78 at 75. Respondent confirmed, for the first time, that the videos were filmed by Project Veritas. *Id.*; Tr. 104-05 (Kropf).

77. Respondent assured the Court that—except for redacting the identities of Officer Adelmeyer and the Project Veritas operative—there was "no evidence to indicate that anything was edited or clipped" from the January 8 videos. DCX 78 at 61-62, 64, 75-76, 79. She also said that during discovery, "We gave them the full entirety of those videos from that day." *Id.* at 80. Respondent did not disclose that she withheld the earlier January 8 video segments showing the general assembly part of the meeting, including Petrohilos's announcements about the march. *Id.*; *see* FF 32; Tr. 719-720.

78. On cross-examination, Officer Adelmeyer admitted to Project Veritas's bias against "left-leaning individuals or organizations" and reputation for "splicing videos together" and "leaving out material information." DCX 79 at 49-52, 56.

79. Respondent sought to elicit testimony from Officer Adelmeyer to the effect that he reported to MPD his understanding that there would be "damage to property" at the Anti-Capitalist march. DCX 79 at 78-79. Defendants objected to this testimony as hearsay. *Id.* at 79. Judge Leibovitz noted that the cross-examination created a potential "inference" that "the plan itself, apparently, was just to have a nonviolent protest." *Id.* at 82-83. She explained that because "this is a conspiracy case," and the defense was pursuing a strategy "to make this about nonviolent, protected activity," the government should be allowed to correct that "misleading impression" and establish that the police did not expect the Anti-Capitalist march to merely be a nonviolent protest. *Id.* at 83-85. Instructing the jury that the testimony was not for the truth of the matter asserted, she allowed Officer Adelmeyer to testify that he believed and reported to his supervisors based on his "participation in meetings," that "there were individuals" in the Anti-Capitalist group who planned to "engage in destruction." DCX 79 at 87-88.

80. Respondent called Pemberton to testify and rebut defense counsel's suggestion "that MPD failed to take steps to verify the authenticity as well as the accuracy and non-editing of the video." DCX 84 at 34-35, 38. Judge Leibovitz ruled that Respondent could show that the government "took steps to make sure that the thing was correct." *Id.* at 43.

81. Pemberton testified that he contacted Project Veritas for "raw, unedited footage" of the Petrohilos-led meeting, and it provided "a hard drive which contained hours of video that they had obtained through their investigation" and had

"individual files of what appeared to be a number of meetings" with "segments of video" for each file. DCX 84 at 31-33. He said he received four video segments of the January 8, 2017 meeting and that three segments "capture[d] the actual meeting itself" as opposed to the "before and after." *Id.* at 33. Respondent asked if he edited "anything else in the videos" other than redacting the identity of the Project Veritas operative at the beginning and Officer Adelmeyer "in the latter part." DCX 84 at 50-51. Pemberton testified, "No. Not at all." *Id.*

82. Respondent did not disclose that she had seven video segments from January 8, but she withheld the segments showing the general assembly. *Id.*; *see* FF 31-32.

83. Defense counsel were unaware that the government had in its possession other videos of the rest of the January 8 meeting and planning related to DisruptJ20's "D.C. actions" for the January 20, 2017 Inauguration. *See* Tr. 111-12 (Kropf); Tr. 354 (Downs); DCX 117 at 6; *see also* DCX 115 at 17 (as part of a request for raw video, defense counsel speculates "there has to be more").

84. All six defendants in the first trial were acquitted in December 2017. Tr. 239 (Knopf); Tr. 448 (Austin); *see* DCX 150 at 10 n.4.

L. After the first trial, Respondent did not disclose the full extent of the government's edits or the existence of the undisclosed videos.

85. In January 2018, the government voluntarily dismissed all the remaining cases, except for 59 defendants, who were perceived to be the most culpable, which included defendants who engaged in violence or participated in planning. DCX 97 at 1, 3-4.

86. Defense counsel for the remaining defendants sent additional discovery requests about the disclosed videos. *See, e.g.*, DCX 103 (2/15/2018). Defense counsel repeated the earlier requests for the "identity of the person(s) who recorded each video" and a "complete, accurate, and unedited copy." *Id.* at 1-4. They also asked for detailed information about "any edits or redactions" made by the "AUSA's office and/or MPD." *Id.*

87. On March 11, 2018, Respondent produced a "full" version of the previously disclosed *Cantu* video titled "Aaron Cantu Conversation." DCX 185. The version produced before the first trial had been clipped by Pemberton. *See id.*; DCX 105 at 6-7, 12; Tr. 1018. Respondent posted the video in a new discovery folder on USAfx. *See* DCX 185; Tr. 860-61; *cf.* DCX 63 (representing no edits).

88. On March 30, 2018, defense counsel for the "planners" group of defendants, including Petrohilos, filed a motion to compel additional discovery about the government's January 8 videos and a motion to strike the disclosed January 8, and Deploraball videos. DCX 110; DCX 111; Tr. 1029.

89. The motion to compel noted that January 8 videos were "not the original video files delivered to the United States," and the government had not responded to their requests for information about how the "disclosed files were produced from the original recordings." DCX 110 at 2-3. Given Project Veritas's involvement, the motion argued that this information was "vital to the Defendants' ability to properly assess the integrity" of the videos and "detect the possible existence of undisclosed edits, missing frames, or other anomalies." *Id.*

90. The motion to strike noted that defendants had discovered online audio recordings "from the beginning" of the January 8 meeting. DCX 111 at 3; *see* DCX 112. Defense counsel therefore requested that "[i]f the government is in possession of a complete video, the Defense, or the Court, *in camera*, should be able to make the determination of the admissibility of the video in its entirety pursuant to the Rule of Completeness." DCX 111 at 3-4.

M. Respondent made material misrepresentations and omissions before the second trial.

91. A motion hearing was conducted on April 6, 2018. DCX 115 at 1. The proceedings were part of the trial readiness hearing for the Petrohilos's trial group, which was scheduled for trial on April 17, but was later continued to June 4. *See* RX 26; DCX 205. At the hearing, Judge Morin addressed the motion to compel, which was "primarily" about "a video of the planning meetings." DCX 115 at 8. He asked Respondent for "the government's position on what they have and what's available to them." *Id.* Respondent said that Pemberton requested "unedited video" from Project Veritas, "[t]hey provided unedited video," and "[w]e posted the video." *Id.* at 8-9.

92. After Judge Morin asked what basis Respondent had to represent that the video was unedited, she proffered: "The only editing that was done by my office" was to cut the "beginning" to redact the face of the Project Veritas operative and to "crop out the undercover officer's face" after the breakout. *Id.* at 9-10. Otherwise "the defense has the exact video we have." *Id.* at 10, 12.

93. Judge Morin asked, "[Y]ou don't have any other presentation of that meeting other than what's been provided to you?" *Id.* at 10. Respondent said, "Correct." *Id.* Referring to the four disclosed video segments, Respondent said, "We have this, it's how we received it." *Id.*

94. Defense counsel asked for the "original video files that were introduced to the government." DCX 115 at 12. Judge Morin twice noted that Respondent had represented that she had "turned over all the video that they have received to you." *Id.* at 17; *see also id.* at 12 ("Am I misunderstanding what the government's saying?"). Respondent did not correct the Court's understanding. *Id.* Defense counsel contended that at the very least, the two "cropped" portions had not yet been turned over. DCX 115 at 17.

95. Ultimately, Judge Morin ruled

> I'm going to order the uncropped or the cropped portions be turned over to the defense. And again -- let me just put a formal order here and it's not to suggest -- I doubt the government's representations. It's -- you are officers of the Court, but *I am ordering you, the entirety of whatever is in the government's possession* to be turned over to the defense.

Id. at 19 (emphasis added).

96. Based on Respondent's representations, Judge Morin and defense counsel were "operating under the assumption that" Respondent had disclosed all the videos she had "concerning this matter except for the two cropped pieces from the January meeting." RX 35 at 58; *see* Tr. 332 (Downs). Indeed, as Judge Morin

later noted in his review of the *Brady* violation, the misperception left by Respondent was substantial:

> At the beginning of that hearing, the Court made a broad inquiry "to get the government's position on what they [the government] have and what's available to [the defense] or not[.]" 4/6/18 Tr. at 8. This general question was asked in the context of available Project Veritas videos. Apparently, the government interpreted this inquiry as narrowly directed only to the Project Veritas videos it had already produced and redacted, rather than as a general inquiry as to all items from Project Veritas that were in the government's possession. Similarly, at the conclusion of the April 6 hearing, after extensive discussion about the Project Veritas videos and the redactions made by the government, the Court formally ordered "the entirety of what is in the government's possession to be turned over to the defense." 4/6/18 Tr. at 19.
>
> Again, notwithstanding an all-encompassing order that the government disclose Project Veritas videos in its possession, the government interpreted this order as limited to only the video to which it had made redactions.
>
> In both instances, to the extent the government considered the Court's questions and directives to be limited in nature, there was a fundamental misunderstanding of the Court's intent. As it subsequently made clear, and as apparently understood by defense counsel, the Court intended that the government disclose all materials it had from Project Veritas to the defense. The government having such a limited understanding of the Court's questions and directives, however, only highlights the need for the government to be complete and fulsome in its disclosures to the Court and the parties as to what is in its possession, so that all are operating on the same knowledge of facts.

DCX 215 at 7-8 (alterations in original).

97. At the same April 6 hearing, Respondent sought permission to admit statements that Officer Adelmeyer allegedly overheard at a January 14 meeting and a smaller January 18 orientation meeting at someone's house that was specific to Adelmeyer's SURJ affinity group. DCX 115 at 77-82, 90-92; *see* Tr. 742-43; DCX

114 at 4. Judge Morin told Respondent: "if there were statements about nonconfrontation, nonviolence, that I mean, obviously, I'm not telling you anything new, but . . . I'm just saying from the Court's point of view, the entire context of what [Adelmeyer] overheard has to be provided to the defense" under the "doctrine of completeness, *Brady*, if there was discussions about nonviolence, all that has to be put in a context where the defendants and the Court can understand it." DCX 115 at 90. Judge Morin reserved ruling on the admissibility and told Respondent: "I do want you to flush that out even to the point of producing backup documents" as part of a "robust proffer." *Id.* at 91-92.

98. On April 12, 2018, Respondent disclosed to defense counsel the seven video segments the government had received of the January 8 meeting that were in the government's possession, including the three previously undisclosed video segments of the general assembly portion of the meeting. RX 30. That disclosure did not include the other Project Veritas videos from DisruptJ20's January 14 and 15 Action Camp training classes and the January 17 meeting.

N. Respondent did not disclose the Action Camp and other meeting videos.

99. The second trial before Judge Knowles began on May 16, 2018. DCX 154.

100. On May 21, Respondent called Officer Adelmeyer to testify to the authenticity of the January 8 videos. DCX 155 at 1, 114, 139-142. She also had him testify about attending "a number of meetings" for DisruptJ20 and "at least

three" that he recalled where the Anti-Capitalist Bloc was discussed, which included discussions of property damage. *Id.* at 159, 163; *see also* DCX 73.

101. Defense counsel received the complete January 8 video for the first time in the April 12 production. *See* RX 35 at 65; DCX 157 at 1. Based on their review, on May 22 (six days after the second trial started, *see* DCX 154), defense counsel from the Petrohilos group of defendants (who were in the fourth trial group, *see* Tr. 1029) filed a motion for *Brady* sanctions based on the undisclosed edit to the end of the January 8 videos (*see* FF 33c), where the Project Veritas operative said of the IWW attendees, "I don't think they know anything about any of the upper echelon stuff." RX 34. Other defense counsel filed similar motions later that night. DCX 157.

102. On May 23, 2018, during these parallel fourth, "planners" trial discovery proceedings, Judge Morin held that the undisclosed "upper echelon" footage was either a *Brady* violation or a violation of Rule 16. RX 35 at 1, 74-75. Judge Morin reserved ruling on a sanction pending the government's ability to cure any prejudice by making the Project Veritas operative who had taken the video available to the defendants for interview. *Id.* at 75-76.

103. Respondent had Pemberton arrange a meeting between defense counsel in the second trial and the Project Veritas operative, who was identified only as "Matt." Tr. 351-52 (Downs). "Matt" informed the defendants that he recorded many more DisruptJ20 meetings than just the January 8 meeting, including at "Action Camp." Tr. 353-54, 359-360 (Downs).

104. On May 29, 2018, defendants in the second trial, which was proceeding simultaneously with the fourth trial group discovery proceedings, were scheduled to complete their cross-examination of Pemberton, the government's last witness. DCX 166 at 1-2. Judge Knowles asked about defense counsel's meeting with "Matt, the videographer." *Id.* at 5. Defense counsel disclosed that Matt revealed that he and other operatives filmed "that January 8th meeting," a "January 14th meeting at American University," and two "planning meetings" in "houses," like the "planning meeting at someone's house" that Officer Adelmeyer testified about. *Id.* at 8-10. In addition, defense counsel said that Matt "does not recall any discussion about property damage at any of those meetings" he attended. *Id.* at 10.

105. Downs noted that this new information was particularly important to her client since Adelmeyer had testified that he saw Webber at "a meeting," and these newly-revealed Project Veritas videotapes were said to have included "a meeting at American University, where [her] client was," so this information was relevant as to "what part of those meetings [he attended], if he was at a breakout session discussing peaceable protests." *Id.* at 13-14.

106. Responding to this mid-trial revelation, Respondent made further oral disclosures, describing the remaining undisclosed Project Veritas videos in her possession. She told D.C. Superior Court Judge Kimberly S. Knowles, who was assigned to the second trial, "We have no other videos from January 8th from Veritas. No other audio recordings from January 8th. We have nothing." *Id.* at 15. She also said, "We have no recording, audio or otherwise, of any other planning

meeting or breakout session on the Anti-Capitalist Bloc." *Id.* She proffered that Project Veritas provided videos of: "a meeting in New York that discussed the Cuban Revolution;" "a de-escalation workshop where they did role playing, generally speaking, about how do you, in this age forward, talk about Islamophobia, and if you see someone being attacked, can you deescalate the situation and how does it feel to be attacked;" "how to combat hate crimes;" and "a workshop on digital security." DCX 166 at 16-17, 19, 159. At the end of the hearing, Respondent proffered:

> I will repeat, again. I don't have -- if there are eight operatives and they're all filming and they went to multiple days, I don't have very much of that. I have a meeting in New York where people are discussing socialist videos. We have some breakout sessions at -- for de-escalation and digital security. We have some walking and sitting on a park bench at a campus. I mean, I don't have this mass trove that they think exists.

Id. at 172.

107. Judge Morin, who was handling the pre-trial discovery for the third trial group, asked the government for an email with a written summary of any undisclosed Project Veritas videos with an explanation for why they were not disclosed. Tr. 764-67; RX 37 at 141.

108. Respondent prepared a written summary of the undisclosed videos, which she provided to AUSA Keil. DCX 168. She requested an opportunity to talk with her colleague before the summary was sent to Judge Morin. DCX 169. Before the summary was sent to Judge Morin, it was edited by Kerkhoff. DCX 170; Tr. 972.

109. A comparison of the initial draft summary Kerkhoff sent to Ms. Keil and the summary that was ultimately sent by Ms. Keil following her discussion with Kerkhoff discloses that she deleted a reference to another "break-out session for role-playing and practice how to de-escalate," which was separate from an "Islamophobia" de-escalation class she described. DCX 171 at 2 (¶ 3). She also deleted the summary phrase, "if you see violence, you should report it to the ACLU and sometimes to law enforcement." *Id.* Respondent also deleted from the summary the statement that one of the videos "end[s] with a phone conversation between the videographer and a third person." *Id.* at 2-3 (¶ 4). In her description of a meeting where a "block" was discussed, Kerkhoff deleted a reference to "break[ing] out into clusters of affinity groups to choose a spokesperson for a spokes council." *Id.* at 3 (¶ 6). This last video was a January 17, 2017 meeting that discussed the Anti-Capitalist bloc, that had not been disclosed. *Id.*; *see* DCX 238 at 42-43, 45; DCX 237 (FNPJ-*6185815*) (19:10:18–19:12:56; 19:18:25–19:18:51).

110. The next morning, May 30, Ms. Keil sent Respondent's summary disclosure to Judge Morin and the defendants in the third trial group. DCX 170.

111. On that same day, during the second trial, Downs again noted that she did not know the full extent of what videos were in the government's possession, which she said was directly relevant to where her client was at Action Camp and if that was where "Adelmeyer saw him." DCX 173 at 44-47. Respondent made a representation about the videos she had not produced, saying they were "videos of individuals in New York discussing political views and socialism and Cuban

revolution and saying that, you know, protesting Trump might be a good thing." *Id.* at 51. She said:

> I have represented to the Court as an officer of the Court what is on the other videos. We have nothing else from Matt. We have nothing else recorded by Matt. We have nothing else. No videos that are of the meetings Officer Adelmeyer attended with the exception of the planning meeting, and we've produced all seven segments of those videos in full.

Id. at 52. In opposing further inquiry, Respondent argued, "We oppose counsel's desire to now further investigate that people who were recording things . . . might have information and we would like to see where that is." *Id.*

112. After an afternoon trial break, defense counsel in the second trial before Judge Knowles received the video summary created by Kerkhoff from defense counsel who were before Judge Morin for discovery proceedings. DCX 173 at 135-36; Tr. 357-59, 371 (Downs).

113. On the next day (May 31, 2018), Judge Morin ruled in the fourth trial group discovery proceedings that Respondent's failure to disclose the complete January 8 videos and the videos from Action Camp constituted a *Brady* violation. RX 41 at 1, 15-16, 35-36. As a sanction, he dismissed the Conspiracy to Riot charge count and precluded the government from going forward on any theory of co-conspirator liability. *Id.* at 35-38.

114. The defendants in the second trial group renewed their motions for sanctions and for a mistrial. DCX 177 at 10. Judge Knowles deferred ruling on the motion and allowed the case to proceed to jury deliberations, which ultimately resulted in an acquittal for Webber and mistrials for his three co-defendants. *Id.* at

4-5, 23, 91, 189; Tr. 431 (Downs); *see* DCX 219 at 67. The government voluntarily dismissed the three remaining defendants with all remaining cases on July 6, 2018. DCX 202; DCX 223 at 5 & n.1; *see* FF 141.

O. The government's *Brady* reconsideration motion.

115. After Judge Morin's May 31 sanction findings in the fourth trial discovery proceedings, *see* FF 113, the U.S. Attorney's Office assigned AUSA David Goodhand, an appellate lawyer, to conduct an "independent review" (DCX 217) of the conduct of the discovery for and the presentation of evidence at the first two trials. Goodhand was responsible for drafting the government's motion for reconsideration and other pleadings, which sought an order from the Court clarifying its sanction holding and requested that the Court conclude that Kerkhoff did not act in bad faith or intentionally mislead the Court. Tr. 940-41, 1052-53, 1061, 1065-66, 1099-1101.

116. Respondent provided Goodhand with the factual predicate for the reconsideration motion, giving him detailed factual summaries, answering questions, and providing edits to draft filings. *See, e.g.*, DCX 183, 185, 188, 196.

117. On June 28, 2018, Goodhand filed the government's reconsideration motion. DCX 200.

118. On August 27, the government filed a reply in support of the reconsideration motion. DCX 207. The first paragraph argued that the record "belies" any suggestion that Respondent engaged in a "pattern" of misrepresentations. *Id.* at 1.

119. On October 12, Goodhand appeared before Judge Morin. DCX 212 at 1. He explained that the government filed the reconsideration motion to "allay the Court's concerns about the possibility of any misrepresentations" because "we don't think there was any misrepresentation." *Id.* at 8.

120. On November 9, Judge Morin issued his order on the reconsideration motion. DCX 215 at 1, 8-9. He accepted the "government's explanations and its proffered analysis as to why it did not disclose certain matters to the defense" because "at this time, the Court has no reason to believe that the government had additional malevolent motives, such as intentionally suppressing evidence." *Id.* at 5-6. He concluded that the government's *Brady* violation was based on "incorrect analysis of its discovery obligations or misunderstanding of the Court's directives," rather than "an attempt to make purposeful misrepresentations to the Court." *Id.* at 8.

P. Pemberton's misidentification of defendant Cassandra Beale was not timely disclosed.

121. Cassandra Beale attended the Anti-Capitalist march with her boyfriend. Tr. 446-49 (Austin). Roy Austin represented her. Tr. 443 (Austin).

122. During the April 25, 2017, grand jury presentation, Respondent asked Pemberton to identify defendants who attended the January 8 planning meeting. DCX 22 at 27-29. He correctly identified some defendants, like Petrohilos, but he misidentified someone else as Beale. *Id.*; *see* FF 127.

123. In May 2017, Respondent told Austin at a discovery conference that the government identified Beale at the January 8 meeting based on the government's videos from that meeting. RX 62 at 36; *see* Tr. 515-17 (Austin).

124. In September 2017, Austin moved to suppress any identification evidence, contending that the government should be precluded from introducing into evidence the basis for the government's identification of Ms. Beale, which had not been disclosed, and from eliciting in-court identification testimony based thereon. DCX 135; *see* Tr. 517-18 (Austin); DCX 143 at 1. His client's trial was not scheduled until May 2018, so there was no immediate suppression hearing. *See* DCX 142 at 1.

125. In January 2018, the government dismissed its case against Beale's boyfriend. Tr. 448-49 (Austin). It did not dismiss the case against Beale. *Id.*; DCX 97 (motion to proceed with Beale's case).

126. On February 6, believing that Beale's case was not dismissed in part because she was misidentified, Austin moved the Court to hold the suppression hearing early. *See* DCX 143. In his opinion, the misidentification was an important factor in the case against Beale. Tr. 459 (Austin); DCX 143 at 2-3.

127. Upon receiving the motion, Respondent asked Pemberton to check his identification, and Pemberton discovered he had misidentified Beale at the planning meeting. RX 62 at 36 & n.44.

128. During the first trial in this series of cases, Judge Leibovitz had ruled that Pemberton could not make in-court identifications of specific defendants based

on his review of videos of the march. *See* DCX 84 at 22-24; DCX 85 at 226-27. Instead, she limited his testimony to identifying unique items and features, such as "Shoes, pants, jacket, hat, hair, height, weight, stature, gait of the individuals," to show that the same person appeared on multiple recordings. DCX 84 at 26; *see* DCX 85 at 226-27.

129. Based on that earlier experience, Respondent's opposition to Beale's motions argued that Pemberton was not going to make an in-court identification of Beale. *See* DCX 144. She wrote: "Consistent with" Judge Leibovitz's rulings at the first trial, any identifications were "for the jury to decide;" so there was "no identification to suppress." *Id.* at 2.

130. Judge Morin held a suppression hearing on February 9, which was handled by AUSA Rizwan Qureshi. DCX 145. Austin asked the Court to preclude the government from presenting "any evidence that . . . Beale was at the planning meeting." DCX 145 at 4. Judge Morin did not rule on the motion but made a "practical request" to Qureshi to "take a second look" at what Austin said about Beale's non-attendance of the January 8 planning meeting. *Id.* at 9-10.

131. After a week, Austin asked if the government had "had another opportunity to review the evidence purporting to show Ms. Beale at the planning meeting." DCX 146 at 1-2. Respondent replied that Austin "never bothered to ask, prior to [the February 9] hearing," if the government still believed it was Beale on the video, saying, "[e]arlier in the case, we did think it might be her but later identified" that as another person. *Id.* at 1. Austin took issue with her suggestion

that it was his responsibility to ask whether the government's position had changed, pointing out that Respondent had told him during a discovery conference that Beale had attended the planning meeting and never corrected herself. *Id.*

132. Based on the acknowledged misidentification of Beale at the January 8 planning meeting, Austin filed motions for *Brady* sanctions and to dismiss the indictment for vindictive or selective prosecution. Tr. 467, 469 (Austin); DCX 150. Austin argued that by not disclosing the government's misidentification, Respondent had withheld exculpatory information, and Beale's case should be dismissed like her boyfriend's. Tr. 466-67, 69 (Austin); DCX 150.

133. Respondent filed an opposition to Beale's motions. DCX 151. On May 18, 2018, Judge Morin heard Beale's motions. *See* DCX 131. During the hearing Kerkhoff contended that the January 8 misidentification of Beale "was never presented to the grand jury," which had returned an indictment based on other evidence. *Id.* at 27-28. She argued that the case should proceed to trial where the jury could "say whether they think it's her," but noted that her belief as the prosecutor was "something that's never presented to a grand jury." *Id.* at 31.

134. Respondent proffered to Judge Morin that after her May 2017 discovery conference with Austin she "provided him every video" of the January 8 meeting. DCX 131 at 27-28; *see* FF 123. Judge Morin asked if there was "any piece of evidence" that she had but Austin did not, and she replied, "No, Your Honor. He had it." DCX 131 at 29.

135. At the end of the May 18 hearing, Judge Morin ruled on Beale's *Brady* motion, finding the government had not suppressed evidence since Respondent had represented that "the evidence was provided to the defense." DCX 131 at 37. He nonetheless ordered her to "provide the court grand jury transcripts concerning Ms. Beale and any arguments made by the government to the grand jury about whether or not she should be indicted." *Id.* at 38. He took the motion for vindictive prosecution under advisement, and he continued Beale's case until her pre-trial hearing on July 13, 2018. *Id.* at 38, 47-48.

136. On June 19, 2018, Austin's associate, Miller, emailed Judge Morin's chambers and Respondent asking whether the government had complied with the May 2018 order to produce grand jury transcripts. DCX 192.

137. On June 20, Judge Morin's chambers responded that it did not believe it had "received the transcripts referenced" in Miller's email but deferred to the government to confirm. *Id.* at 1; Tr. 477-78 (Austin); Tr. 1053-54, 1061.

138. On June 20, Respondent realized, "we have this outstanding issue" because she came to believe that there might be a transcript of an April 25, 2017, grand jury proceeding. Tr. 1061; RX 62 at 31. This realization was prompted by the discovery of a grand jury exhibit dated April 25, suggesting that a grand jury proceeding must have occurred. Tr. 1062-63; DCX 193.

139. Respondent asked a supervisory paralegal to order the April 25 transcript "FAST." RX 43; *see* RX 62 at 31; Tr. 800. Her assistant ordered the transcript for return on June 28. DCX 195; *see also* RX 43 (5 business days).

140. On July 4, Austin and Miller filed a Motion to Dismiss the Indictment, which they emailed to Respondent. DCX 201. The first two sentences of the motion cited the government's failure to produce grand jury transcripts to Judge Morin as the basis for the motion. DCX 201 at 3.

141. On July 6, 2018, the government moved to dismiss all remaining cases against all still pending defendants, including Beale, without prejudice. DCX 202. That order was granted. Tr. 818.

142. On July 11, 2018, Beale moved for the Court to reconsider its dismissal order and dismiss her case *with* prejudice, citing her July 4 motion. DCX 203. That motion remained pending until March 2019. *See* FF 150, 153.

143. Although Respondent requested that the paralegal order the April 25 transcript to be delivered on June 28, she did not obtain it until July 11, when she emailed her assistant, who emailed her a pdf copy. DCX 204; Tr. 1066-67.

144. The April 25 transcript showed that Pemberton misidentified Beale to the grand jury and that Respondent's representation to the contrary before Judge Morin, *see* FF 133, was in error. RX 62 at 32.

145. On the morning of July 12, 2018, Respondent informed her supervisor, AUSA Tischner, about the April 25 grand jury transcript and her misstatement to Judge Morin about whether Beale's presence at the planning meeting was presented to the grand jury. *Id.*; Tr. 1065. AUSA Tischner told Respondent that she did not need to make any correction to Judge Morin at that time. Tr. 803-04. Respondent understood that the U.S. Attorney's Office would handle this matter, particularly

because the Office had (as a result of Judge Morin's sanction finding) previously instructed her not to appear in front of Judge Morin on any matter. Tr. 819.

146. One day later, on July 13, 2018, Respondent received an order from the Court requiring the government respond to Beale's motion to dismiss with prejudice. RX 48. Respondent immediately forwarded the order to AUSA Tischner. *Id.*; Tr. 1099.

147. On November 20, Respondent wrote to AUSA Goodhand and the AUSAs she supervised in the case to ask about the "next steps" for the "response(s) that have to be filed for the attorneys [sic] fees motions and the other motions that the court agreed to extend our response deadline." DCX 216.

148. On December 10, Respondent wrote to Goodhand and told him, "I have not been avoiding you." DCX 217. She said she was following what she understood to be the "protocol" because she was "told, early on in this process, that the front office wanted to have a separation between your independent review and me." *Id.* She said she had "no comments/edits on the pleading," but would gladly talk to him again if the "'Chinese wall' is ever deconstructed." *Id.*

149. Later that day, Goodhand filed the government's Opposition to Beale's (*see* FF 142) and another defendant's Motions to Dismiss the Indictment with Prejudice. DCX 218.

150. The motion hearing for Beale's and other defendants' pending motions was set for March 15, 2019. *See* RX 57.

151. On March 14, 2019, AUSA Alessio Evangelista, who served as the First Assistant to the United States Attorney, met with Respondent regarding facts surrounding the April 25, 2017, transcript and Beale. Tr. 821-22. AUSA Evangelista requested that Respondent provide a statement of facts and what Respondent would like to have presented to Judge Morin. Tr. 821, 1100-01.

152. In the early morning hours of March 15, 2019, Respondent sent an email detailing the facts of the Beale identification and grand jury transcript issue to AUSA Evangelista, AUSA Goodhand, and AUSA Baset. Tr. 1101; DCX 220. She stated that she had discussed the issue with her supervisor, AUSA Tischner, on July 12, 2018, and was advised that no further action on her part was necessary due to the posture of the cases, which had been dismissed without prejudice on July 6. DCX 220 at 2.

153. At the motion hearing, AUSA Goodhand said he had "some representations" that would "significantly truncate these proceedings." RX 57 at 5. First, the government was withdrawing its opposition to Beale's and other defendants' motions to dismiss their cases with prejudice. *Id.* Second, the government itself was moving to dismiss all defendants' cases with prejudice. *Id.* at 6. The Court granted that motion. *Id.* at 6, 9. Third, Goodhand disclosed Pemberton's misidentification of Beale in the April 25 transcript, which he explained, "we have recently discovered, as I was preparing for this motion hearing today" and emphasized the government was still investigating. RX 57 at 11.

IV. CONCLUSIONS OF LAW

Disciplinary Counsel contends that the foregoing facts demonstrate that Respondent acted in violation of Rules 3.3(a), 3.8(d) & (e), and 8.4(c) & (d). Respondent, by contrast, contends that all of her actions were reasonable, and comported with her discovery obligations as she understood them in light of the Court's orders.

For the reasons that follow, the Hearing Committee recommends the following conclusions. Clear and convincing evidence establishes that Respondent:

- Violated Rule 3.8(e) in that she failed to disclose exculpatory information contained in the Action Camp videos;
- Violated Rule 3.8(e) in that she failed to disclose exculpatory information by concealing that Project Veritas was the origin of the Planning Meeting and Action Camp videos;
- Violated Rules 3.3(a) and 8.4(c) in that she concealed material information relating to the Action Camp videos by concealing the existence of the videos and in summarizing the videos' content in response to Judge Morin's order; and
- Violated Rule 8.4(d) in that her conduct significantly adversely impacted the administration of justice.

As detailed more fully below, we also recommend finding that Disciplinary Counsel's remaining Specifications of Charges, relating to alleged violations of Rule 3.3(a), 3.8(d), and 3.8(e), were not supported by clear and convincing evidence.

Finally, we agree with Disciplinary Counsel that it failed to prove violations of Rules 3.4(a), (c), and (d) and Rule 8.4(a). Given Disciplinary Counsel's concession, Respondent did not advance any arguments regarding these alleged violations. We conclude that any arguable basis for misconduct arising from alleged violation of these Rules is adequately captured by our analysis of other Rules violations. We therefore do not address these alleged Rule violations separately.

A. Disciplinary Counsel Proved That Respondent Violated Rule 3.8(e) by Failing to Disclose Evidence That Tended to Negate the Guilt of the Accused.

Disciplinary Counsel has identified the following actions by Respondent that are alleged to have violated Rule 3.8(e). It is alleged that Respondent:

- Did not disclose that Project Veritas was the origin of the January 8 tapes.[13] Disciplinary Counsel contends that the identity of the source of the tape was materially relevant to the defense;
- Was responsible for editing the January 8 Planning Meeting tape segments that were disclosed in discovery to defense counsel in order to conceal the identity of an undercover Metropolitan Police officer; to obscure the existence of a Veritas undercover operative; and to delete a part of one tape that allegedly contained exculpatory information about defendants' lack of knowledge about the "upper echelon" of the organization;

---

[13] Although Disciplinary Counsel did not discuss this charge in the subsection of its brief addressing Rule 3.8(e), its proposed findings of fact alleged that it was improper, and Respondent responded in her brief. *See* Disciplinary Counsel's Post-Hearing Brief at 6-7; Respondent's Post-Hearing Brief at 12.

- Did not disclose other segments of the January 8 Planning Meeting video received from Project Veritas; and
- Did not disclose the Action Camp/Spokes Council tapes from January 14, 15, and 17, which showed planning for nonviolence and de-escalation training.

For the reasons that follow, we find that the last of these, relating to the Action Camp videos, involved conduct that violated the Rules. A majority of the Committee also concludes that the first allegation, relating to failing to disclose that Project Veritas was the origin of the videos, involved conduct that violated the Rules.

At the time of the underlying conduct,[14] Rule 3.8(e) provided:

> 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, . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

To prove a violation of Rule 3.8(e), Disciplinary Counsel must establish: (1) the existence of evidence or information that tends to negate the guilt of the accused or mitigate the offense (exculpatory information); (2) that the prosecutor was aware of this information and either knew that it is exculpatory, or the information was such that a reasonable prosecutor would know that it is exculpatory; and (3) the prosecutor intentionally failed to disclose this information to the defense upon

---

[14] Rule 3.8 was amended on April 7, 2025, in part to account for the Court's opinion in *In re Kline*, discussed below. In particular, Comment [1] was amended to conform to *Kline*. As noted, *see supra* n.2, we apply the Rules as in effect at the time of Respondent's alleged conduct.

request; *i.e.*, the prosecutor must act or fail to act with the purpose that information not be disclosed. *See In re Dobbie*, 305 A.3d 780, 793 (D.C. 2023) (citing *In re Kline*, 113 A.3d 202, 213 (D.C. 2015)).

Thus, the requirement to prove intentional conduct does not require proof that the prosecutor intended to violate his or her legal obligations to turn over exculpatory information or acted in bad faith. *See Dobbie*, 305 A.3d at 794-99; *see also Haines*, 341 A.3d at 627 ("The intentionality requirement is limited to the discrete act of nondisclosure of the information; the requirement does not concern any intent to deprive the defendant of the information."); *Kline*, 113 A.3d at 213 ("In assessing intent, the 'entire mosaic' of conduct should be considered." (quoting *In re Ukwu*, 926 A.2d 1106, 1117 (D.C. 2007)). At the time of Respondent's alleged conduct, Comment [1] to Rule 3.8 stated that the Rule was "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." However, in 2015, prior to the incidents under consideration in this Report, the Court of Appeals clarified that the Rule covers all exculpatory evidence, not just evidence "material" to the outcome of the trial, the standard set in *Brady v. Maryland*, 373 U.S. 83 (1963), to prevent prejudice to defendants. *See Kline*, 113 A.3d at 206-213 ("Retrospective analysis, while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations."); *see also United States v. Bagley*, 473 U.S. 667, 674-75 (formally adopting material-to-outcome standard).

1. ***Action Camp Videos*** – We begin our substantive consideration with Respondent's alleged decision not to disclose the Action Camp videos depicting de-escalatory and non-confrontational training. To prove a violation of Rule 3.8(e), Disciplinary Counsel must establish: that the videos tended to negate or mitigate a defendant's guilt; that Respondent knew of the information and either knew it was exculpatory or that a reasonable prosecutor would know it was exculpatory; and that the failure to disclose the information was intentional (*i.e.* not by mistake or accident). With respect to these videos, we think Disciplinary Counsel has established all three factors by clear and convincing evidence:

First, we think that the exculpatory nature of the videos is manifest. Then Chief Judge Morin was of the same opinion in finding a *Brady* violation (*see* FF 113) and we think his analysis, though not binding on the Committee, is correct:

> [T]he government was prosecuting defendants based on a theory of collective responsibility. Under conspiracy law, defendants who participate in a conspiracy can be held criminally liable for the conduct of other conspirators, even though the defendants did not personally engage in that criminal conduct or even know individuals who did. *Pinkerton v. United States*, 329 US 640 (1946).
>
> Consequently, the collective actions of persons who were engaging in relevant Inauguration planning activities, including evidence that persons were planning non-violent activities . . . would be important to the preparation of any defense and would, in some cases, be exculpatory as to whether any individual defendant was intending to engage in a conspiracy or riot.

DCX 215 at 4 (footnote omitted). None of the defendants in the first trial were alleged to have been personally violent, *see* FF 14, and their principal defense was

that they were present at the protest exercising their First Amendment rights, *see* FF 17-18.

Respondent points to evidence that contradicts this defense, including, for example, the fact that many defendants wore black clothing and failed to leave the protest once it became violent. *E.g.*, FF 16, 19, 20. And there is some justice to that claim, as those facts are ones from which a jury might infer an intent to join the conspiracy with an understanding of its violent intent. But given the contested nature of that claim and the overall context of the prosecution, there can be little doubt that evidence of non-violent intent would tend to support the defense by demonstrating a lack of intent to join a violent conspiracy.

Thus, the Committee concludes that the Action Camp videos would have tended to negate the defendants' alleged guilt.

Second, we must assess whether Respondent was aware of the information and viewed it as exculpatory, or whether a reasonable prosecutor would view the information as exculpatory. To this day, though Kerkhoff acknowledges she was aware of the Action Camp tapes, *see* FF 57, she contests the conclusion that the videos constituted exculpatory evidence, *see* FF 58. As Respondent put it in her post-hearing brief, she believes that the videos in question showed only training sessions about "harassment" and "intervening when someone is kicking a dog," which would *not* be exculpatory because they had "nothing to do with" the march. Respondent's Post-Hearing Brief at 38-39, 44-45.

But Respondent's belief does not control. A prosecutor violates the Rule even if she did not act "in bad faith" and was "simply mistaken as to the evidentiary significance of the information at issue." *Dobbie*, 305 A.3d at 794-95 (citing *Kline*, 113 A.3d at 214). We think, in the end, that it was objectively unreasonable for Kerkhoff to have reached the conclusion she did. The de-escalation videos were exculpatory because they contradicted the government's theory that the individuals who were charged acted collectively as part of a planned conspiracy for rioting, police provocation, and black bloc violence. As defense attorney Sara Kropf explained, she would have "hammered the jury" at the first trial with the videos on "peacekeeping and de-escalation." Tr. 135; *see* FF 64.

The evidence also shows that Respondent's attempt to minimize the exculpatory significance of the Action Camp videos is an incomplete summary of the record. Far more than dog-kicking and harassment were discussed. For example, one video shows a class discussion about avoiding confrontation, including the admonition that protestors should not try to change people's minds in "situations that are escalated," as for example, trying to talk "a Trump supporter" out of supporting Donald Trump during the Inauguration. DCX 233 (RECO-0008) (15:50:38–15:51:18). In another part of the video, the attendees practiced de-escalating "an angry Trump supporter" with a gun to protect "a group of black people." *Id.* (15:55:18); *see* FF 63.

Other videos of Action Camp classes also showed the same kind of training about de-escalation techniques and discussions about working with law enforcement

if there is violence. *See* FF 60; *see also, e.g.*, DCX 239 (FNN-*200219*) (21:45–24:08) (26:39–27:12), (FNN-*203247*) (8:22–11:14) (discussing police).

On the whole, then, we think that Judge Morin's assessment of the Action Camp videos reflects, as well, what a reasonable prosecutor assessing this evidence would have concluded—that given the government's theory of collective responsibility, any evidence negating an inference of intent to join the conspiracy was of potential significance. The Committee is therefore of the view that, notwithstanding Kerkhoff's belief to the contrary, a reasonable prosecutor would have understood that the Action Camp videos were objectively exculpatory.

Third, we turn to the most difficult question before us: whether Respondent's decision not to disclose the videos was intentional. The affirmative case for that conclusion is simple: Kerkhoff was aware that the tapes were in her possession and that Detective Pemberton had received them from Project Veritas. *See* FF 29, 56-57. She later told colleagues that she did not disclose the videos in discovery because "they did not fall within the Rule 16/*Brady* factors" she considered relevant. DCX 168 at 1. Clearly, her failure to disclose the videos was not the product of an accident. Accordingly, one might end the analysis by concluding that Kerkhoff's actions were purposeful and intentional and leave it at that. That assessment would not, however, do justice to Respondent's argument.

Judge Leibovitz's Cell Phone Order – First, Kerkhoff argues that her decision to withhold the tapes was not intentional withholding of exculpatory material because her decision was consistent with a prior Court order. Kerkhoff notes that

she had been ordered by Judge Leibovitz during discovery to limit the volume of cell phone information disclosed to defense counsel in order to avoid overwhelming the defendants with evidence. *See* FF 25. Respondent contends that the ruling on cell phone disclosures guided her as to the other video evidence and that her understanding of the order was reasonable. If we were to accept this argument, we would, in effect, agree with Kerkhoff's contention that the failure to disclose the Action Camp tapes was the product of a reasonable mistake.

With respect, the Committee does not accept Respondent's submission. We do not think it was reasonable to extrapolate from Judge Leibovitz's order regarding cell phone videos to a similar limitation on the disclosure of videos made by Project Veritas. Judge Leibovitz's cell phone order was motivated by two significant concerns:

First, given the number of defendants, the volume of material contained on their collective cell phones would have been substantial—hence the defendants' concern that they would receive a "dump truck" of information, disabling their ability to sift the wheat of relevant evidence from the voluminous chaff of cell phone detritus. RX 9 at 43.

Second, Judge Leibovitz understood that there was significant concern about the privacy of materials contained on individual cell phones. Not all of the information would be germane to the riot prosecution. Indeed, most of it would consist of irrelevant personal materials such as contacts, photos, and the like. *E.g.*, RX 9 at 45 ("photographs from their trip to Cancun").

Given those two concerns, Judge Leibovitz directed Respondent to make only limited disclosures from the voluminous cell phone records collected, focused particularly on information from the cell phones that the government would plan to use as part of its proof. *See* FF 25.

It was unreasonable for Respondent to have taken that direction regarding cell phone evidence and construed it as an order to similarly limit disclosure of the Veritas videos. The Action Camp videos suffer from neither of the challenges that motivated Judge Leibovitz's direction as to cell phone data. The videos were not voluminous and thus not fairly characterized as a "dump truck" of information. They consisted of, at most, five undisclosed video files, *see* FF 57, a far less daunting amount of data. And Judge Leibovitz had already determined that there was not a privacy issue with videos made where there was no reasonable expectation of privacy. FF 68.

Thus, the two situations—private cell phone records and undercover videos of public meetings—do not seem to us at all equivalent. At a minimum, this latter protective order holding in October 2017 ought to have made clear to Respondent that the rationale for the cell phone record order was inapplicable to non-law enforcement videos of a public meeting. And so, we do not credit Respondent's argument that she was constrained by Court order to withhold the Action Camp videos—it is simply an untenable argument.[15]

---

[15] Even less persuasively, Respondent also relies on an admonition by Judge Leibovitz against the introduction of irrelevant video evidence far afield from the

Judge Morin's April 6 Order – We also think that Respondent's argument is untenable in light of the events that occurred before Judge Morin on April 6, 2018, during discovery proceedings relating to the fourth scheduled trial (but before the start of the second, May 2018, trial). *See* FF 91, 99. Judge Morin entered an order requiring the government to provide the "entirety" of the video footage it had—an order which if interpreted literally would encompass the Action Camp exculpatory videos. FF 95.

Respondent contends that she reasonably construed the order as applying only to require her to disclose the previously undisclosed segments of the January 8 Planning Meeting. And her actions the next week in making that disclosure, *see* FF 98, support her testimony as to her contemporaneous understanding of the order.

Nevertheless, we are unpersuaded that Respondent's interpretation of the order was a reasonable interpretation of what Judge Morin said. The hearing, to be sure, was "primarily" about "a video of the planning meetings." FF 91. But Judge Morin began the hearing by setting the motion to compel production in a broader context. He asked Respondent for "the government's position on what they have and what's available to them." FF 91. Respondent said that Pemberton requested "unedited video" from Project Veritas, "[t]hey provided unedited video," and "[w]e posted the video." FF 91. None of those representations were caveated in any way.

---

riot. *See* DCX 84 at 176-77 (characterizing video evidence of, e.g., the inauguration or a visit to a "Beer Garden," as irrelevant). We think it is clear that a general rejection of the introduction of irrelevant evidence cannot be read as permission to withhold in discovery an exculpatory video.

Later in the same hearing, Respondent sought permission to admit statements that Officer Adelmeyer allegedly overheard at a January 14 meeting and a smaller, January 18 orientation meeting at someone's house that was specific to Adelmeyer's SURJ affinity group. In response, Judge Morin told her: "if there were statements about nonconfrontation, nonviolence, that I mean, obviously, I'm not telling you anything new, but . . . I'm just saying from the Court's point of view, the entire context of what [Adelmeyer] overheard has to be provided to the defense" under the "doctrine of completeness, *Brady*, if there was discussions about nonviolence, all that has to be put in a context where the defendants and the Court can understand it." FF 97. Though the context for this discussion was a particular meeting that Adelmeyer attended, we do not think that Kerkhoff could reasonably have thought that her *Brady* obligations only encompassed statements about nonconfrontation and nonviolence that occurred at that specific meeting. Rather, it appears to us clear that Judge Morin understood that all statements relating to nonconfrontation or nonviolence were subject to the requirements of *Brady* disclosure.

When he later reviewed Respondent's conduct on this specific point, Judge Morin reiterated his understanding of what had happened. He noted that based on Respondent's representations, Judge Morin and defense counsel were "operating under the assumption that" Respondent had disclosed all the videos she had "concerning this matter except for the two cropped pieces from the January

meeting." FF 96. Indeed, as Judge Morin wrote in his review of the *Brady* violation, the misperception left by Respondent was substantial:

> At the beginning of that hearing, the Court made a broad inquiry "to get the government's position on what they [the government] have and what's available to [the defense] or not[.]" 4/6/18 Tr. at 8. This general question was asked in the context of available Project Veritas videos. Apparently, the government interpreted this inquiry as narrowly directed only to the Project Veritas videos it had already produced and redacted, rather than as a general inquiry as to all items from Project Veritas that were in the government's possession. Similarly, at the conclusion of the April 6 hearing, after extensive discussion about the Project Veritas videos and the redactions made by the government, the Court formally ordered "the entirety of what is in the government's possession to be turned over to the defense." 4/6/18 Tr. at 19.

Id. (alterations in original). From our perspective either Respondent was deliberate in her misinterpretation of Judge Morin's direction or, more likely, reckless in her interpretation of his order. Either way, the order informed Respondent's decision as to what material to produce, and further supports our finding that her withholding of the Action Camp videos was intentional.

Other Video Discovery Action – As further support for our conclusion that Respondent intentionally withheld the Action Camp videos, the Hearing Committee notes that in other instances when the discovery of video evidence was considered, Kerkhoff allowed ambiguous representations as to the scope of discovery to go unclarified, and then interpreted those representations narrowly.

Consider an early arraignment hearing that occurred on March 17, 2017 (the day *after* Kerkhoff had posted the first four edited segments of the January 8 Planning Meeting video to the discovery portal, *see* FF 36-37). In response to a

defense lawyer saying that he intended to make "a formal discovery demand," Judge Leibovitz (who was, at that time, managing discovery for all cases) announced that the government was providing "discovery to everyone by means of a portal and is giving everybody **a hundred percent of the video footage they have**." FF 37 (emphasis added). Judge Leibovitz also announced that defense counsel could issue "subpoenas for videotapes and other materials from private entities." FF 37.

Respondent contends that this promise of all video footage was limited to all videos taken of the riot on January 20. But a reading of the transcript makes it clear that no such limitation was ever explicitly stated. While it is possible, given the context, that Judge Leibovitz meant to say that the government had promised to disclose a hundred percent of the January 20 video, on the record before us the Judge far more plausibly intended to say that she construed Respondent's representations as promising the disclosure of a hundred percent of *all* footage the government had—a promise that would, of course, have included the exculpatory videos at issue in this proceeding.

In our view, Kerkhoff could not, reasonably, have understood Judge Leibovitz's representations to encompass only January 20. As noted, just the day before, she had posted to the discovery portal the video segments of the January 8 Planning Meetings (*see* FF 36)—*i.e.* videos that were not from January 20. Thus, at a minimum, on the day of arraignment, she knew that one day earlier, she had already provided some non-January 20 video. Her construction of a discussion of video disclosures to *exclude* a disclosure she had made one day earlier is, at best, strained

and unpersuasive. And if there was any confusion on her part, then Kerkhoff might have sought clarification of the matter directly or expressed her own understanding on the record. Respondent did neither of these and chose instead to implement her discovery obligations as she understood them to be.

To similar effect, in August 2017, a defense lawyer asked about the disclosure of video evidence which she thought had already taken place. Judge Leibovitz explained that the issue under discussion was that the government had not yet disclosed all the cell phone information (including videos) from individual defendants. But, the Judge noted, the Respondent had disclosed "videos of all this stuff that they got from wherever they got them." FF 53. Once again, a broad statement that was potentially ambiguous was construed by Respondent in one manner (she did not voice an objection or offer a clarification) had a different import for others.

Our conclusions as to Respondent's overall approach to video discovery support our determination that Respondent was not justified by Judge Leibovitz's order to withhold the Action Camp tapes. Rather, withholding the Action Camp videos was, in our view, consistent with and part of her systematic approach to video discovery and inconsistent with the asserted good-faith nature of her belief that the Court's cell phone order controlled.

* * *

For all these reasons, we recommend finding that Respondent's action in withholding the Action Camp videos was intentional. We further recommend

finding that Respondent's asserted reliance on the Court's cell phone disclosure order as grounds for her decision is unpersuasive. Given these conclusions—that the Action Camp videos were objectively exculpatory and that Kerkhoff intentionally withheld them—the Committee recommends that Respondent be found to have violated Rule 3.8(e).

2. ***Edits to the January 8 tape*** – Before producing the January 8 Planning Meeting tape, Respondent and Pemberton made three substantive alterations or redactions to the tape as follows: First, they produced only four segments of the January 8 tapes they received from Project Veritas, while choosing not to disclose an additional three tape segments. *See* FF 32-33. Second, they edited the tape segments produced to conceal the identities of Officer Adelmeyer and the Veritas videographer, "Matt." *See* FF 33a and 33b. Third, Pemberton edited one portion of the tape to end it prior to a post-meeting commentary indicating that the members of the meeting were not aware of the "upper echelon" responsible for organizing the protest. *See* FF 33c.

As to these actions,[16] the Committee concludes that Disciplinary Counsel has not proven a violation of Rule 3.8(e) for the following reasons:

- As to the three preliminary segments of the January 8 tapes that were not disclosed, it is clear to us that in context, the undisclosed portions are not exculpatory. Each of the tape sections contains general preliminary

[16] We discuss the edit of "Matt's" identity and Project Veritas independently in the next subsection.

material relating to the protests and generally peaceful conduct. But having reviewed the tapes, we see no substantive discussion of non-violence or de-escalation training in the tape segments. Though the Committee is of the view that the wiser practice would have been to disclose the entirety of the tapes under Rule 16, we cannot say that the failure to produce them was a violation of Rule 3.8(e), which requires only the disclosure of exculpatory information that tends to negate guilt.

- Similarly, the redaction of the identity of the undercover officer, Adelmeyer, was not the concealment of exculpatory information. Indeed, it was common practice in the U.S. Attorney's Office for reasons of officer safety. Tr. 1012-13. More importantly, at the end of the day, Officer Adelmeyer was one of the principal witnesses in the two trials and thus his identity was not concealed. Accordingly, we likewise do not see this action as a violation of the Rule.
- Finally, we agree with Judge Morin (*see* FF 102) that the undisclosed portion of the tape relating to defendants' lack of knowledge of the "upper echelon" was exculpatory *Brady* information that ought to have been disclosed. We credit, however, Kerkhoff's testimony that she was unaware of that portion of the tape. *See* FF 34-35; *see also* DCX 162; Tr. 937. Our own review confirms that a significant gap in the recording of more than a minute and a half without audio or visual after the operative exited the meeting and zipped his coat might reasonably have led any listener to

believe that the recording was complete. Hence, we conclude that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent was aware of the exculpatory material and thus failed to prove that her withholding of it was a violation of the Rule.

3. ***Refusing to Identify Project Veritas*** – There is disagreement within the Hearing Committee about whether Respondent's decision not to identify Project Veritas as the source of the videos constituted an independent Rule 3.8(e) violation. A majority of the Committee concludes that it did, as discussed below. The Hearing Committee Chair filed a dissenting opinion, *infra*, contending that Respondent's refusal to identify Project Veritas was not a separate violation.[17]

The D.C. Court of Appeals has held that "exculpatory evidence must be disclosed in time for the defense to be able to use it *effectively*, not only in the presentation of its case, but also in its trial preparation. . . . '[T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use.'" *Miller v. United States*, 14 A.3d 1094, 1111-12 (D.C. 2011) (emphasis added) (first citing *Lindsey v. United States*, 911 A.2d 824, 839 (D.C. 2006) and *Edelen v. United States,* 627 A.2d 968, 970 (D.C. 1993); and then quoting *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001)); *see also In re Haines*, Board Docket No. 20-BD-041, at 41-42 (BPR July 31, 2023) ("*Haines* Bd. Rpt.") ("In the District of Columbia, defense counsel must be

---

[17] The Committee Chair joins fully in the remainder of the Committee's Report, including the recommended sanction.

provided with exculpatory evidence with sufficient time to permit 'effective' use of the evidence at trial and 'effective use' contemplates some ability to investigate that evidence."), *recommendation adopted in relevant part*, 341 A.3d at 611. Additionally, "the more a piece of evidence is valuable and rich with potential leads, the less likely it will be that the late disclosure provides the defense an 'opportunity for use.'" *Miller*, 14 A.3d at 1111-12 (quoting *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)).

In *Haines*, the Court found a Rule 3.8(e) violation by a prosecutor under similar circumstances. During a high-profile murder investigation, experienced AUSA Amanda Haines discovered evidence that could impeach the government's key witness. 341 A.3d at 621. Specifically, Haines learned that the witness—who was prepared to testify that the defendant gave him a jail house confession—had previously "debriefed" with law enforcement. *Id.* This conflicted with his grand jury testimony that he only came forward following a moral epiphany. *Id.* Although Haines found that the evidence of this communication was harmful to her case, she nonetheless determined that it was not exculpatory and concealed this information from defense counsel. *Id.* at 623 (despite not disclosing communications, record indicated that Haines prepared the witness for the possibility of this information coming to light, stating that she wanted to "take the sting out of [it]"). Following the trial, defense counsel discovered the witness's prior communication with law enforcement and moved for a new trial, which led to multiple hearings and a Department of Justice investigation. *See id.* at 625. This subsequent investigation

uncovered the witness's extensive history of cooperation with law enforcement that defense counsel would have used to impeach his credibility concerning the defendant's jail house confession. *See id.*; *Haines* Bd. Rpt. at 17, 21 (defense counsel testified that she could have effectively used this information to impeach the witness). The government then moved to dismiss the case without prejudice. *Haines* Bd. Rpt. at 22. It decided it could no longer sponsor the witness and could not prosecute the defendant without him. *Haines* HC Rpt. at 25 (Feb. 24, 2022).

Here, Respondent declined to disclose that Project Veritas was the source of the videos of the Planning Meeting, despite defense counsel's repeated requests for identification during discovery. *See* FF at 69, 70; *see also* FF 72 (request for chain of custody). Respondent was fully aware that Project Veritas had a reputation for anti-left bias. *See* FF 28, 30. Respondent was also aware that in prior events Project Veritas has been accused of altering videos to suit its political agenda. *See* FF 28.

Indeed, when Respondent mentioned Project Veritas in the first grand jury, she got significant pushback from one of the grand jurors. DCX 5 at 22-24. According to her own words, the origin of the videos was a "can of worms," FF 28, and the record demonstrates that she made every effort to prevent the defense from discovering this fact—including not presenting the Veritas origins to the second grand jury, FF 46, and arguing during the first trial that disclosure of this information was irrelevant, FF 73.

Specifically, when defense counsel proffered that they believed the video came from a biased organization, which it argued made the video "particularly

susceptible to manipulation and adulteration," DCX 78 at 72-74, Respondent objected:

> MS. HEINE: The Government hasn't identified who that is. We believe it was provided by –
>
> MS. KERKHOFF: Objection. Who provided it is irrelevant.

DCX 78 at 71. This objection prompted Judge Leibovitz to ask Respondent, "have you disclosed the nature of the organization?" DCX 78 at 75. Despite defense counsel's repeated requests for this information during discovery, Respondent offered the false representation that no one "ever asked" for the "identity of the tapers," *Id.* at 74, a statement we do not find credible. At this point, for the first time, Respondent identified Project Veritas as the source of the videos. *Id.* at 75; Tr. 104-05 (Kropf).[18]

As the Court of Appeals emphasized in *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010):

> [T]he critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel, who has a different perspective and interest than the police or prosecutor. . . . It is not for the prosecutor to decide not to disclose information that is on its

[18] Although Respondent's use of Officer Adelmeyer to authenticate the video—as someone who attended a portion of one of the plannings meetings—was proper, the admissibility of the Project Veritas video does not relieve her of the obligation to identify the source. On the contrary, Respondent recognized the peril to the prosecution from presenting evidence from a source known for bias and unethical editing practices and elected to obfuscate that information. Defense counsel was not adequately prepared to cross-examine Officer Adelmeyer regarding the veracity of the evidence he authenticated absent timely disclosure of the source.

> face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial . . . .

See also Haines, 341 A.3d at 631 (construing *Zanders* as providing that federal prosecutors are "trained to err on the side of providing potentially exculpatory evidence").

As in *Haines*, if Respondent had provided the identity of the source, which would have directly led to the identity of the videographer during discovery, then the defense counsel in the first trial could have engaged in meaningful investigation to determine its exculpatory value. *See Haines*, Board Docket No. 20-BD-041, Bd. Rpt. at 41-42 (recommending that Haines be sanctioned for depriving the defense of "effective use" of potentially exculpatory information). Constrained by the late notice, defense counsel was unable to investigate or make full effect of this exculpatory information.

Moreover, Respondent's concealment of Project Veritas's role in producing the videos during the first trial—and continued obfuscation before Judge Knowles—hampered discovery efforts in the second trial. Defense counsel in the second trial did not have access to the Action Camp videos. Judge Morin—who was handling parallel discovery matter in the fourth trial—ordered that the Project Veritas videographer be made available to counsel representing defendants in the fourth trial. FF 102. In response to this order, defense counsel in the second trial learned of the existence of the most exculpatory videos—the Action Camp videos. *See* FF 103-04, 111. Respondent's ultimate disclosure of the existence of the Action Camp videos does not excuse her earlier failures to disclose the role of Project

Veritas with "sufficient time to permit 'effective' use of the evidence at trial." *Haines*, Board Docket No. 20-BD-041, Bd. Rpt. at 41-42.

The Chair's dissenting opinion assumes that those videos were the only exculpatory information that could have been learned from the earlier disclosure of Project Veritas's role. But that is not the case. The second-trial defense counsel—who interviewed "Matt, the videographer"—explained to Judge Knowles that the leads provided by Matt were much broader. After bringing up the Action Camp videos, defense counsel continued:

> [Matt] told us that there were two January meetings in houses that he attended, planning meetings. One was in the 16th Street neighborhood and one was in Columbia Heights. He didn't recall the dates. Recall that, if you would, Your Honor, that Officer Adelmeyer testified about one small planning meeting at someone's house. So there was apparently at least one other. Both of these meetings in someone's house were attended by Matt. He recorded both. He took notes on both. He also told us that he does not recall any discussion about property damage at any of those meetings, either the AU meeting *or the two in people's homes*, and this would contradict the testimony of Officer Adelmeyer and, obviously, be exculpatory to the defense. . . .
>
> Matt also told us that he's aware of two meetings that Project Veritas personnel had with the FBI prior to January 20th. He told us that the FBI visited a house in which he lived at the time along with several other Project Veritas personnel. He also told us that Project Veritas personnel met with the FBI at the Washington Field Office, again, prior to January 20th. Matt would not tell us who from Project Veritas met with the FBI.

DCX 166 at 8-12 (emphasis added). Matt also disclosed that eight different Project Veritas operatives had infiltrated various Disrupt J20 meetings, some of whom made recordings, but refused to reveal their identities. *Id.* at 8. Thus, defense counsel

could have investigated whether different videos or accounts of the planning meetings contradicted the evidence presented by the government. *See id.* at 12-13 (describing questions defense counsel sought to ask Detective Pemberton following their meeting with Matt).

By repeatedly concealing Project Veritas's role in producing the videos, Respondent's acts of concealment effectively deprived defendants in the first two trials of "a piece of evidence [that] is valuable and rich with potential leads." *Haines*, Board Docket No. 20-BD-041, Bd. Rpt. at 42 (quoting *Miller*, 14 A.3d at 1111-12). The fact that defense counsel ultimately did not need to explore those leads, however, does not make Respondent's conduct less culpable, because Rule 3.8(e) is concerned with prosecutors' conduct, not harm to the defendants. *See Kline*, 113 A.3d at 207-213. Accordingly, the Hearing Committee majority recommends a finding that Disciplinary Counsel has proven by clear and convincing evidence that Respondent denied defendants the "procedural justice" required by Rule 3.8(e) when she refused to disclose the role of Project Veritas. Rule 3.8, cmt. [1].

B. Disciplinary Counsel Proved That Respondent Violated Rule 3.3(a) by Knowingly Making False Statements to a Tribunal, Offering False Evidence, and/or Failing to Correct Materially False Statements to the Court.

Disciplinary Counsel has identified the following actions by Respondent that are alleged to have violated Rule 3.3(a). It is alleged that Respondent:

- Edited a court-ordered disclosure relating to the Action Camp/Spokes Council videos to conceal their exculpatory nature; and

- Failed to correct her representations to the Court regarding the mistaken identification of one defendant in front of the grand jury.

For the reasons that follow the Committee recommends a finding that Respondent violated Rule 3.3(a) in her statements to the Court about the existence of the Action Camp videos and in editing the court-ordered disclosure, thereby concealing material information, but finds that Respondent did not violate Rule 3.3(a) insofar as she failed to correct her mistaken statement to the Court regarding a grand jury identification.

Rule 3.3 provides, in relevant part :

> A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6; . . . or (4) Offer evidence that the lawyer knows to be false, except as provided in paragraph (b). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The obligation under Rule 3.3 to speak truthfully to a tribunal is one of a lawyer's "fundamental obligations." *In re Ukwu*, 926 A.2d at 1140 (appended Board Report). Unlike Rule 8.4(c), which can be violated based on reckless conduct, Rule 3.3 requires the Respondent to "knowingly" make a false statement. As the Board noted in *Ukwu*, it is important for the Hearing Committee to determine (1) whether Respondent's statements or evidence were false, and (2) whether Respondent knew that they were false. *Id.* at 1140. The term "knowingly" "denotes actual knowledge of the fact in question" and this knowledge may be inferred from the circumstances.

Rule 1.0(f); *cf. In re Spitzer*, 845 A.2d 1137, 1138 n.3 (D.C. 2004) (noting respondent could not "knowingly" violate Rule 8.1(b) without actual knowledge of a Disciplinary Counsel investigation).

Critically, for purposes of this Hearing Committee, Comment [2] to Rule 3.3 provides that "[t]here may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." *See, e.g.*, *In re Samad*, 51 A.3d 486, 499 & n.8 (D.C. 2012) (per curiam) (finding that intentional failure to correct a judge's misimpression about the respondent's obligations in another case violated Rule 3.3(a)).

1. ***Edited Disclosure*** – In the lead up to, and during the second trial, Respondent made several statements relating to the videos in her possession. After disclosing the three video segments from January 8 that had not been previously disclosed (*see* FF 98) Respondent told Judge Knowles, "We have no other videos from January 8th from Veritas. No other audio recordings from January 8th. We have nothing." FF 106. Since the de-escalation videos are from dates other than January 8 these statements are strictly accurate.

Respondent went on to say: "We have no recording, audio or otherwise, of any other planning meeting or breakout session on the Anti-Capitalist Bloc." FF 106. This statement was inaccurate, *see* FF 109, but the Committee concludes that Disciplinary Counsel has not met its burden of proving that it was knowingly false—*i.e.* that at the time she made the statement to the Court, Respondent had a

present recollection of the video from January 17 that discussed the Anti-Capitalist bloc.

To seek greater clarity from the government, Judge Morin ordered the government to provide a full written summary of any undisclosed Project Veritas videos. *See* FF 107. Respondent prepared a written summary and edited it. *See* FF 108. In preparing the written summary, Kerkhoff deleted certain phrases that disclosed the exculpatory nature of the undisclosed videos. In particular, Respondent deleted a reference to another "break-out session for role-playing and practice how to de-escalate." FF 109. She also deleted the summary phrase, "if you see violence, you should report it to the ACLU and sometimes to law enforcement." FF 109. And she deleted a disclosure that one of the videos "end[s] with a phone conversation between the videographer and a third person." FF 109.

Given that the "upper echelon" video (the one referenced in the deleted phrase "ends with a phone conversation between the videographer and a third person") had already been the subject of a *Brady* motion (FF 101) and held to be either a *Brady* violation or a violation of Rule 16 (FF 102), the purpose of this deletion cannot have been to prevent disclosure of the existence of the tapes. Rather all of these deletions (and most notably the deletion of references to de-escalation and reporting to law enforcement) can only have been intended to elide the true nature of the videos that had not yet been disclosed. Even at this late date, while under an affirmative order from the Court to provide a summary of the videos that

had not been disclosed, Respondent was unwilling to provide the Court with a full and truthful accounting of her actions.

We accept that Kerkhoff was editing the summary for Judge Morin while in trial before Judge Knowles. But we cannot accept the implicit argument that the deletions were the product of mistake or haste. The deletions are too systematic in their nature—uniformly excluding descriptions that would characterize the undisclosed videos as exculpatory. The Hearing Committee is therefore of the view that these specific edits were the knowing concealment of a material fact (namely the exculpatory nature of the videos that were yet to be disclosed). Accordingly, we conclude that Disciplinary Counsel has proven by clear and convincing evidence that in editing this disclosure that was required by a Court order and sending the edited disclosure to the Court, Respondent knowingly suppressed a material fact, in violation of Rule 3.3(a).

2. ***Grand Jury Identification*** – It is beyond dispute that initially Respondent and Pemberton identified Cassandra Beale as being present at the January 8 planning meeting and that Kerkhoff informed Beale's counsel of this identification in May 2017. *See* FF 122-23. It is equally clear that in February 2018, Respondent and Pemberton realized that they had made an error and misidentified Beale as being at the planning meeting. *See* FF 126-27. Later that month Kerkhoff informed Beale's counsel of the mistaken identification. *See* FF 131.

Relying on the misidentification and alleging that it was the withholding of exculpatory *Brady* material, Beale moved to dismiss the indictment against her. *See*

FF 132. In opposition to the motion, Kerkhoff told Judge Morin that the misidentification had "never [been] presented to the grand jury." FF 133. Respondent made that representation based on her review of the grand jury transcripts in her possession, which she had obtained prior to the start of the first trial in November 2017. Tr. 796, 816.

Her representation to the Court was, however, in error. It later became apparent that during an April 25 appearance, Pemberton misidentified Beale to the grand jury. *See* FF 144. Given the context, however, we have no doubt that Respondent did not know of the error at the time she made the representation to Judge Morin and thus that the representation itself is insufficient to establish a violation of Rule 3.3(a) by clear and convincing evidence.

The more difficult aspect of this question arises from events that occurred after the hearing before Judge Morin. At the hearing on May 18, Judge Morin directed Respondent to "provide the court [with] grand jury transcripts concerning Ms. Beale." FF 135. We credit Respondent's testimony that she ordered the April 25 transcript on June 20 when she realized she did not have a copy. *See* FF 138-39. Although the transcript was requested for delivery on June 28, it was not received by Respondent until July 11. *See* FF 143. As noted, the transcript revealed that Respondent's representation to Judge Morin (*see* FF 144) was in error.

Respondent informed her supervisor of the error the next day and her supervisor told her that she should take no action. FF 145. As a result of the May

31 finding that Kerkhoff had violated the requirements of *Brady* (FF 113) she was not permitted to appear further in front of Judge Morin. *See* FF 145.

We credit this testimony. First, it is an entirely logical way for the U.S. Attorney's Office to operate. As soon as a finding of a *Brady* violation is entered, one would expect the Office to (as it did here, *see* FF 115) conduct an independent review and sideline the impacted attorney—both for her own sake and for the protection of the reputation of the office.

Second, and more importantly from the Committee's perspective, documentary evidence supports Respondent's testimony. Two days after she received the grand jury transcript, Kerkhoff received an order from the Court requiring the government to respond to Beale's motion to dismiss with prejudice. FF 146. Rather than answer that motion, consistent with her understanding of her role, Respondent also forwarded that order to her supervisor. *See* FF 146; RX 48.

We cannot know for certain what transpired thereafter. The record before us is silent as to the actions of Respondent's supervisor, AUSA Tischner, upon his receipt of her email. We do know, because there is documentary evidence, that on the day of the hearing on Beale's motion to dismiss, Kerkhoff communicated similar information to the AUSA who was conducting the independent review, *see* FF 152, and that at the hearing, the AUSA confessed error. *See* FF 153.

Here, as noted, the original misrepresentation was neither intentional nor knowing. It was not until the grand jury transcript was received on July 11 that the erroneousness of the representation was revealed. There is, of course, some justice

to the idea that Respondent had a personal obligation to correct the record of her own misrepresentation. But given the context in which this arose—her awareness coming *after* she had already been condemned for a violation of *Brady*—we think that Respondent's reliance on her supervisor to correct the record was reasonable. *See Haines*, 341 A.3d at 611 ("It would be unreasonable to hold Mr. Campoamor-Sánchez violated the Rules when he acted in accord with instructions from the lead trial attorney . . . .").

Accordingly, as to the failure to correct the misrepresentation to the Court of the nature of the grand jury misidentification of Beale, we recommend a finding that Disciplinary Counsel has not proven the allegation of a violation of Rule 3.3(a) by clear and convincing evidence.

C. Disciplinary Counsel Proved That Respondent Violated Rule 8.4(c) by Engaging in Dishonesty, Fraud, Deceit, and/or Misrepresentation.

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Dishonesty is the most general of these categories. It includes "not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (per curiam) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). The Court holds lawyers to a "high standard of honesty, no matter what role the lawyer is filling," *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because "[l]awyers have a greater duty than ordinary citizens to be

scrupulously honest at all times, for honesty is 'basic' to the practice of law." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc) (quoting *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc)). If the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.*; *see also In re Uchendu*, 812 A.2d 933, 939 (D.C. 2002) ("[S]ome evidence of a dishonest state of mind is necessary to prove an 8.4(c) violation."). Dishonest intent can be established by proof of recklessness. *See Romansky*, 825 A.2d at 315, 317.

To prove recklessness, Disciplinary Counsel must establish by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.*; *see, e.g.*, *In re Boykins*, 999 A.2d 166, 171-72 (D.C. 2010) (finding reckless dishonesty where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers). The entire context of the respondent's actions, including their credibility at the hearing, is relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam). In *Dobbie*, the Court found that prosecutors who failed to disclose exculpatory information to the defense violated Rule 8.4(c)

because they acted with "reckless disregard for whether the defense would ever know the truth about [a key witness]'s conduct" by forcing the defense to rely on a misleading summary of a piece of evidence instead of disclosing it in full. *Dobbie*, 305 A.3d at 807.

Rule 1.0(d) defines fraud as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." The Court has held that fraud "embraces all the multifarious means . . . resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). Fraud requires a showing of intent to deceive or to defraud. *See Romansky*, 825 A.2d at 315; *Hutchinson*, 534 A.2d at 921, 923 (finding no violation of the predecessor to Rule 8.4(c) where the respondent committed misdemeanor violation of Securities Exchange Act of 1934 and crime did not require proof of specific intent to defraud or deceive).

Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead." *Shorter*, 570 A.2d at 767 n.12 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity, but it is not necessary that the respondent have intent to deceive or defraud. *See In re Schneider*, 553 A.2d 206, 207, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm and there was no personal gain).

Finally, misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also Schneider*, 553 A.2d at 209 n.8 (misrepresentation is an element of deceit). Misrepresentation requires active deception or a positive falsehood. *See Shorter*, 570 A.2d at 768. The failure to disclose a material fact also constitutes misrepresentation. *Outlaw*, 917 A.2d at 688 ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." (citations omitted)); *see, e.g.*, *Reback*, 513 A.2d at 228-29 (respondents neglected a claim, failed to inform client of dismissal of the case, forged a client's signature onto second complaint, and had the complaint falsely notarized); *In re Lattimer*, 223 A.3d 437, 451 (D.C. 2020) (per curiam) (respondent stated as fact a proposition that was contradicted by the only relevant evidence in the record); *In re Scanio*, 919 A.2d 1137, 1139-1144 (D.C. 2007) (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate). As with dishonesty, Disciplinary Counsel does not need to establish that a misrepresentation was deliberate, only that it was made with "reckless disregard for the truth." *In re Brown*, 112 A.3d 913, 916, 918 (D.C. 2015) (per curiam); *see, e.g.*, *In re Jones-Terrell*, 712 A.2d 496, 499 (D.C. 1998) ("Even if they were, at least in part, attributable to [r]espondent's haste in preparing the petition, the false statement and omissions were of such significance to the issues before the court that we believe her conduct was at least reckless and sufficient to sustain a violation of the rule." (quoting Board Report)).

1. *Charged Misconduct* – For reasons we have outlined in prior sections of this Report, we think it clear that Respondent's conduct violated Rule 8.4(c).

First, as was the case in *Dobbie*, Kerkhoff's failure to disclose exculpatory information to the defense (*see supra* §§ IV.A.1 and IV.A.3) violated Rule 8.4(c) because she acted with "reckless disregard for whether the defense would ever know the truth about" the de-escalation training by providing the defense with misleading assurances that discovery had been complete. *Dobbie*, 305 A.3d at 807.

Second, as to her concealment of the exculpatory nature of the videos in her response to Judge Morin's order (*see supra* § IV.B.1), we think it clear that Respondent engaged in "conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness." *Samad*, 51 A.3 at 496 (quoting *Shorter*, 570 A.2d at 767-68). Her withholding of that information was "obviously wrongful and intentionally done." *Romansky*, 825 A.2d at 315. Hence, "performing the act itself is sufficient to show the requisite intent for a violation." *Id.*

For these reasons, as to the *Brady* violations and the material concealment in the disclosure to Judge Morin, the Committee recommends a finding that Disciplinary Counsel has proven a violation of Rule 8.4(c) by clear and convincing evidence.

2. *Uncharged Misconduct* – During the course of its review of the evidence, the Hearing Committee identified another instance of conduct by Respondent that was troubling. This conduct was not affirmatively identified by Disciplinary Counsel as the basis for an alleged Rule 8.4(c) violation. Accordingly, Respondent

had no opportunity to offer an explanation or response, and Disciplinary Counsel made no effort to meet its burden of proving a violation of the Rules. In light of this, the Committee has not relied upon this conduct in assessing recommended sanctions, nor has it had recourse to this conduct as evidence of the Respondent's overall intent. We summarize the evidence here because of its disturbing nature and for such contextual use as the Board might wish to put it to.

The Committee's review of evidence in the record supports a finding that other portions of her communications with the Court were deceitful in the sense that they involved the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead." *Shorter*, 570 A.2d at 767 n.12 (citation omitted).

Recall that during the discovery proceedings on May 23, 2018, Judge Morin had ordered Respondent to make the Project Veritas operative available to defendants. *See* FF 102. Thereafter "Matt" disclosed the existence of videos of events other than the January 8 Planning Meeting, including the Action Camp videos. *See* FF 103. Having spoken to "Matt" defense counsel in the second trial disclosed the Action Camp meetings to the trial Judge, Judge Knowles—though they remained unaware of the full content of those videos. *See* FF 104.

Meanwhile, as a further part of discovery, Judge Morin asked for a summary of the undisclosed videos. *See* FF 107. That disclosure was made on May 30, FF 110, and its editing has been the subject of our earlier recommendation (*see supra* § IV.B.1).

Thus, having just completed the disclosure to Judge Morin, Respondent knew of the controversy regarding the Action Camp videos. In fact, the previous day, Judge Knowles had asked about defense counsel's meeting with "Matt, the videographer." FF 104. Defense counsel disclosed that Matt revealed that he and other operatives filmed "that January 8th meeting," a "January 14th meeting at American University," and two "planning meetings" in "houses," like the "planning meeting at someone's house" that Adelmeyer testified about. FF 104.

Nevertheless, during further proceedings the next day, May 30, before Judge Knowles during the second trial—that is, the *same* day and *shortly after* her colleague sent the email response to Judge Morin—Respondent amplified on her representations regarding the videos, stating:

> I have represented to the Court as an officer of the Court what is on the other videos. **We have nothing else from Matt. We have nothing else recorded by Matt. We have nothing else**. No videos that are of the meetings Officer Adelmeyer attended with the exception of the planning meeting, and we've produced all seven segments of those videos in full.

FF 111 (emphasis added). The emphasized portions of this statement were at best deceitful.

Indeed, Respondent's lack of clarity was so significant that just a few moments later, one of the defense counsel expressed the view that Kerkhoff had represented that she had produced the entirety of the hard drive provided by Veritas. DCX 173 at 55 ("My argument was that Project Veritas turned over a hard drive to Detective Pemberton and Detective Pemberton didn't bother to ask Veritas do you have any **other** videos in your possession?") (emphasis added). Thus, after

Respondent's representation, the concern was that Veritas might be in possession of other videos that the government had never seen. *Id.* at 54-56 (questioning Respondent's "due diligence in terms of discovery if Project Veritas was in possession of other videos if they didn't even speak to them until the end of last week").

In short, based on Respondent's representation, even at this late date, defense counsel were not aware that there were potentially exculpatory Action Camp videos already in Respondent's possession from the original hard drive that Veritas had provided. It was only after the afternoon trial break that defense counsel in the trial before Judge Knowles received the video summary created by Kerkhoff from defense counsel who were before Judge Morin. *See* FF 112. And thus, it was only then that defense counsel and Judge Knowles were made aware that someone from Veritas (either "Matt" or another operative) had made the Action Camp videos and had already given them to Pemberton and Respondent.[19]

By emphasizing the lack of other videos from "Matt" and eliding the possibility of videos from other Veritas operatives, Respondent continued a pattern of limiting discovery, in this case in a manner that appears intended to postpone or prevent further inquiry. It appears to the Committee, therefore, that the evidence

---

[19] One of the significant ironies of this case is that, insofar as the Committee can tell from the record before it, the exculpatory Action Camp videos were never actually provided to any defendant in discovery. After their existence was disclosed, the government dismissed the pending cases before further discovery occurred.

supports a conclusion that in this regard, Respondent was deceitful as that term is defined by Rule 8.4(c).

As we have noted, however, since Disciplinary Counsel made no argument to that effect, we have not made any recommendation as to this conduct and we have not relied upon it in any other aspect of our Report and Recommendation.

D. Disciplinary Counsel Proved That Respondent Violated Rule 8.4(d) by Engaging in Conduct That Seriously Interfered with the Administration of Justice.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent's conduct was improper, *i.e.*, that Respondent either acted or failed to act when she should have; (ii) Respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent's conduct tainted the judicial process in more than a de minimis way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) can be violated if the attorney's conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266 (D.C. 2009). The Rule covers affirmative actions, negligent inaction, and failure to correct wrongful actions by their agents. *See In re Bailey*, 283 A.3d 1199, 1210 (D.C. 2022) (finding a violation of Rule 8.4(d) where the respondent "was made aware of his failures to comply with the initial subpoena and took no meaningful

steps to personally remediate that failure or to ensure that his attorney did so"); *In re Agee*, Bar Docket No. 243-01, at 33, 37 (BPR May 14, 2004) (ordering an informal admonition) ("A failure to act need not be intentionally improper or reckless in order to violate Rule 8.4(d)."); *see also Dobbie*, 305 A.3d at 810 (noting that, while recklessness or intent could be "highly relevant to a Rule 8.4(d) violation" in some contexts, the Court has rejected a strict recklessness requirement (citing *In re L.R.*, 640 A.2d 697, 700-01 (D.C. 1994))).

Recently, in *Haines*, the Court concluded that failure to disclose exculpatory information, even when the respondent did not appreciate the exculpatory nature of the information, was nevertheless "improper" and "bore heavily upon the judicial process" under *Hopkins*. 341 A.3d at 634. The Court further concluded that the Haines's failure to disclose exculpatory information tainted the judicial process in a more than de minimis way because it resulted in the defendant's conviction and required numerous post-conviction hearings, ultimately leading to the dismissal of the case. *Id.*

Respondent's conduct here meets the *Haines* standard for the finding of a violation. Not only was her conduct of discovery improper, it substantially disrupted the judicial process, and led to multiple post-trial hearings, and led directly to the government's decision to dismiss the indictments against more than 50 defendants. *See* FF 85 (59 remaining defendants); FF 141 (dismissal of remaining cases without prejudice); FF 153 (dismissal with prejudice). Amongst those defendants were any number of individuals whose lives were disrupted. Equally problematic, the

Committee has no doubt that the decision to dismiss the cases had the effect of allowing a smaller number of culpable individuals to escape punishment for their wrongdoing. In short, Respondent's conduct was highly disruptive of the judicial system and had a significant adverse impact.

Accordingly, the Committee recommends a finding that Disciplinary Counsel has proven a violation of Rule 8.4(d) by clear and convincing evidence.

E. Disciplinary Counsel Did Not Prove That Respondent Violated Rule 3.8(d) by Intentionally Avoiding the Pursuit of Evidence and Information That May Have Damaged the Prosecution's Case.

At the time of the underlying conduct[20], Rule 3.8(d) provided:

> The prosecutor in a criminal case shall not: . . . (d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid in the defense . . . .

Disciplinary Counsel's allegation here is a cursory one. They contend that Respondent violated Rule 3.8(d) by objecting to the defendants' own investigation of the Veritas videos. Though we agree, more generally, with Disciplinary Counsel's contention that Kerkhoff withheld exculpatory evidence, we do not see how merely objecting to the possibility of further inquiry constitutes a violation of the Rules. It is not an intentional turning of a blind eye by Respondent—rather it is merely the expression of a legal objection.

---

[20] As noted, Rule 3.8 was amended on April 7, 2025, in part to account for the Court's opinion in *In re Kline*, and the relevant subsection was renumbered as Rule 3.8(e). *See supra* n.2.

Accordingly, we recommend a finding that Disciplinary Counsel has not proven a violation of Rule 3.8(d) by clear and convincing evidence.

V. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of a six-month suspension. Respondent has requested that the Hearing Committee recommend no sanction. For the reasons described below, we recommend the sanction that Respondent be suspended from the practice of law for three months.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *Hutchinson*, 534 A.2d at 924; *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *Cater*, 887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Hutchinson*, 534 A.2d at 924 (quoting *Reback*, 513 A.2d at 231); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Haines*, 341 A.3d at 636 (citing *In re Nwadike*, 905 A.2d 221, 229 (D.C. 2006)); *see also Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals

considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged her wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession.'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Respondent's misconduct was serious and substantially impacted the administration of justice. Over 200 individuals were impacted by her conduct in ways that cannot be fully enumerated. The Court of Appeals takes "*Brady* violations particularly seriously" due to their "devastating potential consequences" and also because they are "both common and difficult to detect." *See Dobbie*, 305 A.3d at 811 (citation omitted).

2. Prejudice to the Client

A federal prosecutor's client is the "general public," rather than any specific government agency or criminal victim. *Id.* (citing ABA Standards for Criminal Justice, Prosecutorial Investigations, Standard 1.2(b) (Am. Bar Ass'n 3d ed. 2014)).

Here, the people of the United States were adversely impacted by the failure of these prosecutions, both because of their impact on those whose cases were improperly conducted and because of the failure of the prosecution to punish those whose criminal conduct was deserving of condemnation. *See Haines*, 341 A.3d at 636 ("By withholding exculpatory information, Ms. Haines undermined the credibility of law enforcement and damaged the reputation of her office," while doing "a disservice to her client, which is to say the general public."); *Dobbie*, 305 A.3d at 811 ("Any action by a prosecutor that erodes the public's trust in the criminal justice system's ability to correctly mete out justice is . . . prejudicial.").

3. Dishonesty

As noted earlier, we recommend finding that Respondent's conduct involved dishonesty in violation of Rules 3.3(a) and 8.4(c).

4. Violations of Other Disciplinary Rules

Respondent violated the four Rules identified, Rules 3.3(a), 3.8(e), 8.4(c), and 8.4(d). The violations of Rules 3.8(e) and 8.4(d) arose from the same conduct, but the violations of Rules 3.3(a) and 8.4(c) are independent violations. There are no other Rules violations.

5. Previous Disciplinary History

Respondent has no record of prior discipline.

6. Acknowledgement of Wrongful Conduct

Respondent contends that her conduct was not wrongful. However, "an attorney has a right to defend [her]self and we expect that most lawyers will do so

vigorously, to protect their reputation and license to practice law." *In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014).

7. Other Circumstances in Aggravation and Mitigation

Respondent submitted character reference letters from her colleagues that attest to her overall character. RX 101-103. The Committee gave these letters due consideration an afforded them appropriate weight in its review. In addition, there can be little doubt that Respondent's position was to some degree untenable—charging decisions were made by her supervisors, and yet she was provided with inadequate assistance to manage the administrative burdens of that decision. Tr. 643-46, 1108-1112; *see Dobbie*, 305 A.3d at 812-13 (finding deficient conduct of supervisors to be a mitigating circumstance). Prosecuting these matters was undoubtedly time-consuming and complicated.

Finally, Respondent has suffered substantial harassment as a result of her involvement in this matter. This harassment is unacceptable, intolerable, and condemned by the Committee. Nevertheless, "[t]roubles of this nature are not what this factor contemplates." *Haines*, 341 A.3d at 637 (citing *Dobbie*, 305 A.3d at 812-13).

C. Sanctions Imposed for Comparable Misconduct

In three prior cases, the Court and the Board have imposed discipline for prosecutors engaged in roughly equivalent conduct. In *Kline*, the Court identified the range of sanctions for a single 3.8(e) violation to be between a public reprimand and a six-month suspension. 113 A.3d at 215-16. Even though the Court determined

that a suspension was an appropriate recommendation, it concluded that the uncertainty at the time of the decision as to the relationship between *Brady* and Rule 3.8(e) warranted lenity in sanctioning. *Id.*

In *Dobbie*, the Court imposed a six-month suspension for violations of Rules 3.8(e), 8.4(c), and 8.4(d) and those violations arose from "essentially the same conduct." *Dobbie,* 305 A.3d at 812. There were, however, significant mitigating factors, including the respondents' lack of bad faith and the fact that their supervisors were partly responsible. 305 A. 3d at 787, 812-13. The Court in that case stayed the suspension in favor of one year of probation based on their supervisors' conduct being a partial cause of the misconduct. *Id.* at 814.

Most recently, in *Haines*, the Court found the respondent violated Rules 1.6(a), 3.8(e), and 8.4(d), but that "her misconduct was the result of a seemingly honest mistake," and imposed a fully stayed sixty-day suspension with one year of probation. 341 A.3d at 638.

D. Analysis

No prior decision of the Court of Appeals has imposed the sanction of an unstayed suspension on a prosecutor for alleged misconduct in violation of Rule 3.8(e). Though some, *see, e.g.*, *Dobbie*, 305 A.3d at 816-17 (Deahl, J., dissenting), see this as an overly solicitous response to prosecutorial ethical misconduct, we, as a Hearing Committee, are bound by the prior decisions of the Court and obliged to apply its analysis to the matter before us in good faith. We are therefore squarely faced with the question of whether, notwithstanding the earlier decisions of the

Court, this matter involves conduct that ought to be sanctioned with an unstayed suspension, as Disciplinary Counsel recommends. For the reasons that follow, we recommend a finding that Respondent's conduct was significantly more egregious than that in *Kline*, *Dobbie*, and *Haines*, and thus recommend that the Board impose a three-month suspension as a sanction.

To begin with, as we have laid out at some length, we find Respondent's conduct to be below the standard of acceptable behavior for a prosecutor. As set forth in fuller detail in this Report, she routinely took a narrow view of her discovery obligations and regularly interpreted the Court's discovery admonitions in the narrowest way possible, often straining credulity in doing so. More to the point, she persisted in her erroneous interpretation of her discovery obligations in the face of explicit court orders to the contrary and, when her conduct was finally discovered, continued to dishonestly obscure the nature and extent of what she had done.

In this, her behavior was simply untenable. When the Court (addressing videos) formally ordered that "the entirety of whatever is in the government's possession to be turned over to the defense" that entirety ought to have included everything in the government's possession. FF 95. As Judge Morin aptly put it: "[N]otwithstanding an all-encompassing order that the government disclose Project Veritas videos in its possession, the government interpreted this order as limited to only the video to which it had made redactions." FF 96. This "fundamental misunderstanding of the Court's intent" was a grave error on Respondent's part. FF 96.

Respondent persisted in her course of conduct, obscuring the existence and nature of the exculpatory videos, in discovery, FF 40-42, in her presentations to the grand jury, FF 46, and in the face of clear indications of the Court's contrary understanding. *E.g.*, FF 36-37, 52-53, 106. And when the Court demanded a written accounting of her actions, Respondent edited that disclosure to conceal the nature of the Action Camp videos that had yet to be disclosed. FF 107-09. This extensive course of conduct convinces us of the overall willfulness of Respondent's actions.

To be sure, there were mitigating factors that speak in Respondent's favor. She was the sole lead prosecutor responsible for the overall prosecution of more than 200 matters relating to the riot. She was burdened substantially by an overbroad charging decision that was mandated by Office leadership, and she was later further burdened by understaffing for such a large matter. And in at least one instance (involving the failure to correct her misstatement regarding the misidentification of Beale, *see supra* § IV.B.2), she was let down by supervisors who failed to follow through on their own obligations to her and to the Court.

But we do not think those mitigating factors outweigh the serious nature of Respondent's misconduct. Taking all of these facts into account, we conclude that Respondent's conduct was qualitatively more violative of the Rules than that which has occurred in prior cases.

In *Kline*, the Court found a clear, deliberate violation of Rule 3.8(e) in the withholding of evidence that would have negated the identification of the defendant by the victim. *See Kline*, 113 A.3d at 204-05, 214. The Court declined to impose a

sanction, however, because of the novelty of the interpretation of Rule 3.8(e) that it announced in that case. *Id.* at 215-16. It also took "into consideration [that] no companion violations were charged, no allegations of dishonesty were made, [and that] the respondent has a clean disciplinary record." *Id.* at 216.

Thus, *Kline* involved only a single primary violation of Rule 3.8(e) without any unrelated charges and without any allegations of dishonesty. By contrast, here the Committee has recommended finding at least two distinct violations of Rule 3.8(e) and has recommended finding two further distinct violations of Rules 3.3(a) and 8.4(c), both of which involve components of dishonesty. And, of course, Respondent's actions post-date *Kline*, so there is no argument of the inappropriate retrospective imposition of a newly announced standard. These factors readily distinguish this case from *Kline* and suggest that a served suspension is appropriate.

In *Dobbie*, the prosecutors had concealed a report (the "Collins report") that called into question the veracity of a key government witness in violation of Rule 3.8(e). 305 A.3d at 789-792, 799, 803-04. They had also engaged in reckless dishonesty by mischaracterizing the Collins report in a motion in limine and in the related decision not to concede that the witness had made false or misleading statements. *Id.* at 805-07. Over the dissent of one member of the panel, the majority found as an "overriding mitigating circumstance . . . the deficient conduct of respondents' supervisors . . . in their oversight of th[e] case." *Id.* at 812; *see id.* at 816 (Deahl, J., dissenting).

In *Dobbie,* all of the Rules violations arose "out of essentially the same conduct," and though reckless dishonesty was involved, it was not "intentionally malicious" and was, in the view of the majority, of less substantial gravity. *Id.* at 811-12. And, as we have noted, deficient supervisory conduct was an "overriding" issue in mitigation. Here, by contrast, there was a continued pattern of misconduct that amounted to more than a single incident, and Respondent's dishonesty appears to have been a deliberate effort to conceal her prior actions. More significantly, save for one instance (in which we have already recommended against any violation, *see supra* § IV.B.2), this case presents no significant instance of supervisory failure—rather, to the contrary, Respondent was, herself, a supervisor of other attorneys and thus bore, if anything, a greater responsibility of fidelity to the Rules. Accordingly, again, we think Respondent's conduct here is distinguishable from and more egregious than that in *Dobbie*.

Finally, in *Haines* the prosecutor had concealed a portion of a letter which revealed that the key government witness may have lied about his prior contacts with the government. *See* 341 A.3d at 621, 623-24, 634. The Court characterized the prosecutor's actions as an "honest mistake" that was the product of a "once-in-a-career lapse in judgment." *Id.* at 638. The Court also noted that Haines had not engaged in dishonesty and therefore imposed only a stayed suspension. *Id.* at 637-38.

While we accept that Respondent, here, likewise engaged in a once-in-a-career lapse in judgment, we nevertheless think that this matter involves more

significantly violative conduct than in *Haines*. To begin with, as noted, we have concluded that Respondent engaged in a pattern of dishonesty intended to conceal the full nature of her actions. More importantly, this lapse of behavior was not a one-off mistake of the sort at issue in *Haines*. Rather, it involved a continuing course of conduct over several months that persisted even after the Court had issued several orders directing more robust disclosure.

Put bluntly, Respondent took a view as to the admissibility of the Action Camp videos and she acted in a manner that demonstrated that she was bound and determined to see that view realized—even in the face of multiple instances where Judges of the Superior Court held a different view. *E.g.*, FF 96 (Judge Morin: "The government having such a limited understanding of the Court's questions and directives, however, only highlights the need for the government to be complete and fulsome in its disclosures to the Court and the parties as to what is in its possession, so that all are operating on the same knowledge of facts."); FF 97 (Judge Morin: "[I]f there were statements about nonconfrontation, nonviolence, that I mean, obviously, I'm not telling you anything new, but . . . I'm just saying from the Court's point of view, the entire context of what [Adelmeyer] overheard has to be provided to the defense."); FF 102 (Judge Morin held that the undisclosed "upper echelon" footage was either a *Brady* violation or a violation of Rule 16.). We think this sort of fundamental, long-standing error is of greater significance than the one-time events in *Haines* and, again, makes that case distinguishable.

The Committee is mindful of the Court's admonition as to the "imperative to avoid 'inconsistent dispositions for comparable conduct.'" *Dobbie*, 305 A.3d at 813 (quoting D.C. Bar R. XI, § 9(h)(1)). We are cognizant of the fact that our recommendation would impose a first-of-its-kind unstayed suspensory sanction on a prosecutor in this jurisdiction—a recommendation that is in tension with prior Court decisions. But just as inconsistent dispositions for comparable conduct are to be avoided, so too should equivalent dispositions for incomparable conduct be rejected. In the Committee's view, it simply cannot be the case that the prior lack of suspensory sanctions on prosecutors in this jurisdiction immunizes all prosecutorial misconduct from suspensions. At some point, prosecutorial errors must cross a line beyond which suspensory sanctions are appropriate.

We think that this case crosses that line. Respondent's significant and substantial violations of the Rules exceed those the Court has identified in previous cases. Our view is that a suspensory sanction is appropriate in this matter, given the number and gravity of the Rules violations identified, the long-running nature of the misconduct, the vast impact of Respondent's conduct on the administration of justice in more than 200 cases, and the necessity of deterring similar misconduct in future prosecutions within this jurisdiction.

Indeed, the Committee gave considerable thought to recommending a longer suspension than three months, in line with Disciplinary Counsel's recommendation. But in the end, we could not say that the goals of deterrence and error correction would be better served by a longer term. Accordingly, in light of the foregoing

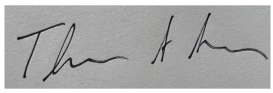
analysis, the Hearing Committee recommends as a sanction that Respondent be suspended from the practice of law for three months.

VI. CONCLUSION

For the foregoing reasons, the Committee recommends finding that Respondent Jennifer Kerkhoff Muyskens, violated Rules 3.3(a), 3.8(e), and 8.4(c) & (d), and recommends that she receive the sanction of suspension from the practice of law for three months. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14.

HEARING COMMITTEE NUMBER ONE

Paul Rosenzweig, Esquire, Chair*



Mr. Thomas Alderson, Public Member

Jay Brozost, Esquire, Attorney Member

* Mr. Rosenzweig filed a separate statement dissenting in part.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER ONE

In the Matter of:	:	
	:	
JENNIFER KERKHOFF MUYSKENS,	:	
	:	Board Docket No. 24-BD-038
Respondent.	:	Disc. Docket No. 2018-D218,
	:	2018-D262, & 2018-D300
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 475353)	:	

SEPARATE STATEMENT OF CHAIR ROSENZWEIG,
DISSENTING FROM § IV.A.3

I respectfully disagree with my colleagues' conclusions in § IV.A.3 of this Report that the failure to disclose the identity of Project Veritas as the origin of the Planning Meeting and Action Camp videos was an independent violation of Rule 3.8(e).

My colleagues first err when they conclude that the failure to disclose the identity of "Matt," the Veritas videographer, directly concealed Matt's own exculpatory observations. No evidence in the record shows that Kerkhoff was aware of those observations before they were disclosed during the second trial before Judge Knowles. My colleagues also err when they conclude that the Veritas identity, by itself, was exculpatory—it neither negates an element of the offenses charged nor provides a basis for challenging the credibility of any witness presented. My colleagues' mistaken interpretation of the Rules and misreading of the law

effectively converts a narrow, but robust, ethics mandate relating to the obligation to disclose exculpatory material into a broader and unsustainable discovery mandate.

I begin with common ground. We agree that Respondent declined to disclose that Project Veritas was the source of the videos of the Planning Meeting. Her motivations in making that decision were assuredly not pure. We also agree that her eventual disclosure, in turn, led directly to the interview of Matt and from there to the discovery that there were several other Action Camp videos that had not been disclosed. *See* FF 73, 100-04, 106. All members of the Committee agree that those Action Camp videos were, themselves, exculpatory *Brady* material (*see supra* § IV.A.1) and so Respondent's concealment of the Veritas origin of the videos was a causal link in the chain of her violation of Rule 3.8(e) by failing to disclose the exculpatory materials of the Action Camp videos.

I agree, as well, with much of my colleagues' statements of the relevant legal standard. Exculpatory material must, under Rule 3.8(e), be disclosed promptly. And the utility of exculpatory evidence must be viewed from the perspective of the defendant, not from that of the prosecutor. As the Court of Appeals explained in *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010): "It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, . . ."

All that having been said, the refusal to identify Veritas as the source of the videos is not an independent Rule 3.8(e) violation. To be clear, the failure to disclose the Veritas origin was an inappropriate discovery practice that was consistent with

Kerkhoff's overall approach to discovery in this case. It was also out of keeping with the principle that prosecutors should strive to model fairness and justice. A far better practice would have been to disclose the origin of the tapes and then argue against their evidentiary relevance at trial. But Respondent's discovery stance on this issue is not, by itself, a Rules violation.

My colleagues contend that the failure to disclose Veritas as the origin of the video directly concealed Matt's exculpatory observations. The causal chain is factually accurate; however, my colleagues' conclusion that this action resulted in a direct violation of Rule 3.8(e) cannot be sustained based on the evidence.

During the second trial, defense counsel summarized their interview with Matt to the effect that Matt "[did] not recall any discussion about property damage at any of those meetings." DCX 166 at 8-12. If that summary of Matt's report is accurate (we have no reason to think it is not, but there is no proof in the record that it is), it would, indeed, potentially constitute exculpatory information. Matt's report about the peacefulness of some Action Camp meetings would contradict the report of Officer Adelmeyer as to their violent planning and, thus, go directly to the intent of the defendants (exactly as the Action Camp videos themselves would have done).

I do not dispute that Matt's proffered evidence might be exculpatory. Rather, the evidence before us does not establish a Rule 3.8(e) violation by Respondent because there is no evidence in the record that she was aware of Matt's evidence before the moment that defense counsel disclosed it during the second trial.

To establish a Rule 3.8(e) violation, Disciplinary Counsel must show that Kerkhoff was, in fact, aware of the exculpatory information. *See In re Dobbie*, 305 A.3d 780, 793 (D.C. 2023); *see also* Rule 3.8(e) cmt. [1] ("[B]ecause the failure to disclose must be intentional, the rule only requires disclosure of such information when its existence is known to the prosecutor."). Here, the evidence in the record shows the contrary. The first time Respondent knew of Matt's existence (as opposed to the generalized existence of some Veritas videographer) was when Respondent was required by Judge Morin to produce a videographer. Thereafter, Detective Pemberton identified Matt and Matt made himself available for an interview. On the record before us, it was not until, quite literally, the defense counsel summarized Matt's evidence that Kerkhoff would have been aware of any exculpatory evidence he might have offered. *See* Tr. 718 ("I never interviewed Matt . . . ."). Respondent cannot be found to have violated Rule 3.8(e) for not disclosing evidence of Matt's exculpatory observations when there is no proof she knew the evidence existed.

My colleagues also contend that Veritas's identity, by itself, is an exculpatory fact. But the identity of Veritas as the videographer is not "on its face exculpatory." *Zanders*, 999 A.2d at 164. Quite to the contrary. Veritas's role is an evidentiary fact; certainly, one that defense counsel would have wanted to know. But under no construction of the facts does it negate an element of the defendants' crimes or provide a basis for cross-examining a percipient witness for bias or error.

To begin with, under D.C. law, the identity of a videographer is generally not relevant to the authentication of the video. *See Bryant v. United States*, 148 A.3d

689, 696-97 (D.C. 2016). Thus, in the normal course of events, Respondent was under no legal obligation to have Matt testify. Moreover, sometimes photos and videos may be admitted even if their origin is unknown, so long as they are properly authenticated.

In other words, Respondent's decision to have the videos authenticated by Officer Adelmeyer (*see* FF 30) was, as a general matter, legally sufficient to render the videos admissible. To find a Rule 3.8(e) violation my colleagues must identify some circumstance relating to the failure to disclose Veritas's identity in this matter that makes the case different.

With respect, they cannot. Rule 3.8(e) requires disclosure of evidence that: "tends to negate the guilt of the accused." In other words, it must be evidence that bears on guilt or innocence, either by negating an element of the offense (as the Action Camp videos do) or by calling into question the bias or veracity of a witness. Veritas's identity as the videographer satisfies none of the traditional definitions of what constitutes exculpatory information.

First, and most obviously, the identity of the videographer, whomever it might be, does not negate any of the elements of the offenses with which the defendants were charged. Each was charged with some combination of rioting, violence, or conspiracy to riot. None of the elements of any of those offenses is made more or less likely by the identity of who originally recorded an authenticated video.

Second, and more saliently, this specific failure to disclose the identity of Veritas as the video source is completely unlike the Court's decision in *Haines* on

which my colleagues rely. *In re Haines*, 341 A.3d 611 (D.C. 2025) (per curiam). As my colleagues correctly describe it, the *Haines* case involved exculpatory information because the concealed discovery would have been useful to impeach the credibility of the witness who testified to the defendant's jailhouse confession. *See id.* at 630-31.

It has long been the case that the prosecution must disclose known factors that could affect the witness's bias or veracity. Thus, for example, a prosecutor must disclose a non-prosecution agreement that bears on a witness's testimony, or contradictory statements that the witness may have made. But, critically, this sort of witness-*Brady* information goes only to the bias of *actual witnesses* who testify at trial.

Three cases from our Court of Appeals amplify and make clear this requirement: In *Kline*, defense counsel requested *Brady* material, and specifically sought "information, which . . . impeaches a witness' testimony." *In re Kline*, 113 A.3d 202, 205 (D.C. 2015). Kline was aware of the victim's prior inconsistent statement but decided that it did not have to be produced to the defense because he had determined it was not exculpatory. *Id.* at 214. The Board found that Kline reasonably should have known that the victim's statement tended to negate the defendant's guilt "because of its obvious *exculpatory and impeachment potential*" and because "the circumstances under which the [statement] was made were 'of a kind that would suggest to any prosecutor that the defense would want to know about it.'" *In re Kline*, Board Docket No. 11-BD-007, at 13-14 (BPR July 13, 2013)

(emphasis added) (quoting Hearing Committee Report at 24 (quoting *Leka v. Pontuondo*, 257 F.3d 89, 99 (2d Cir. 2001))).

Similarly, in *Dobbie*, the Board concluded that the respondents violated Rule 3.8(e) when they failed to disclose information that tended to impeach the credibility of a government witness, namely that the witness (a corrections officer) had filed a false disciplinary report and had later been demoted for doing so. *See In re Dobbie*, Board Docket No. 19-BD-018, at 16-23 (BPR Jan. 13, 2021), *adopted in relevant part*, 305 A.3d at 787. The Board found that a reasonable prosecutor would have known that the false disciplinary charge and subsequent demotion were *Giglio* information, and that the respondents intentionally decided not to disclose it. *Id.* at 16, 20-22. Despite the fact that "[r]espondents did not connect the dots . . . to fully appreciate its importance," the Board concluded "[r]espondents reasonably should have known that an official determination that a corrections officer lied to get an inmate in trouble would be *powerful impeachment evidence* in a case where that corrections officer is going to testify against an inmate defendant at trial." *Id.* at 16, 20 (emphasis added).

The *Haines* case likewise involved relevant exculpatory information because the prosecutor's key witness may have testified falsely on the stand. The witness had declared that he had not previously provided information to the government—an assertion that was contradicted by the undisclosed letter at issue in *Haines*. 341 A.3d at 621, 623. Had the defendant had possession of the letter, he would have been able to effectively use it to impeach the witness. *Id.* at 628.

Thus, to be clear, in all three of the salient prior ethics matters—*Kline*, *Dobbie*, and *Haines*—the evidence at issue was exculpatory because it went directly to the credibility, bias, or veracity of a witness who testified at trial. Here, my colleagues do not identify a witness in this case whose bias or veracity might be called into question if the defendants had known the identity of the videographer. Nor, frankly, could they do so—no such witness testified.

Instead, my colleagues argue that refusing to disclose Veritas's identity is part of a causal chain that contributed to the concealment of the Action Camp videos and thus is, itself, a violation of Rule 3.8(e). There are three problems with this argument.

The first is that the identity of the videographer is irrelevant to the causal chain. Kerkhoff was wrong to conceal the existence of the Action Camp videos no matter ***who*** took them. She would have violated her Rule 3.8(e) obligations even if the videographer had been the Pope. It is the failure to disclose that videos were taken that is the violation—not the failure to disclose who took them.

Second, the argument is atextual. Rule 3.8(e) requires the disclosure of evidence that "tends to negate guilt." It does not require the disclosure of non-exculpatory evidence that might *lead* to exculpatory evidence that tends to negate guilt.

Third, this extended causal chain is without legal precedent. I do not know of any ethics case (nor, indeed, any *Brady* case) either here or in any other jurisdiction where a court has used a two-step causal chain to a *Brady* violation. As noted

already, the only Rule 3.8(e) cases in this jurisdiction all involved a primary and direct causal connection between the evidence and a witness.

I have written about this issue at some length because of its importance. Not to the specific case at hand: As I have made clear, I join the entire remainder of the Hearing Committee's Report and Recommendation, which details significant violations of the Rules. And those other violations, in turn, amply support our recommended sanction, regardless of how this particular question is resolved.

More broadly, however, this question has systemic importance. My colleagues have mistakenly converted a relatively narrow, but important, ethical admonition regarding exculpatory evidence into a broader discovery obligation that is unmoored either from precedent or the text of the Rule. Especially at a time when the application of ethical rules to prosecutors is fraught with controversy, it is incumbent on the Board, in my view, to read the Rules within the confines of its authority. By extending the Rules, as they do, I fear my colleagues have gone beyond our remit.