THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Issued
June 12, 2026

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 THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

Respondent Jennifer Kerkhoff Muyskens was a long-tenured Assistant United States Attorney ("AUSA") in the District Columbia. This matter arises from her conduct in four consolidated criminal trials in the Superior Court of the District of Columbia of certain protesters at President Trump's first inauguration on January 20, 2017 (the "Inauguration Protest" cases).

In a series of meetings conducted in the weeks preceding President Trump's first inauguration, various civic, labor, and political organizations came together to plan and coordinate protests at the inauguration, adopting the "DisruptJ20" moniker for their joint efforts. The "DisruptJ20" protests ultimately involved a mix of peaceful demonstrations—conduct protected under the Constitution's First Amendment—and violent rioting, which is not protected from criminal prosecution.

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

The latter mayhem led to mass arrests of over 200 protesters on Inauguration Day. After securing initial indictments, Respondent and her supervisors decided to prosecute those arrested under a "conspiracy-to-riot" theory of joint and several criminal liability, among other charges. Respondent was the lead prosecutor in the Inauguration Protest cases.

Over the next two years during several different pre-trial and trial proceedings in these cases, Respondent repeatedly failed to disclose certain evidence which was later determined by the court to be "exculpatory," meaning that the withheld evidence tended to justify, excuse, or clear ("exculpate") a defendant from all or some of the alleged guilt asserted. In the course of withholding this evidence, Respondent misled Superior Court judges who were trying to determine whether all exculpatory evidence had been disclosed. After a Superior Court judge found that Respondent committed *Brady* violations by failing to disclose exculpatory evidence, her supervisors removed her from the Inauguration Protest cases, which the government subsequently dismissed.[1]

This disciplinary matter followed. After extensive evidentiary proceedings, Hearing Committee Number One found that Respondent violated D.C. Rules of Professional Conduct ("Rules") 3.3(a) (knowing false statement to tribunal), 3.8(e)

[1] Under *Brady v. Maryland*, 373 U.S. 83 (1963), a government prosecutor violates a defendant's Constitutional due process rights when she withholds evidence that is material to a determination of guilt or punishment. The Supreme Court's *Brady* decision obligates a government prosecutor to disclose any significant evidence in its possession that suggests that the defendant is not guilty as charged.

(prosecutor's intentional failure to disclose exculpatory information to defense),[2] 8.4(c) (dishonesty, fraud, deceit, and/or misrepresentation), and 8.4(d) (serious interference with the administration of justice), and recommended that Respondent be suspended for three months.

Respondent timely filed exceptions to the Hearing Committee Report, in which she urges the Board to adopt different findings and conclusions, and to dismiss all ethics charges. Disciplinary Counsel also takes exception to some aspects of the Committee's recommendations and urges that Respondent be suspended for six months. As discussed below, the Board agrees with the Hearing Committee that Disciplinary Counsel proved most of the charged ethics violations by clear and convincing evidence. However, the Board recommends that Respondent receive a six-month suspension.

II. FINDINGS OF FACT

While Respondent's brief to the Board includes a "Statement of Facts" with citations to the underlying record, nowhere does she identify any specific Hearing Committee findings of fact which she contends are not supported by substantial evidence. Respondent proposes a number of alternative or competing factual findings which, she argues, support inferences or legal conclusions at odds with

[2] Rule 3.8 was amended on April 7, 2025, in part to account for the Court's opinion in *In re Kline*, 113 A.3d 202, 213 (D.C. 2015). In the April 2025 amendment, subsections (e) and (d) switched places within the rule, but the parties and Hearing Committee used the language and numbering of Rule 3.8 that was in effect at the time of Respondent's challenged conduct in 2017-2018.

those of the Hearing Committee. But it remains the law that even where additional or countervailing facts might be supported by a disciplinary hearing record, this Board "must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see In re Szymkowicz*, 124 A.3d 1078, 1084 (D.C. 2015) (per curiam); *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached").

We adopt the Hearing Committee's factual findings, summarized below, because they are supported by substantial evidence in the record as a whole. *See* Board Rule 13.7. In instances where we find supplemental facts by clear and convincing evidence, *see id*., we cite the transcript and exhibits.[3]

One of the "DisruptJ20" protests that was planned for Inauguration Day was an Anti-Capitalist Black Bloc ("ACBB") march, for which 500 participants ultimately gathered at Logan Circle on the morning of the 2017 inauguration and, wearing all-black outfits and face coverings, marched in formation from Logan Circle through the streets of downtown Washington. Hearing Committee Report Finding of Fact ("FF") 4-5. From time to time, some ACBB marchers left formation

[3] "Tr." refers to the transcript of the hearing conducted before the Hearing Committee on March 11-14, 2015. Hearing Committee Report ("HC Rpt.") at 4 n.4. "DCX" refers to Disciplinary Counsel's Exhibits, and "RX" refers to Respondent's Exhibits.

to commit acts of property destruction and then returned to the bloc as the march proceeded. FF 6. The D.C. Metropolitan Police Department ("MPD") ultimately declared the ACBB march a riot and, after corralling or "kettling" many of its participants, arrested approximately 230 of them. FF 7-8.

The D.C. United States Attorney assigned Respondent to be the lead prosecutor for the ensuing criminal cases. FF 9; *see also* Tr. 604-08.

A. The Government's Conspiracy-to-Riot Theory of Criminal Liability.

The government's theory of criminal liability in the Inauguration Protest cases provides important context for the legal ethics violations that the Hearing Committee found. Because the ACBB march tactics obscured the identities of individual participants—making it difficult to distinguish those destroying property from those who did no violence—the government decided to charge all defendants with conspiracy to riot,[4] along with other offenses. FF 5-6, 11-13.[5] Respondent's theory

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[4] A conspiracy is commonly understood to entail "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose." *Conspiracy*, *Black's Law Dictionary* (12th ed. 2024). Under District of Columbia Court of Appeals precedents, a criminal conspiracy is a "partnership in crime" involving "deliberate plotting to subvert the laws," and each participant in the conspiracy is liable for the foreseeable acts committed by other co-conspirators in furtherance of that plan. *Wilson-Bey v. United States*, 903 A.2d 818, 841 (D.C. 2006).

[5] The government initially sought a single indictment charging all arrested protesters in a single case alleging a felony riot. On February 8, 2017, a grand jury returned the first indictment on those charges. FF 11. After a second grand jury was convened and heard evidence in April and May 2017, a second superseding indictment issued which added charges for Inciting a Riot (Count I), Rioting (Count II), Conspiracy to Riot (Count III), Destruction of Property (Counts IV-IX),

was that the destruction and violence of the ACBB march was planned in advance, and evidence of any defendant's participation in the march which conformed to that plan—such as wearing black clothing and masks, and remaining in formation as fellow-marchers committed acts of violence—demonstrated each defendant's agreement to participate in a riot. FF 13. In the Inauguration Protest cases reaching trial, Respondent accordingly argued that the evidence showed each defendant's conduct was "consistent with the instructions provided by co-conspirators at earlier planning meetings." FF 13; *see* FF 16-21.

Due to the large number of defendants, the government divided the Inauguration Protest cases into four groups, with discovery and other proceedings often running concurrently before different judges, while presenting the same issues:

- Superior Court Judge Lynn Leibovitz presided over the first Inauguration Protest trial, which began in November 2017, ten months after the inauguration. FF 14, 25; *see also* DCX 74. None of the defendants in this first trial personally engaged in violence or in any DisruptJ20 planning meetings. FF 14. Yet, consistent with the government's theory of the case, Respondent argued that evidence about the march organizers' planning activities helped prove that these defendants also joined a conspiracy to riot because they all appeared at the appointed time and place and participated in the planned ACBB

Misdemeanor Assault on a Police Officer (Counts X-XI), and Felony Assault on a Police Officer (Counts XII-XIV). *Id.*

march tactics: wearing black garb and face masks while engaging in other coordinated conduct as other marchers committed riotous acts. FF 19-20; *see* FF 13.

- Superior Court Judge Kimberley Knowles presided over the second Inauguration Protest trial, which began several months later, on May 16, 2018. FF 99; DCX 154. Importantly for this disciplinary proceeding, the second trial group included a defendant named Casey Webber, a member of the Industrial Workers of the World ("IWW") labor union who also did not engage in any destructive acts during the ACBB march but did attend one or more DisruptJ20 planning meetings. *See* DCX 158 at 69; DCX 161 at 4; FF 21, 62, 65. Respondent asserted that defendant Webber was guilty of conspiracy to riot based on his participation in planning for the event, plus evidence that he could be observed in various cell phone videos marching with the ACBB group. Consistent with this theory, Respondent argued, "This riot, it was planned. You're going to have evidence of planning meetings," and defendant Webber "receiv[ed] information about the plans." FF 21.
- Then-Chief Judge of the D.C. Superior Court Robert Morin handled pre-hearing discovery for the remaining trial groups of Inauguration Protest cases. FF 61, 107; *see* FF 113; HC Rpt. at 8. As detailed more fully below, Chief Judge Morin ultimately ruled that Respondent

committed *Brady* violations by failing to disclose various items of exculpatory evidence to the defense.

B. Discovery Proceedings in the Inauguration Protest Cases.

In advance of the scheduled trials for these matters, Respondent conducted discovery conferences with defense counsel to help them understand the government's theory of the case and identify evidence that Respondent and her team were mustering against each defendant. FF 22. The evidence was voluminous, including hundreds of videos and photographs sourced from police officer bodycams, traffic and aerial cameras, business security cameras, cell phone videos of marchers and bystanders, and other publicly available recordings discussing or portraying the ACBB march. FF 23; *see* RX 24. The evidence also included MPD use-of-force investigative reports, arrest photos, 911 calls, cell phone reports from many of the defendants, lists and photos of property seized, and over nine hours of radio runs. FF 23. Respondent and her lead investigator, MPD Detective Greggory Pemberton, tried to identify videos and photographs showing each defendant participating in the planning or execution of the ACBB march, and then marked these materials accordingly so each defense counsel could locate the evidence pertaining to his or her client. FF 24; RX 61 at 5.

Of particular importance in this disciplinary matter, the evidence Respondent gathered included videos provided by a third-party advocacy group calling itself Project Veritas. FF 23. The Project Veritas evidence included several surreptitiously recorded videos of DisruptJ20 planning meetings for Inauguration

Day protests (FF 27-29), including (i) a January 8 meeting conducted at St. Stephen and The Incarnation Episcopal Church in Northwest D.C. (the "January 8 Planning Meeting") (FF 30-33; *see* DCX 170 at 1; DCX 234 at 38-39; RX 37 at 27; Tr. 708), and (ii) other DisruptJ20 meetings held at American University and private homes (sometimes called "Action Camp" or "Spokes Council" meetings) occurring thereafter on January 14, 15, and 17 (FF 23; *see* FF 55-57; DCX 170 at 2).

During the court's discovery conference for the first trial group held in April 2017, discussion arose about the government's voluminous cell phone data or video evidence. FF 25. Judge Leibovitz cautioned the government not to "dump-truck" this discovery on the defense. *Id.* Respondent replied that the court's admonition might place her in a "*Brady* trick bag." *Id.* To which Judge Leibovitz responded: "I understand the concern, and I think we just need to try and zero in on a middle ground here." *Id.* That brief and somewhat ambiguous exchange took on significance in this disciplinary matter, because Respondent relies on it to justify her decision to limit production of Project Veritas videos from various DisruptJ20 planning meetings. *See* FF 26, 57-58.

Early on in her investigation, Respondent became aware that Project Veritas had infiltrated and surreptitiously recorded several DisruptJ20 meetings about Inauguration Day protests. FF 27; *see* FF 29. In February or March 2017—just weeks after the inauguration events at issue—Project Veritas gave Respondent and Detective Pemberton a hard drive containing videos of various DisruptJ20 planning meetings. FF 29. Project Veritas operatives had used hidden "button" cameras to

capture the footage and voluntarily (without subpoena) provided the government with footage they recorded. FF 29; *see* Tr. 703. As a consequence, there was no public record of Respondent's investigators receiving these videos from Project Veritas. *See* Tr. 993.

From the outset, Respondent knew that Project Veritas presented a "can of worms" because as a political advocacy group, it wanted to "subvert" DisruptJ20 and was therefore biased against the people and activities its operatives were secretly recording. FF 28, 30; *see* Tr. 908, 920. Respondent also knew that Project Veritas had a reputation for manipulating or distorting evidence, and she discussed these issues with the first grand jury on January 30, 2017, when a grand juror asked whether the government would be using evidence provided by "the group that videotaped . . . Acorn."[6] DCX 5 at 20. The grand juror expressed concern that Project Veritas might not be a trustworthy source of video evidence. DCX 5 at 20-24; *see* FF 28.

1. Respondent and Detective Pemberton Edited Project Veritas January 8 Planning Meeting Video Segments Before Producing Them.

In the January 8 Planning Meeting video obtained from Project Veritas, Respondent and Detective Pemberton focused on a "breakout" session about the ACBB march led by organizer Dylan Petrohilos. FF 30. While reviewing these clips, Respondent and Detective Pemberton, who had been assigned to assist

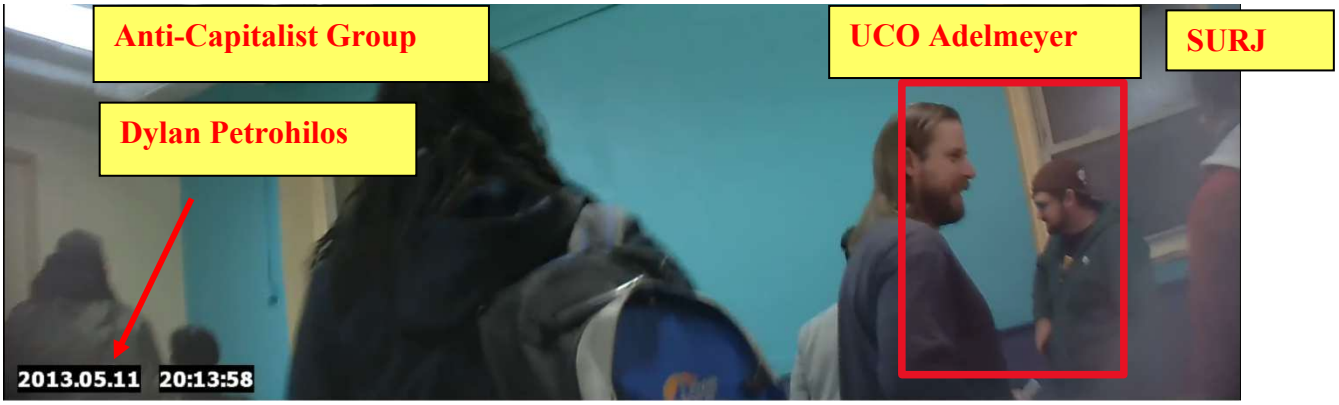
[6] ACORN is an acronym for the Association of Community Organizations for Reform Now. *See* https://acorninternational.org/about/.

Respondent, recognized that undercover Officer Bryan Adelmeyer could be seen attending another breakout session of the January 8 Planning Meeting. *Id.* Because Respondent understood that Project Veritas had a particular "political view[] and belief" that she wished to exclude from consideration at trial, Respondent seized on the opportunity to use Officer Adelmeyer to authenticate these video segments, thereby avoiding the necessity of identifying Project Veritas as the video's source. *Id.*

At Respondent's direction, Detective Pemberton prepared video clips from the ACBB breakout session of the January 8 Planning Meeting for disclosure and production to defense counsel. FF 31; *see* FF 33a. Respondent did not prepare any of the remaining January 8 Planning Meeting videos for disclosure, although they contained about fifty minutes of additional footage from the general assembly of that day's meeting, where DisruptJ20 organizers discussed plans for each group's activities, including the ACBB march. FF 32.

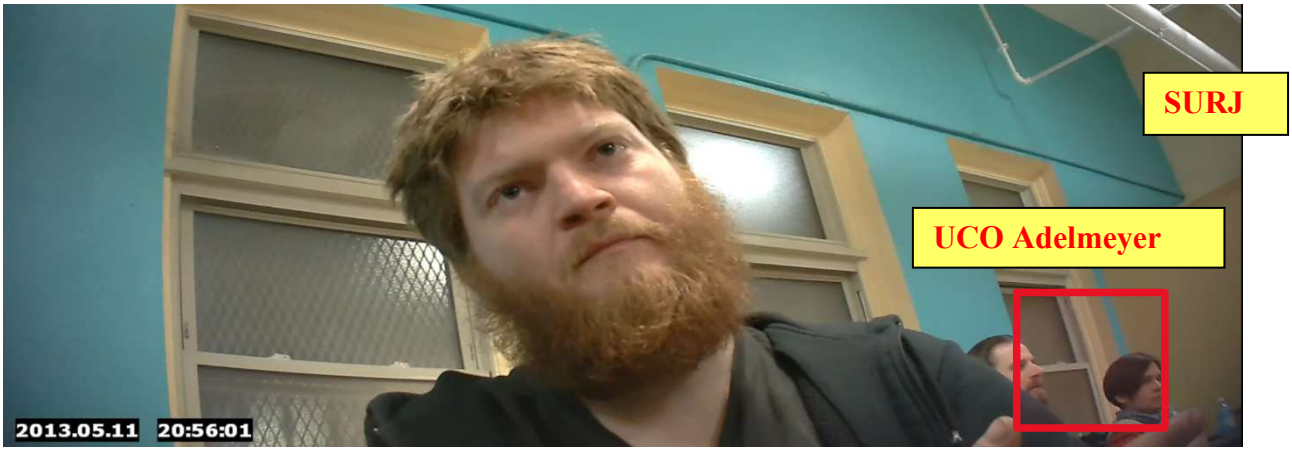
The first of the video segments that Respondent chose to produce picks up where a third omitted video segment ended, with the Project Veritas operative adjusting his hidden camera in the bathroom. FF 33a. As the operative leaves the bathroom, the video briefly shows his face. *Id.* It then shows him walking to the ACBB breakout session where march organizer Petrohilos is speaking, but on the way the operative passes undercover Officer Adelmeyer, (marked as "UCO") who is attending a different breakout session for a group called Stand-Up for Racial Justice ("SURJ")—one of several different breakout sessions that were occurring at

the same time in the basement at St. Stephen's. *Id.*; *see* DCX 78 at 54-55. The ACBB breakout session began approximately 20 seconds after Officer Adelmeyer is seen attending the SURJ breakout session in the portion Respondent's team edited from the video clip. DCX 242, video ending 201302, at 0:54-1:19; DCX 247 at 1 (transcript marking the beginning of the meeting).



Under Respondent's direction, Detective Pemberton redacted the first minute and nine seconds of this video clip, removing footage of both the Project Veritas operative and undercover Officer Adelmeyer attending the SURJ breakout session. FF 31, 33a.

The third produced video segment shows that approximately ninety seconds after the ACBB breakout session ended, the Project Veritas operative panned his hidden camera around and once again captured undercover Officer Adelmeyer attending the SURJ breakout session, as depicted below. FF 33b; DCX 242, video ending 204911, at 5:10-6:44; DCX 247 at 22 (transcript marking the end of the meeting).



Under Respondent's direction, Detective Pemberton edited the video to obscure Officer Adelmeyer's identity. FF 31, 33b.

Another video edit involved footage from the fourth produced video segment, which originally showed the Project Veritas operative's interviews with two individuals discussing DisruptJ20 and the IWW labor union. FF 33c. Afterwards, the operative zipped his coat over his hidden camera and left the church. *Id.* Detective Pemberton clipped the video at this point, which excised a recording of the operative's subsequent telephone call with another Project Veritas colleague. FF 31, 33c. In that deleted conversation, the Project Veritas videographer 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." FF 33c.

Respondent was aware of the foregoing edits to delete identification of the Project Veritas operative and undercover Officer Adelmeyer, and to omit the general assembly portion of DisruptJ20's January 8 Planning Meeting—edits which were carried out at her direction. FF 31, 34. But she was apparently unaware that

Detective Pemberton clipped off the concluding portion of the fourth video segment.[7] FF 35.

Respondent had these four edited video clips labeled: "*Planning Meeting Video 1–4*" and, on March 16, 2017, posted them to the government's "USAfX" discovery portal in a folder labeled "*Planning Meeting Videos*." FF 33, 36.

The following day during an arraignment hearing before Judge Leibovitz, when defense counsel indicated that a formal discovery demand would be forthcoming, the court announced that Respondent 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. Judge Leibovitz also announced that defense counsel could issue "subpoenas for videotapes and other materials from private entities." *Id.* Respondent appeared at that hearing but did not correct the court's representation that the government was giving everybody "a hundred percent of the video footage they have." *See id.*; DCX 12 at 4-6.

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[7] When these edits came to light later, during the first trial, Respondent assured Judge Leibovitz that both she and her investigator Detective Pemberton reviewed the January 8 video segments, and Respondent explained that only the "individual putting on the button cam" and "walking into the meeting," and "the officer's visible presence" had been redacted. FF 34. The Hearing Committee credited Respondent's testimony that she remained unaware of Detective Pemberton's edit to the fourth video segment—which deleted the Project Veritas operative's comment about the IWW organizer not knowing "anything about any of the upper echelon stuff"—until confronted with that information before Judge Knowles one year later, during the second Inauguration Protest trial of May 2018. FF 35.

2. Respondent Did Not Disclose Project Veritas as the Source of Planning Meeting Video's When She Pursed a Superseding Indictment.

Also on March 17, 2017, Respondent and Detective Pemberton discussed "reindicting the defendants" to add a felony destruction of property charge. FF 38. By adding a charge for conspiracy to riot, Respondent understood that she could pursue felony charges for destruction of property based on a "*Pinkerton* theory of liability," referring to *Pinkerton v. United States*, 328 U.S. 640 (1946), under which a defendant joining a criminal conspiracy to riot is liable for any subsequent destruction of property because it was foreseeable. *Id.*

One week later, Respondent and Detective Pemberton prepared and signed an affidavit to support a search warrant for the home of DisruptJ20 organizer Petrohilos. FF 39. The warrant was partially based on Petrohilos's statements captured on the Project Veritas video of the ACCB breakout session at the January 8 Planning Meeting. *Id.* The affidavit declared that an undercover officer (Officer Adelmeyer) was present and "reported" about Petrohilos's statements, and that a "third-party (non-law enforcement)" had provided "unedited video footage of portions of the same January 8, 2017, meeting," which the affidavit swore was "consistent with [Officer Adelmeyer's] statement." FF 40.

Contrary to the sworn affidavits Respondent submitted in support of the warrant, excised portions of the January 8 Planning Meeting video and subsequent trial testimony revealed that undercover Officer Adelmeyer was in a different breakout session at the time, twenty to thirty feet away from the ACBB breakout session that Petrohilos attended during the time period at issue. FF 41. As

demonstrated by the Hearing Committee's findings cited above, footage clipped from the January 8 Planning Meeting video segments confirm that Officer Adelmeyer was *not* with the ACBB breakout session at issue, but was standing twenty to thirty feet away in the SURJ breakout session. *See supra* pp. 11-13; FF 33a-33b. Respondent did not turn over the March 2017 search warrant affidavit in her *Jencks*[8] disclosures before trial but did disclose a second search warrant affidavit filed in July 2017 for disruptj20.org. FF 42. That affidavit did not refer to a "third-party" video. *Id.*

One month later in April 2017, Respondent sought a superseding indictment to add Conspiracy to Riot and felony Destruction of Property counts against all defendants and charging Petrohilos for the first time. FF 43. The government presented evidence to a second grand jury over three days: April 18, 21, and 25, 2017, to obtain the superseding indictment. FF 44. Respondent presented evidence only on April 25, which was also the only time the government presented its January 8 Planning Meeting video clips to the second grand jury. *Id.* Detective Pemberton testified that even though Petrohilos did not attend the ACBB march, he was responsible for planning and organizing it. FF 45. Detective Pemberton testified to the grand jury that "there was a number of things that they [*i.e.*, the people at the January 8 Planning Meeting] talked about" that "led the officer [*i.e.*, Officer

[8] "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).

Adelmeyer] to believe that there was going to be destruction." *Id.* Respondent advised the grand jury that Petrohilos could be charged if he was involved in planning the riot regardless of whether he participated on the day of the riot. *Id.*

Respondent presented the January 8 Planning Meeting video segments as recordings of an ACBB planning meeting at which an undercover officer was present. FF 46. During this presentation—unlike the first grand jury (*see supra* p. 10; FF 28)—the government did *not* disclose Project Veritas's role in creating the January 8 Planning Meeting videos. FF 46. Respondent did not disclose the April 25 transcript of Detective Pemberton's grand jury testimony in her *Jencks* disclosures at trial. FF 47; *see* FF 135-144 (describing the subsequent production and discovery of the April 25 transcript). On April 27, 2017, the second grand jury returned a superseding indictment against all Inauguration Protest defendants, including Petrohilos. FF 48.

3. Respondent Understood That Evidence of Any Defendant's Participation at DisruptJ20 Planning Meetings Might Require Disclosure.

Unremarkably, the Hearing Committee found that Respondent understood that there were different levels of culpable activity among the 200+ defendants. *See* FF 50. Respondent appreciated that proof of a lack of involvement in planning for the ACBB march could be exculpatory as to those defendants for whom there was no record of participation in the march. *Id.* She also understood that evidence about a particular defendant's planning to attend DisruptJ20's peaceful protests was also potentially exculpatory. FF 51. Acting on that understanding, Respondent

developed categories of information from each defendant's cell phone which the government was required to disclose to *all* defendants under Rule 16 of the Federal Rules of Criminal Procedure or *Brady*. FF 52; *see, e.g.*, DCX 161 at 1.

One of Respondent's designated categories was "[a]ll images or videos" relating to "attending, preparing for, or participating in the [ACBB], DisruptJ20 events, or other events on January 20, 2017." *Id.* When a defense lawyer asked about this category during an August 2017 pre-trial hearing, Judge Leibovitz explained that the government had not yet disclosed all of the cell phone evidence it possessed but *had* already disclosed "videos of all this stuff that they got from wherever they got them." FF 53. Operating under the mistaken impression that cell phone data and video evidence was the only category of information the government had not yet produced due to privacy issues that had previously been raised, Judge Leibovitz explained it "would be a problem" if a defendant did not receive evidence taken from another defendant's cell phone, in the government's possession, regarding attendance, preparation, and participation in the events of January 20. *See id.*; DCX 47 at 24-26.

Weeks later 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.['']" FF 53. Respondent replied by acknowledging that evidence of this

sort, having "either a dual purpose or another purpose, in part," to legitimately protest—would constitute exculpatory information. FF 54.

4. Respondent Reviewed Other Project Veritas Videos of DisruptJ20 Meetings for the Inauguration and Did Not Disclose Them.

In addition to the January 8 Planning Meeting at St. Stephen's Episcopal Church, DisruptJ20 conducted other planning and training meetings for Inauguration Day protests. One of these meetings was the "Action Camp" held at American University, and there were other so-called "Spokes Council" meetings conducted in private residences. FF 55. Respondent knew that DisruptJ20's Action Camp at American University consisted of training classes for all its planned inauguration protests—including the ACBB march. *Id.*; *see* Tr. 982. Respondent also knew that Spokes Council general assembly meetings were large umbrella meetings (around 300 people) about direct actions planned for Inauguration Day, often including a formal meeting among representatives of the affinity groups participating in each action—including ACBB. FF 55; *see* Tr. 953-55, 962-63. DisruptJ20's January 14 meeting was one of several Spokes Council meetings that undercover Officer Adelmeyer attended where there was talk of property destruction, according to his testimony. FF 55.

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*" in addition to the already disclosed, albeit substantially redacted, January 8 Planning Meeting video segments. FF 56; *see* FF 36-37, 67; DCX 185 at 1. Respondent took notes on the content of the remaining

Project Veritas videos and later used these notes to summarize them when ordered to do so by Chief Judge Morin, after their existence came to light in later Inauguration Protest cases. FF 56, 60-61; *see infra* pp. 36-38.

Respondent knew that she possessed additional Project Veritas videos that she had not disclosed, and that these undisclosed videos recorded other DisruptJ20 meetings in preparation for its Inauguration Day protests. FF 57. These undisclosed Project Veritas videos included several segments of DisruptJ20 meetings conducted on:

- Jan. 14, 2017. (Action Camp training at American University);
- Jan. 15, 2017. (Action Camp training at American University); and
- Jan. 17, 2017. (other meeting included mention of "block" activities.)

Id. Respondent willfully suppressed the existence and production of this evidence throughout the initial Inauguration Protest case proceedings. She did not acknowledge their existence until May 29, 2018—after she was compelled to identify the Project Veritas operative who took the January 8 Planning Meeting video clips already in evidence. FF 104-106. Only when defense counsel was allowed to interview the Project Veritas operative did they learn that Project Veritas had long ago provided Respondent with additional videos of DisruptJ20 meetings at the outset of her investigation in February or March of 2017. *See* FF 29, 57, 103-104; *see also infra* pp. 34-35.

5. The Undisclosed Video Evidence Contained Evidence of Non-Violent Protest Preparations by Certain Defendants.

The Hearing Committee made several findings of fact in support of its conclusion that the withheld Project Veritas video clips contained exculpatory evidence. For example, Respondent knew that Petrohilos, the government's alleged "lead planner and organizer" for the ACBB march, was depicted on the undisclosed Project Veritas videos attending DisruptJ20's Action Camp at American University. FF 59. These undisclosed Action Camp videos included a training class that undercover Officer Adelmeyer attended on January 14, 2017, which involved multiple sessions on "de-escalation." FF 60. Respondent's own notes from her review of the undisclosed videos include a citation to "guidance" that "if you see violence, you should report it to the ACLU and sometimes to law enforcement." *Id.*

The Hearing Committee also cited Chief Judge Morin's later finding that Respondent's failure to disclose additional Project Veritas videos constituted a *Brady* violation, relying in part on the significance of de-escalation training depicted in these undisclosed materials. FF 61. Chief Judge Morin also found that the videos Respondent withheld tended to rebut undercover Officer Adelmeyer's testimony about ACBB plans for destruction, and were therefore "relevant to the jury's understanding as to the totality of what occurred at [DisruptJ20's] planning meetings." *Id.* Evidence contained in the undisclosed videos contrasted with the January 8 Planning Meeting video segments which Respondent used to substantiate Officer Adelmeyer's testimony about hearing DisruptJ20 meeting attendees discuss plans for property destruction. *Id.*

In the second trial, Officer Adelmeyer identified defendant Webber as being present at a DisruptJ20 meeting he attended but could not recall which meeting it was. FF 62. Defendant Webber's attorney was adamant that Officer Adelmeyer "should not be able to identify" defendant Webber unless he could say which meeting he attended, "because some of them were more peaceable, and others might discuss more aggression." *Id.* The undisclosed videos showed defendant Webber attending one of the Action Camp training classes on January 14, 2017, the same day Officer Adelmeyer attended. *Id*. During that same January 14 Action Camp session, trainers discussed "de-escalation" and "peacekeeping" for Inauguration Day protests, instructed attendees about de-escalation, and discussed how they should plan to contact the police "if a Trump supporter showed up with a gun." FF 63. This evidence was, in the opinion of defendant Brittne Lawson's defense counsel, Sara Kropf (FF 18), "directly contrary" to the government's theory that defendants were planning violence, destruction, and provocation with the police. FF 64. As Kropf testified before the Hearing Committee, "I would have hammered the jury on this." Tr. 135. That same evidence was also potentially exculpatory for 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. FF 64.

The Hearing Committee found that clipped footage from the January 8 Planning Meeting video—where the Project Veritas operative discussed IWW members not knowing about "upper echelon" stuff (*see supra* p. 13)—was also

potentially exculpatory information for defendant Webber, an IWW member. FF 65; *see* FF 33c. The deleted scene suggested that IWW members like defendant Webber were not part of—indeed, unaware of—the "upper echelon" plans for Inauguration Day violence and therefore served to distance him from the government's conspiracy-to-riot allegations. FF 65. Chief Judge Morin also found that withholding this exculpatory evidence was a *Brady* violation. *See id.*; RX 35 at 61-62, 73-74.

The edited January 8 Planning Meeting video clips that Respondent produced were also limited to ACBB breakout session excerpts only (*see* FF 30-34), omitting other general sessions from the January 8 DisruptJ20 meeting which included more peaceful plans. Defense counsel from the first Inauguration Protest trial testified before the Hearing Committee that a complete disclosure about both the existence and substance of undisclosed edits and remaining Project Veritas video segments from that DisruptJ20 meeting would have been "very powerful" to "undermine [Detective Pemberton's] credibility." FF 66.

C. The First Inauguration Protest Trial (Judge Leibovitz).

Events at the first trial demonstrate the impact of Respondent's decisions not to disclose Project Veritas as the source of the government's January 8 Planning Meeting video segments, while withholding additional video footage of that and other DisruptJ20 planning and training meetings that included ACBB organizers.

The first Inauguration Protest trial of six defendants began in November 2017. FF 14. Respondent offered evidence to prove that ACBB march organizers planned

a riot, including: (i) segments of the January 8 Planning Meeting videos, and (ii) testimony from undercover Officer Adelmeyer, which Respondent proffered to authenticate the January 8 Planning Meeting video segments of the ACBB breakout session at trial—even though excised portions of that video showed Officer Adelmeyer was standing with the SURJ breakout group, rather than the ACBB session, just before and after the ACBB session. FF 15, 41. After Officer Adelmeyer testified that he only attended a portion of the ACBB meeting, Respondent proffered that the witness could nonetheless confirm the substance of the first three and final nine pages of the video transcript (*see* DCX 247 at 1-3, 14-22). DCX 78 at 57-58, 68. Judge Leibovitz then ruled that Officer Adelmeyer could authenticate the full video, stating that his inability to verify specific statements would go to the weight, not admissibility of the evidence. *Id.* at 82-84; *see also id.* at 90-91, 97 (Officer Adelmeyer testifying that he listened to the beginning and end of the ACBB breakout session, and that after he moved to a separate affinity group, he could see that the ACBB meeting was still in progress). At the time, defense counsel was surprised by the revelation that Officer Adelmeyer had not attended the full meeting and, based on their belief that the videos were recorded by a biased source, which would require clear and convincing evidence to authenticate them, argued that Officer Adelmeyer should not be able to authenticate video evidence of any statements he did not personally hear. *Id.* at 61, 73-74.

Consistent with her conspiracy-to-riot theory of the case, Respondent argued to the jury that the ACBB march was planned to be a riot—not a protest—and that

the defendants on trial "got the memo" about using a "black bloc" march formation to facilitate violence and destruction and act as a cover and "getaway car" for the violent perpetrators. FF 16. Based on: (i) the planning meetings; (ii) how defendants "showed up prepared" to "fight" for and acted "consistent" with the ACBB plans; and (iii) how defendants chose to stay in formation with other ACBB marchers after violence broke out, the government argued that the jury could infer the existence of a plan to riot and each defendant's knowledge of and intent to join that plan. FF 20. Defendants countered, however, that "other people" committed the violent acts at issue, and that the government was trying to hold "peaceful protesters" liable for others' misconduct. FF 17.[9]

As mentioned earlier, Respondent disclosed the edited four video segments from DisruptJ20's January 8 Planning Meeting well in advance of the first trial. FF 67; DCX 185 at 1. Soon thereafter, one of the defendants 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

[9] Defendant Lawson, for example, was an oncology nurse who attended the ACBB march as a "street medic." Her attorney argued to the jury that the ACBB 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. FF 18. The government responded that Lawson was guilty of felony rioting and felony destruction of property based on evidence of her conduct (including what she wore and brought to the march, and her decision to stay with the bloc after violence began), which were consistent with instructions from the planning meetings. The government cited the planning meeting as "circumstantial evidence" of Lawson's alleged "intent to join an illegal conspiracy," and further argued that as a member of the conspiracy, she was liable for the violent acts of her co-conspirators." FF 19.

pre-Inauguration Events." FF 69. That discovery request entailed 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.* Respondent declined to provide the requested information about who recorded the meetings or the circumstances under which they were recorded and also refused to provide complete or unedited copies of the videos or explain how the government obtained and "edited" them. FF 70.

A week later, Respondent replied to several inquiries to describe the government's redactions from the produced video segments of the January 8 Planning Meeting. Respondent advised that

> [t]he 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 . . . .

FF 71.

On the eve of the first trial, defendants moved to exclude the January 8 Planning Meeting video segments. FF 72. In the course of that motion, defense counsel shared their belief that the video clips were sourced from Project Veritas, did not "reflect the full meetings" depicted, and appeared "to have been edited." *Id*. Defense counsel advised the court that Respondent "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," citing *Cox v. United States*, 898 A.2d 376, 381 (D.C. 2006). FF 72.[10] Defense counsel proffered that they believed the video came from a biased organization, which made it "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." FF 74.

Respondent freely admitted that she had not disclosed the "identity of the tapers," falsely stating that no one "ever asked." FF 75; *see* FF 69 (defense counsel previously requested the identity of persons who recorded each video the government produced). When Judge Leibovitz asked Respondent if she had disclosed "the nature of the organization," Respondent confirmed for the first time that the videos were filmed by Project Veritas. FF 76. Respondent also 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 Planning Meeting videos. FF 77. She also represented to the court that during discovery, "We gave them the full entirety of those videos

[10] During the ensuing trial, undercover Officer Adelmeyer testified about the January 8 Planning Meeting video clips of the ACBB breakout session, and when defense counsel attempted to raise the issue of the source of the video, Respondent objected to prevent the identity of Project Veritas from being disclosed. FF 73

from that day." *Id*. Respondent did not disclose that she withheld January 8 Planning Meeting video segments depicting the fifty-minute general assembly, which included defendant Petrohilos's announcements about the ACBB march. *Id*.

On cross-examination, Officer Adelmeyer admitted to knowing about Project Veritas's bias against "left-leaning individuals or organizations" and reputation for "splicing videos together" and "leaving out material information." FF 78. When Respondent sought to elicit his testimony that he contemporaneously reported to MPD his understanding that there would be "damage to property" at the ACBB march, defendants objected to this testimony as hearsay. FF 79. Judge Leibovitz observed that the cross-examination created a potential "inference" that "the plan itself, apparently, was just to have a nonviolent protest." *Id.* 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 ACBB march to be peaceful. *Id.* 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 ACBB group who planned to "engage in destruction*." Id.*

Respondent later called Detective 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." FF 80. Overruling defense objections,

Judge Leibovitz ruled that Respondent could show that the government "took steps to make sure that the thing was correct." *Id.*; *see* DCX 84 at 42-43. Detective Pemberton testified that he contacted Project Veritas for "raw, unedited footage" of the Petrohilos-led ACBB breakout session, 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. FF 81. Detective Pemberton testified that 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.* When Respondent asked Detective Pemberton 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," Detective Pemberton falsely testified, "No. Not at all." *Id.*

Respondent elicited this false testimony in open court and at no time disclosed her decision to withhold fifty minutes of video depicting that day's general assembly. FF 82; *see also* FF 31-32. Defense counsel were unaware that the government possessed other video evidence from the rest of the January 8 Planning Meeting, which depicted planning for DisruptJ20 protests for the 2017 inauguration. FF 83.

All six defendants in the first trial were acquitted by the jury in December 2017. FF 84.

D. Proceedings After the First Trial's Acquittal Verdict (Chief Judge Morin).

After the first trial resulted in an acquittal, the government voluntarily dismissed many of the remaining Inauguration Protest defendants—except fifty-nine defendants perceived to be the most culpable for either performing or planning violent acts during the ACBB march. FF 85; DCX 97 at 3-4. Defense counsel in those matters served additional discovery requests upon Respondent, seeking further information about the January 8 Planning Meeting video segments including (i) the identity of the persons who recorded each video; (ii) complete, accurate, unedited copies of same; and (iii) detailed information about the nature of any edits or redactions made by Respondent's office. FF 86. A motion to compel soon followed, in which defense counsel sought additional discovery about the January 8 Planning Meeting video segments and moved to strike the previously disclosed segments. FF 88. Among other things, that motion asserted that the January 8 Planning Meeting video segments were "not the original video files" received by Respondent's investigator, and that the government had not responded to prior discovery seeking information about how the disclosed segments had been edited. FF 89.

At a hearing on that motion, when Chief Judge Morin asked Respondent for "the government's position on what they have and what's available to them," Respondent replied that her investigator (Pemberton) requested "unedited video" from Project Veritas, that "[t]hey provided unedited video," and "[w]e posted the video." FF 91. Chief Judge Morin asked on what basis Respondent represented that

the video was unedited, and she replied: "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 ACBB breakout session. Respondent then falsely represented to the court that, otherwise, "the defense has the exact video we have." FF 92.

Chief Judge Morin asked Respondent: "[Y]ou don't have any other presentation of that meeting other than what's been provided to you?" FF 93. Respondent answered, "Correct." *Id.* Referring to the four previously disclosed video segments of the January 8 Planning Meeting, Respondent said, "We have this, it's how we received it." *Id.*

When defense counsel persisted to ask for the "original video files" provided to the government, Chief Judge Morin twice cited Respondent's representation to the court that she had "turned over all the video that they have received to you." FF 94. When the judge asked: "Am I misunderstanding what the government's saying?", Respondent did not correct the court's misunderstanding. *Id*.; *see* DCX 115 at 12. Undeterred, defense counsel contended that at the very least, the two "cropped" portions had not yet been turned over. FF 94. Chief Judge Morin ultimately ordered that

> 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.

FF 95 (quoting DCX 115 at 19 (emphasis added)).

As the Hearing Committee found based on the undisputed record of these pre-trial proceedings, Respondent's misrepresentations led Chief Judge Morin to operate under the assumption that Respondent had disclosed all videos in her possession concerning these matters. FF 96. That finding is supported by Chief Judge Morin's later analysis of the resulting *Brady* violation, finding that the misperception caused by Respondent's misrepresentations to the court were 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); *see* FF 96.[11]

On April 12, 2018, Respondent disclosed to defense counsel the seven video segments received from Project Veritas of the January 8 Planning Meeting, which included the three previously undisclosed video segments of that day's general assembly. FF 98. Despite Chief Judge Morin's emphatic and all-encompassing order that Respondent produce "the entirety of whatever is in the government's possession," Respondent did not include the other Project Veritas videos of DisruptJ20's January 14 and 15 Action Camp training classes, nor the January 17 meeting. FF 95, 98.

E. The Second Trial of Inauguration Protest Defendants.

The second trial before Judge Knowles began on May 16, 2018. FF 99. On May 21, Respondent called Officer Adelmeyer to testify about the authenticity of the January 8 Planning Meeting video segments. FF 100. She also elicited his

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[11] At that 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. FF 97. Chief 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 [Officer 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." *Id.* Chief 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.*

testimony about attending "a number of meetings" for DisruptJ20, and "at least three" that he recalled where the ACBB march discussion included plans for property damage. *Id.* By this time, defense counsel had received the complete January 8 Planning Meeting videos in the government's April 12 production. FF 101. Based on their review of the withheld videos, on May 22 defense counsel for the fourth trial group of defendants filed a motion for *Brady* sanctions before Chief Judge Morin. *Id.* That motion was based on undisclosed edits at the end of the January 8 Planning Meeting video segments (*see* FF 33c), wherein the Project Veritas operative said of the IWW attendees: "I don't think they know anything about any of the upper echelon stuff." FF 101. Other defense counsel filed similar motions later that night. *Id.*

On May 23, 2018, during discovery proceedings in the fourth trial group, Chief Judge Morin held that the undisclosed "upper echelon" footage was either a *Brady* violation or a violation of Rule 16. FF 102. Chief Judge Morin reserved ruling on a sanction pending the government's ability to cure any prejudice by making the Project Veritas operative who took the video available to the defendants for interview. *Id.*

Respondent's team arranged a meeting between defense counsel in the ongoing second trial and the Project Veritas operative: a man identified only as "Matt." FF 103. Upon questioning, Matt informed defense counsel that he recorded and provided to Project Veritas many more DisruptJ20 planning and training meetings for the Inauguration Day protests—in addition to the January 8

Planning Meeting tapes already produced—and that these additional meetings included "Action Camp" sessions conducted at American University. FF 103; DCX 166 at 11. Matt informed defense counsel that he was told by other unidentified members of Project Veritas that his recordings would be given to law enforcement. DCX 166 at 11-12.

On May 29, 2018, defendants in the second trial were scheduled to complete their cross-examination of Detective Pemberton, the government's last witness. FF 104. When Judge Knowles asked about defense counsel's meeting with "Matt, the videographer," defense counsel informed Judge Knowles that Matt revealed he and other Project Veritas operatives filmed "that January 8th meeting," a "January 14th meeting at American University," and two more DisruptJ20 planning meetings held in private residences, like the "planning meeting at someone's house" about which Officer Adelmeyer had testified. *Id.*

Significantly, defense counsel also advised the court that Matt "does not recall any discussion about property damage at any of those meetings" he attended. *Id*. Defendant Webber's counsel, April Downs, advised Judge Knowles that this new information was particularly important to her client because undercover Officer Adelmeyer testified that he saw defendant 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." FF 105.

Responding to this mid-trial revelation, Respondent made further oral representations to the court, describing the remaining undisclosed Project Veritas videos in her possession. FF 106. She told Judge Knowles that "[w]e have no other videos from January 8th from Veritas. No other audio recordings from January 8th. We have nothing," and that "[w]e have no recording, audio or otherwise, of any other planning meeting or breakout session" of the ACBB organizers. *Id.* 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.

Meanwhile on that same day, Chief Judge Morin—who was handling pre-trial discovery for the remaining trial groups—asked the government for a written summary of any undisclosed Project Veritas videos in their possession, with an explanation about why they were not previously disclosed. FF 107; *see* RX 37. Respondent prepared the summary based on notes she had taken after reviewing the videos in Fall 2017, and she provided a draft to AUSA Brittany Keil while asking for an opportunity to discuss before the summary was submitted to Chief Judge Morin. FF 108; Tr. 764. After that discussion and before it was submitted to the court, Respondent edited the undisclosed video summaries further. FF 108. A comparison of the initial draft summary Respondent sent to AUSA Keil, and the

summary ultimately submitted to Chief Judge Morin, reveals that Respondent deleted references 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. FF 109. Respondent also deleted the phrase, "if you see violence, you should report it to the ACLU and sometimes to law enforcement" from her summary. *Id*. Respondent also deleted a statement that one of the videos "end[s] with a phone conversation between the videographer and a third person." *Id.* In her description of a meeting where a "block" was discussed, Respondent deleted a reference to "break[ing] out into clusters of affinity groups to choose a spokesperson for a spokes council." *Id.* This last description was for a video from a January 17, 2017 meeting about plans for the ACBB march, which Respondent had not disclosed. *Id.*; *see* RX 39.

The next morning, on May 30, AUSA Keil submitted Respondent's revised summary to Chief Judge Morin and defense counsel in the third trial group. FF 110. On that same day, during the second ongoing trial before Judge Knowles, Downs again objected that she did not know the full extent of planning meeting videos in the government's possession, which she said was relevant to where her client was at Action Camp and if that was where "[Officer] Adelmeyer saw him." FF 111. Respondent represented to the court that the videos she had not yet produced 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.* Respondent further 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.

Later that day, defense counsel in the second trial group became aware of Respondent's summary of undisclosed videos that was submitted to Chief Judge Morin in the remaining cases. FF 112. The following day (May 31, 2018), Chief Judge Morin ruled that Respondent's failure to disclose the complete January 8 videos and the other Project Veritas videos from DisruptJ20's Action Camp event at American University constituted additional *Brady* violations. FF 113. As a sanction, Chief Judge Morin dismissed the Conspiracy to Riot count and precluded the government from pursuing any theory of co-conspirator liability in those remaining trial groups. *Id*.

Upon learning of Chief Judge Morin's *Brady* ruling, defendants in the ongoing second trial renewed motions for sanctions and a mistrial. FF 114; DCX 177 at 8-10. Judge Knowles deferred ruling on those motions and allowed the case to proceed to jury deliberations, which ultimately resulted in an acquittal for defendant Webber and mistrials for his three co-defendants. FF 114. The government later voluntarily dismissed the three remaining defendants, together with all other remaining Inauguration Protest cases, on July 6, 2018. FF 114, 141.

F. The Government's *Brady* Reconsideration Motion.

After Chief Judge Morin's May 31 sanctions order, the U.S. Attorney's Office assigned AUSA David Goodhand to review Respondent's conduct of discovery for and presentation of evidence during the Inauguration Protest cases. FF 115. In the course of that review, AUSA Goodhand—with Respondent's assistance—drafted and filed a motion seeking clarification of Chief Judge Morin's sanctions order and asking the court to find that Respondent did not act in bad faith or intentionally mislead the court. FF 115-118; DCX 200 (motion filed on June 28, 2018). The government's briefing on the motion argued that the record "belies" any suggestion that Respondent engaged in a pattern of misrepresentations (FF 118) and, at the hearing on his motion, AUSA Goodhand 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." FF 119.

On November 9, 2018, Chief Judge Morin issued an order on the motion which accepted the government's untested explanations about why Respondent did not disclose several matters about the Project Veritas videos. FF 120; DCX 215. Chief Judge Morin's order stated that the court had "no reason to believe that the government had additional malevolent motives, such as intentionally suppressing evidence," and 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." FF 120.

G. The Government's Misidentification of Defendant Beale Was Not Timely Disclosed.

One other of Respondent's failures to disclose evidence in the Inauguration Protest cases involved defendant Cassandra Beale, who attended the ACBB march with her boyfriend. FF 121; *see, e.g.*, FF 132. Defendant Beale was represented in the criminal proceedings by Attorney Roy Austin. FF 121.

During an April 2017 grand jury proceeding, Respondent asked Detective Pemberton to identify defendants who attended the DisruptJ20 January 8 Planning Meeting at St. Stephen's Episcopal Church. FF 122. Detective Pemberton correctly identified several defendants but misidentified another attendee as defendant Beale. *Id.* Thereafter, Respondent advised Austin that the government identified his client at the January 8 Planning Meeting based on videos from that meeting. FF 123. Austin later moved to suppress any identification of defendant Beale at that meeting, contending that the basis for the identification had not been disclosed. FF 124. That motion was not immediately ruled upon because Beale's case was part of the later trial groups. *Id.*

Several months later, Austin moved for a suppression hearing because he believed his client had been misidentified as attending the DisruptJ20 January 8 Planning Meeting. FF 126. When Respondent asked Detective Pemberton to reconfirm his earlier identification of Beale, the detective discovered that he had indeed misidentified defendant Beale. FF 127. Nonetheless, Respondent filed a

brief opposing the suppression motion, but without disclosing the misidentification Detective Pemberton discovered. *See* FF 128-129.

At a hearing on the suppression motion, Chief Judge Morin asked the government to take another look at its identification of Beale before he ruled. FF 130. When Austin followed up with Respondent for status of her confirmation a week later, she told Austin that he "never bothered to ask" about Beale's misidentification prior to the court's February 9 suppression hearing. FF 131; *see* FF 130. Respondent advised defense counsel that "[e]arlier in the case, we did think it might be her, but later identified" that as another person. FF 131.

Based on the acknowledged misidentification of Beale, Austin filed motions for *Brady* sanctions and to dismiss Beale's indictment for vindictive or selective prosecution. FF 132. Respondent opposed the motion, arguing that the misidentification was never presented to the grand jury, which returned an indictment against Beale based on other evidence. FF 133.[12] Chief Judge Morin denied Beale's *Brady* motion, and on the basis of Respondent's misrepresentation that "the evidence was provided to the defense," ruled that Respondent had not suppressed evidence. FF 135. The court nonetheless ordered Respondent to "provide the court grand jury transcripts concerning Ms. Beale and any arguments

[12] Respondent proffered to Chief Judge Morin that after her May 2017 discovery conference with Austin, she "provided him every video" of the January 8 Planning Meeting. FF 134; *see also* FF 123 (Respondent told Austin that Beale was identified based on videos of the meeting). Chief Judge Morin asked if there was "any piece of evidence" that Respondent had but Austin did not, and Respondent answered, "No, Your Honor. He had it." FF 134.

made by the government to the grand jury about whether or not she should be indicted." *Id.* Chief Judge Morin also took the motion for vindictive prosecution under advisement, continuing Beale's case until her pre-trial hearing on July 13, 2018. *Id*.

On June 19, 2018, Austin's office emailed Chief Judge Morin's chambers and Respondent, asking whether the government had complied with the May 2018 order to produce grand jury transcripts. FF 136. Respondent had failed to comply with Chief Judge Morin's order (FF 136-139) to submit the grand jury transcripts, so Austin filed a motion to dismiss the indictment on July 4, 2018. FF 140. Two days later on July 6, 2018, the government moved to dismiss all remaining cases against all remaining defendants—including Beale—without prejudice. FF 141. That motion was granted. *Id.* But a few days later, Beale moved for the court to reconsider its dismissal order and dismiss her case *with* prejudice, citing her July 4 motion. FF 142. That motion pended for several months, until March 2019. *Id.*; *see also* FF 150, 153.

Ultimately, Respondent received and reviewed the April 25, 2017 grand jury transcript—delivery of which had been delayed due to factors both within and without her control (*see* FF 138-139, 143)—and saw it showed that Detective Pemberton had indeed misidentified Beale to the grand jury, and that Respondent's earlier misrepresentation to the contrary before Chief Judge Morin (*see* FF 133) was erroneous. FF 144.

On the morning of July 12, 2018, Respondent informed her supervisor (AUSA Tischner) about the grand jury transcript and her earlier misrepresentation to Chief Judge Morin about whether Beale's misidentification at the January 8 planning meeting was presented to the grand jury. FF 145. AUSA Tischner told Respondent that she did not need to make any correction to Chief Judge Morin at that time. *Id.* Respondent understood that the U.S. Attorney's Office would handle this matter, particularly because the Office had (as a result of Chief Judge Morin's sanction finding) previously instructed her not to appear in front of Chief Judge Morin on any matter. *Id.*

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, which Respondent forwarded to AUSA Tischner. FF 146. On November 20, Respondent wrote to AUSA Goodhand and the AUSAs she had supervised in the Inauguration Protest matters, asking about "next steps" for the "response(s) that have to be filed for the attorneys' fees motions and the other motions that the court agreed to extend our response deadline." FF 147. But a few weeks later on December 10, Respondent wrote to AUSA Goodhand to say she had been advised by the front office to follow "protocol" and maintain "a separation between your independent review and me." FF 148. Respdonent wrote that she had "no comments/edits on the pleading" but would gladly talk to him again if the "'Chinese wall' is ever

deconstructed." *Id.* Later that same day, AUSA Goodhand filed the government's opposition brief to Beale's motion to dismiss with prejudice. FF 142, 149.

The hearing on Beale's motion was set for March 15, 2019, and the day before that AUSA Alessio Evangelista—who served as the First Assistant to the United States Attorney—met with Respondent to discuss facts surrounding the April 25, 2017, grand jury transcript and misidentification of Beale. FF 150-151. AUSA Evangelista asked Respondent to provide a statement and share any facts that should be presented to Chief Judge Morin. FF 151. In the early morning hours of March 15, 2019, Respondent sent an email about the Beale misidentification and grand jury transcript issue to AUSA Evangelista, AUSA Goodhand, and AUSA Ahmad Baset. FF 152. Respondent represented 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. *Id.*

At the motion hearing, AUSA Goodhand told Chief Judge Morin that he had "some representations" to offer which would "significantly truncate these proceedings." FF 153. He advised the court that the government was withdrawing its opposition to Beale's motion to dismiss her cases with prejudice, and that the government was moving to dismiss all defendants' cases *with* prejudice. *Id.* The court granted that motion. *Id.* AUSA Goodhand also disclosed Detective Pemberton's misidentification of Beale in the April 25 grand jury transcript, which he explained as something that "we have recently discovered, as I was preparing for

this motion hearing today," while emphasizing that the government was still investigating. *Id*.

III. DISCUSSION

The Board reviews *de novo* a hearing committee's legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam) (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed de novo"). The Board is not free, however, to set aside the Hearing Committee's credibility findings about a respondent's intent unless those findings are unsupported by substantial evidence, or if the credibility finding itself was made in error of law. *In re Krame*, 284 A.3d 745, 752-55 (D.C. 2022) (recognizing that "[s]ome factual questions, like whether an individual acted with knowledge or intent, at least resemble legal questions of 'ultimate fact'"). In other words, a hearing committee's "credibility findings must be accepted and can have a foreclosing impact on ultimate facts and legal conclusions, so long as they are supported by substantial evidence and uninfected by legal error." *Id.* at 754-55.

This disciplinary proceeding presents no question or dispute that Respondent withheld the evidence at issue by a conscious and sustained design—not by inadvertence, nor by an isolated mistake or momentary lapse of judgment. What is disputed here is whether each of the withheld evidence items was exculpatory, whether a reasonable prosecutor would have recognized the exculpatory nature of the withheld evidence, whether a reasonable prosecutor would therefore have

disclosed and produced these items, and whether Respondent made misrepresentations to Superior Court judges and defense counsel concerning the withheld evidence. The Hearing Committee's resolution of these disputes presented mixed questions of law and ultimate fact which, although reviewed *de novo* under the above-cited authorities, the Board unanimously adopts for the reasons set forth below.

Based on the foregoing findings of fact, the Hearing Committee concluded that Respondent violated Rules 3.3(a), 3.8(e), 8.4(c), and 8.4 (d), recommending that she receive a sanction of three-month suspension from the practice of law. Respondent timely objected to the Hearing Committee Report. As she maintained before the Hearing Committee, Respondent argued in her brief and at oral argument before this Board that Respondent's ethics violations are not supported by clear and convincing evidence, and that any suspension from practice for the violations at issue fails to accord due weight to mitigating circumstances. *See* Respondent's Brief to the Board on Professional Responsibility, filed Nov. 6, 2025 (the "Respondent's Brief") and Respondent's Reply Brief, filed Jan. 5, 2026 (the "Reply"). Disciplinary Counsel also objects in part to the Hearing Committee Report, arguing that the Board should find additional violations of Rule 3.8(e) and that a three-month sanction for Respondent's ethics violations does not align with this Court's prior cases involving prosecutorial misconduct, and that a six-month suspension does. *See* Disciplinary Counsel's Brief, filed Dec. 16, 2025 ("ODC's Brief").

The Board agrees with the Hearing Committee's conclusions about Respondent's Rule violations. The Hearing Committee Report provides clear and convincing evidence that Respondent violated Rule 3.8(e) when she failed to (i) disclose exculpatory information contained in the Action Camp videos; and (ii) disclose exculpatory information by concealing that Project Veritas was the source of the January 8 Planning Meeting video segments. The Board also finds that same record supports, by clear and convincing evidence, a conclusion that Respondent violated Rule 3.8(e) by editing the January 8 Planning Meeting video segments to conceal images of Officer Adelmeyer, which revealed that he did not attend that day's ACBB breakout session. Although we defer to the Hearing Committee's factual finding that Respondent was initially following standard procedures by protecting the identity of an undercover officer, *see* HC Rpt. at 74 (crediting Respondent's explanation at Tr. 1012-13), it was nevertheless improper for her to maintain these edits while at the same time using Officer Adelmeyer to authenticate Project Veritas videos of the ACBB breakout session—and provide other percipient fact testimony about that session—when his attendance at a different breakout session was captured by excised portions of the video clips. The excised video clips showing Officer Adelmeyer's attendance at the other SURJ breakout session could have undermined his ability to authenticate or testify about the ACBB session. *See* FF 40-41. During the first trial before Judge Leibovitz, Respondent, defense counsel, and Officer Adelmeyer devoted extensive and contested time, attention, and testimony to the witness's precise whereabouts during the various breakout sessions

depicted, which only reinforces the material and exculpatory nature of the Officer Adelmeyer edits which Respondent excised from the January 8 Planning Meeting Project Veritas clips. DCX 78 at 55-97, 107-110, 113.

Clear and convincing evidence also supports a conclusion that Respondent violated Rules 3.3(a) and 8.4(c) when she actively and continually misled Superior Court judges and defense counsel about (i) the nature of her edits to the January 8 Planning Meeting video segments showing the ACBB breakout meeting and what had been previously produced to defense counsel; (ii) the existence and nature of remaining undisclosed footage, including the general session, from that January 8 Planning Meeting video segments; (iii) the existence of and significant content found in other Project Veritas videos, including the Action Camp videos; and (iv) a misleading summary of undisclosed Project Veritas videos submitted in response to Chief Judge Morin's order. Clear and convincing evidence also supports the conclusion that Respondent violated Rule 8.4(d) because her conduct significantly and adversely impacted the administration of justice by substantially delaying the underlying matters and because the government ultimately dismissed charges against the Inauguration Protest defendants due, in part, to Respondent's misconduct.[13]

[13] The Hearing Committee concluded that some of the remaining charges alleging violations of Rules 3.3(a), 3.8(d), and 3.8(e) were not supported by clear and convincing evidence. With the exceptions noted above, we accept the Hearing Committee's conclusions. The Hearing Committee also agreed with Disciplinary Counsel that it failed to prove violations of Rules 3.4(a), (c), and (d) and Rule 8.4(a). Disciplinary Counsel does not have the authority to unilaterally elect not to pursue

A. Respondent's Multiple and Sustained Failures to Disclose Exculpatory Evidence Violated Rule 3.8(e).

Rule 3.8(e) applies expressly and exclusively to government prosecutors. At the time of the challenged conduct, the Rule 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) that the prosecutor intentionally failed to disclose this information to the defense upon request; *i.e.*, the prosecutor must act or fail to act with the purpose that information not be disclosed.

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charges approved by a Contact Member. *See In re Drew*, 693 A.2d 1127, 1132-33 (D.C. 1997) (per curiam) (appended Board Report) (suggesting that the Board should address charges not decided by a hearing committee). However, we agree with the Hearing Committee that any arguable basis for finding violations of those rules would be captured by the analysis of other violations, and we hereby dismiss those charges. *See* HC Rpt. at 58-59.

See In re Dobbie, 305 A.3d 780, 793 (D.C. 2023).

Importantly in this particular matter, Disciplinary Counsel need not prove that Respondent withheld evidence in bad faith, or with the aim of depriving the defendants a fair trial. All that Rule 3.8(e)'s intent element requires is a prosecutor's volitional act, such that the withholding of evidence did not arise merely by inadvertence. *See Dobbie*, 305 A.3d at 794-99; *see also In re Haines*, 341 A.3d 611, 627 (D.C. 2025) (per curiam) ("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))).

Disciplinary Counsel challenged the following actions as intentional failures to disclose exculpatory information under Rule 3.8(e):

- Respondent's failure to disclose Project Veritas as the source of the government's video evidence of DisruptJ20's January 8 Planning Meeting;
- Respondent's failure to provide the Project Veritas "Action Camp" videos to the defense;
- Alterations to the January 8 Planning Meeting videos at Respondent's direction that omitted the general assembly portion of the meeting, obscured the identity of Officer Adelmeyer, and obscured the existence and identity of a Project Veritas undercover operative; and

- Alterations to a January 8 video which deleted the videographer's statement about IWW members not knowing "upper echelon stuff" about plans for Inauguration Day protests.

With the exception of the last item about "upper echelon stuff," there is no question that these disclosure failures were intentional—not inadvertent—and that Respondent was aware of the substance of information she was withholding. Respondent consciously decided to withhold each item of evidence at issue. The only remaining issue under Rule 3.8(e) is whether the withheld information was exculpatory, and whether Respondent knew or should have known that. Below we address that question for each item at issue.

1. Project Veritas as the Source of January 8 Planning Meeting Video.

Respondent consciously withheld disclosure of Project Veritas as the source of the government's January 8 Planning Meeting video segments. FF 28, 30. The record also clearly demonstrates that defense counsel requested the identity of this source, which Respondent refused. FF 69-70, 72. Before the Hearing Committee and in her brief to the Board, Respondent asserts that "[w]ho recorded the videos has no exculpatory value" and "is not even relevant" because the "authenticity and accuracy of the videos was verified by independent law enforcement testimony." Respondent's Brief at 46 (referring to Officer Adelmeyer's testimony). Respondent also emphasizes that beyond Officer Adelmeyer, the accuracy of the videos was verified by multiple defendants who attended the ACBB breakout session depicted. *Id.* at 46-47.

A majority of the Hearing Committee concluded that Respondent violated her Rule 3.8(e) ethical duties when she decided not to disclose Project Veritas as the source of these video segments. *See* HC Rpt. at 75-81. The majority concluded that Respondent thereby deprived the defense of the ability to investigate potential bias and credibility issues in time for effective use at trial. One Hearing Committee member filed a separate dissent on that point. *See id.* at 111-19, Separate Statement of Chair Rosenzweig, Dissenting from § IV.A.3 (contending that the video's source was irrelevant because Respondent could authenticate the video by other means, namely the testimony of Officer Adelmeyer).

We agree with the Hearing Committee majority that by failing to disclose the known source of her video evidence, Respondent knowingly withheld exculpatory evidence in violation of Rule 3.8(e). It bears emphasis that the production of video excerpts from Project Veritas videos of the DisruptJ20 January 8 Planning Meeting at St. Stephen's Episcopal Church was among the earliest materials Respondent received and disclosed in the course of her investigation in the Inauguration Protest cases. *See supra* pp. 9-10, 14. At that same early moment in her handling of these matters, Respondent knew that the produced video segments of the January 8 Planning Meeting were substantially edited, and that she was withholding other Project Veritas video footage from that same day and subsequent DisruptJ20 meetings attended by some of the defendants in preparation for the Inauguration Day protests. *See supra* pp. 10-14, 19-22.

After making her selective production from the Project Veritas video evidence in her possession, Respondent vigorously resisted requests to identify the source of this evidence. One reason Respondent resisted identifying the video's source was that she knew Project Veritas had a fraught reputation as a political advocacy organization with a *modus operandi* of generating misleading undercover videos of left-leaning organizations. *See supra* pp. 10, 28. It was not until the first trial was underway and under orders from Judge Leibovitz that Respondent finally disclosed Project Veritas as the video's source. What happened next illustrates the exculpatory nature of this evidence.

After Respondent identified Project Veritas during the first trial, defense counsel were permitted by Chief Judge Morin in one of the parallel proceedings to interview Matt, the Project Veritas operative who filmed the January 8 Planning Meeting segments. At that interview, Matt revealed for the first time that Project Veritas had long ago provided Respondent with other videos of DisruptJ20 preparations for Inauguration Day protests. *See supra* pp. 34-35. Defense counsel were thereafter able to wrest production of the remaining withheld Project Veritas videos from Respondent, some of which depicted various defendants attending other protest meetings discussing the avoidance of violence. *See supra* pp. 34-38. Chief Judge Morin later ruled that Respondent's failure to produce these exculpatory materials constituted a *Brady* violation. *Supra* pp. 21, 23, 32-34, 38.

Respondent argues that Project Veritas's political bias was irrelevant because the video evidence could be authenticated without identifying the videographer and

that the accuracy of the videos was not in dispute. Respondent's Brief at 24, 46-47.[14] Respondent further contends that no precedent holds that a prosecutor's failure to disclose the identity of a non-governmental source constitutes a breach of Rule 3.8(e), and that Respondent's view of her duties in this regard were "approved and sanctioned by her supervisor." *Id.* at 47; Reply at 23. The Hearing Committee heard and reviewed Respondent's testimony on this point and concluded that she indeed made the decision not to identify Project Veritas. FF 30 (citing extensive hearing testimony). A majority of the Hearing Committee concluded, after extensive analysis, that Court of Appeals precedents under Rule 3.8(e) compel a finding that Respondent's decision not to disclose Project Veritas as the source of her video evidence violated Rule 3.8(e). HC Rpt. at 75-81. As detailed below, we agree with the Hearing Committee majority on this point.

Respondent asserts that she ultimately revealed Project Veritas as the source of the video evidence at issue—when the first trial was underway before Judge Leibovitz—but the Court of Appeals holds 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) (internal citations omitted); *see also In re*

[14] The dissent filed by the Hearing Committee's Chair makes a similar argument on this particular finding. HC Rpt. at 114-15.

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 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 611.

Of particular significance in this matter, "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)). The identity of Project Veritas proved to be rich indeed with leads. Once Respondent was forced to disclose Project Veritas and defense counsel were permitted to interview the group's operative Matt, they discovered that Respondent was withholding much more of the relevant video footage she had received from Project Veritas earlier in her investigation. *See supra* pp. 34-35. Soon thereafter, Chief Judge Morin found that Respondent committed a *Brady* violation based on her failure to disclose the Action Camp videos she had received from Project Veritas. *Supra* p. 38.

These events leave little to no room for arguing that the identity of Project Veritas as the source of the January 8 Planning Meeting video was not exculpatory. It proved to be, in no uncertain terms, as any reasonable prosecutor acting under these circumstances could have and should have anticipated. As a majority of the Hearing Committee found, the Court of Appeals decision in *Haines* found a prosecutor's violation of Rule 3.8(e) under similar circumstances. In that matter

involving 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, AUSA Haines learned that the witness—a prison inmate who was prepared to testify that the defendant gave him a jailhouse confession—had previously "debriefed" with law enforcement. *Id.* This fact conflicted with his grand jury testimony that he came forward only after experiencing a moral awakening in prison, and had never before cooperated with law enforcement in any matter. *Id.* AUSA Haines knew this narrative was false, and that evidence of the witness's prior debriefs might be harmful to her case because it tended to rebut his claimed basis for coming forward. AUSA Haines nonetheless concealed the information from defense counsel throughout the underlying trial. *Id.* at 622-23 (despite not disclosing communications, in an attempt to "take the sting out" of it, AUSA Haines prepared the witness to testify against the possibility of this information coming to light). 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, a Department of Justice investigation, and ultimate dismissal of the underlying case with prejudice. *See id.* at 625.

Here, Respondent failed to disclose that Project Veritas was the source of the January 8 Planning Meeting video segments, despite defense counsel's repeated requests for identification during discovery. *See* FF 69-70; *see also* FF 72 (request for chain of custody). Respondent was fully aware that Project Veritas had a reputation for bias and had been accused of altering videos to suit its political agenda

in the past. *See* FF 28, 30. Indeed, a grand juror in the first grand jury asked Respondent whether she would use any footage from "the group that videotaped Acorn," because the juror had read that the group had recorded DisruptJ20 meetings. DCX 5 at 20. Respondent had not raised that issue herself but informed the grand juror that the organization was named Project Veritas, and that it had provided video evidence that the government might use at trial. *Id.* at 20-21. The grand juror pressed Respondent about whether a jury could trust footage provided by the group due to their reputation for selective editing. *Id.* at 21-24. Respondent replied that "just as with all the other evidence, you have to weigh its credibility." *Id.* at 23. In her own words, the origin of the videos was a "can of worms" (FF 28) and she made every effort to prevent the defense from discovering the source of the video evidence. *See, e.g.*, FF 46, 73.

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

> the 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 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").

If Respondent had provided the identity of the video's source, this would have (and indeed, did) directly led to the identity of the videographer (Matt) during

discovery, which defense counsel in the first trial could have investigated further to determine its exculpatory value. *See Haines* Bd. Rpt. at 41-42 (recommending that AUSA Haines be sanctioned for depriving the defense of "effective use" of potentially exculpatory information). Constrained by the late notice, defense counsel in the first trial were unable to investigate or make full effect of this exculpatory information. *See supra* pp. 26-29.

Moreover, Respondent's concealment of Project Veritas's role in producing the videos during the nine month lead-up to the first trial hampered discovery efforts for the latter trials. Defense counsel in the second trial did not have access to the Action Camp videos. Chief Judge Morin, presiding over parallel discovery matters in the remaining trial groups, ordered that the Project Veritas videographer be made available to defense counsel. FF 102. It was only in response to this order that defense counsel in the second trial learned about 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 Project Veritas as the source within "sufficient time to permit 'effective' use of the evidence at trial." *Haines* Bd. Rpt. at 41.

Nor were the Action Camp videos the only relevant information that could be gleaned from a timely disclosure of Project Veritas's role. The second-trial defense counsel that interviewed the Project Veritas operative Matt explained to Judge

Knowles that the leads provided by this withheld evidence were manifold. 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 10, 12 (emphasis added); *see also id.* at 8-12.

Matt's recollection of the DisruptJ20 meetings he attended—and secretly filmed—contradicts testimony Respondent elicited from Officer Adelmeyer that property destruction was discussed at a number of different DisruptJ20 meetings. FF 100. This plainly exculpatory information arose directly from the lead provided by Respondent's *un*timely identification of Project Veritas. Matt also disclosed that eight different Project Veritas operatives had infiltrated various DisruptJ20 meetings

in advance of Inauguration Day, some of whom made recordings, but he refused to reveal their identities. DCX 166 at 8. Clearly, defense counsel could have investigated whether different videos or accounts of the inauguration protest preparations contradicted selected evidence presented by the government—as Matt's own statements did. *See id.* at 12-13 (describing questions defense counsel sought to ask Detective Pemberton following their meeting with Matt).

By her ongoing concealment of Project Veritas's role in producing the videos—a refusal maintained from February/March 2017 until November 2017 (FF 76) while the first trial was underway—Respondent effectively kept the lid on a trove of other exculpatory video evidence and deprived defendants of "a piece of evidence [that] is valuable and rich with potential leads." *Haines* Bd. Rpt. at 42 (quoting *Miller*, 14 A.3d at 1111).

The Hearing Committee majority found that Disciplinary Counsel proved 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. *See* Rule 3.8, cmt. [1]. The findings of fact provide clear and convincing support for the conclusion that Respondent was aware of this information, and by her affirmative words and actions in the underlying matter as well as before the Hearing Committee, demonstrated that she appreciated the clearly foreseeable and exculpatory value this information would have in the Inauguration Protest matters. *See* HC Rpt. at 77-78 & n.18; FF 28, 30 (Respondent recognized that Project Veritas was a "can of worms" and therefore wanted to keep the videographer's identity out

of the trials). By intentionally failing to disclose Project Veritas's role, despite knowing that it was exculpatory, Respondent violated Rule 3.8(e).

2. Project Veritas Action Camp Videos.

The Hearing Committee concluded that Respondent's failure to disclose the Action Camp videos violated Rule 3.8(e) because evidence that some defendants attended training on non-violence and de-escalation tends to contradict the government's theory of a conspiracy, under which every ACBB marcher agreed to support a riot at the Inauguration Day protests. HC Rpt. at 62-63. Respondent objects that the Action Camp videos were not exculpatory because the de-escalation trainings were not part of DisruptJ20 planning devoted to the ACBB march, and that the withheld videos depicted mere attendance, but not active participation, by three ACBB defendants. Respondent's Brief at 43-44. She also contends that other information about Action Camp was previously disclosed, publicly available, and known to the defendants themselves. *Id.* at 45.

None of these arguments impact the exculpatory nature of the Action Camp videos. The Hearing Committee found that the exculpatory nature of the Action Camp videos was "manifest," and that "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." HC Rpt. at 62-63. Whether de-escalation training was directed solely at ACBB marchers or the entire community of DisruptJ20 protesters—of which ACBB organizers were a part—the impact of this evidence remains intact: Some of the defendants attended de-escalation training in

advance of the Inauguration Day protests, evidence which if believed by the jury could contradict the government's theory that all ACBB marchers planned to participate in a riot. *See supra* pp. 17-19. Based largely on Respondent's own summary of the Action Camp videos, Chief Judge Morin concluded that they "tended to rebut [Officer] Adelmeyer's testimony about planning for destruction" at the January 8 Planning Meeting and other DisruptJ20 meetings in advance of Inauguration Day. FF 61; *see* DCX 215 at 5 n.7. Nor can it possibly detract from the exculpatory nature of withheld evidence that the defense already had access to related information which the withheld videos would substantiate.

Chief Judge Morin's conclusion that the content of Project Veritas's Action Camp videos was exculpatory—while not dispositive of the issues presented here—constituted substantial evidence supporting the Hearing Committee's conclusion that that Respondent's conduct failed to meet a "reasonable prosecutor standard." HC Rpt. at 65. Chief Judge Morin later ruled upon a reconsideration motion filed by Respondent's colleagues at the U.S. Attorney's Office and, without vacating the court's earlier *Brady* rulings, made further findings that Respondent appeared to have no "malevolent motives" for her misconduct. FF 120; *see* FF 115-119. That reconsideration order does not impact our analysis here. Malevolent intent is *not* an element of a Rule 3.8(e) violation. As demonstrated above, the only intent aspect of

this rule is the intent to withhold evidence, which Respondent cannot dispute she had.[15]

Respondent also misplaces reliance on her colloquy with Judge Leibovitz in advance of the first trial. The judge advised Respondent against "dump trucking . . . hundreds if not thousands of terabytes of material on 200 people" onto defense counsel. RX 9 at 43. When Respondent replied that the court's warning would put her in a "*Brady* trick bag," the court acknowledged the concern but declined to provide additional specific guidance. *See supra* p. 9. Initially, we note that this exchange does not rise to the level of a tribunal's protective order which may "relieve the prosecutor of [her] responsibility" under Rule 3.8(e). The upshot of this brief dialogue about cell phone data is also somewhat ambiguous and debatable and provides little justification for Respondent's claimed mindset that Judge Leibovitz thereby gave Respondent wide latitude to limit production of all video evidence. After being warned by Judge Leibovitz against the unexamined production ("dumping") of cell phone data in the government's possession, Respondent invited the court to "relieve" her of any consequences under *Brady*. Judge Leibovitz understood the concern but declined the invitation to suspend *Brady*, so Respondent was never justified in acting as if the court had done so.

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[15] Here, Respondent's intent to withhold the various items of evidence at issue is not—indeed on this record, cannot be—contested. If there was a closer question about whether Respondent intended to withhold the information at issue, or the circumstances under which the failure to disclose arose, there might be more room for Respondent's "reasonable prosecutor standard." But on this record, where the salient facts are not in genuine dispute, the argument avails her nothing.

Similarly, none of the other cited judicial discovery or evidentiary rulings excuse Respondent's failures to disclose exculpatory evidence. The chronology of these judicial colloquies, discovery and evidentiary rulings fail to support Respondent's reliance arguments. Her exchange with Judge Leibovitz about a "*Brady* trick bag" took place in April 2017. FF 25. By then, Respondent had already decided to suppress the identity of Project Veritas and the Action Camp videos, while cuts to the January 8 Planning Meeting video segments had already been made and those segments produced. FF 30, 36 (government produced four edited video segments of January 8 Planning Meeting on March 16, 2017); DCX 185 at 1. Respondent had already opened her "*Brady* trick bag" by the time she raised this risk with Judge Leibovitz. Nor was Judge Leibovitz granting license to Respondent to limit identification and production of all video evidence: the topic was solely cell phone data. FF 25.

Respondent cites even-later discovery and evidentiary rulings by Judges Knowles and Morin as validating her approach to discovery (Reply at 13-14), but these also cannot serve to justify pre-existing decisions not to disclose exculpatory evidence. At best, Respondent may have conveniently misinterpreted earlier court directives to identify and/or produce "all" remaining video evidence in the government's possession—hearing only what she wanted to hear to justify decisions she had already made to withhold evidence. But the Hearing Committee did not credit her testimony and found it unreasonable for Respondent to so steadfastly maintain her obfuscations through the Inauguration Protest cases in the face of those

directives. *See* HC Rpt. at 62-72. In other words, a reasonable prosecutor under these circumstances would have recognized the exculpatory nature of the Action Camp recordings.

3. Edits to January 8 Planning Meeting Videos of ACBB Breakout Session and Omission of Preliminary Video Segments.

Disciplinary Counsel also contends that removing footage identifying the videographer—which the Hearing Committee concluded was not exculpatory—furthered Respondent's sustained efforts to hide the involvement of Project Veritas—which the Hearing Committee found constituted exculpatory evidence. ODC's Brief at 24-25; *see* HC Rpt. at 73-75. Disciplinary Counsel emphasizes that Respondent intentionally failed to disclose the identities of Officer Adelmeyer and the Project Veritas videographer, and "deliberately withheld" the January 8 Planning Meeting video segments showing the general assembly—a point on which there appears to be no genuine dispute on this record. ODC's Brief at 32 (citing FF 31-34 for findings that Detective Pemberton edited the January 8 Planning Meeting video segments at Respondent's direction).

The Hearing Committee determined that edits to conceal the identities of Officer Adelmeyer and the videographer from the January 8 Planning Meeting videos, and the omission of preliminary segments of that day's events, were not exculpatory because they did not conceal substantive discussions of non-violence or de-escalation. HC Rpt. at 73-75. The Hearing Committee also credited Respondent's testimony that she was following a common practice in the U.S.

Attorney's Office to conceal the identity of undercover officers revealed in video evidence. *Id.* at 74.

We do not agree with the Hearing Committee's conclusion that information Respondent redacted from the January 8 Planning Meeting video clips was not exculpatory, and that the withholding of this evidence did not violate her Rule 3.8(e) duties. As Disciplinary Counsel contends, the hidden identities of Officer Adelmeyer and the videographer, along with the omitted preliminary segments, undercut the evidentiary value of those clips. ODC's Brief at 23-25. The preliminary segments, showing that the ACBB march was just one of several plans for direct action involving discussions of peaceful protests, provided important context for the videos that followed. FF 32. Most importantly, excised video clips showing that Officer Adelmeyer was attending the SURJ breakout session moments before and after the ACBB breakout session could have been used to impeach his testimony that he attended the beginning of the ACBB breakout meeting (reflected in the first three pages of the transcript), which, in turn, could have impacted Judge Leibovitz's ruling about his ability to authenticate the video clips at issue and testify as a percipient fact witness about what transpired during the ACBB breakout session. *See* DCX 78 at 82-84; Disciplinary Counsel's Post-Hearing Brief to Hearing Committee, filed Apr. 17, 2025, at 21-22 (proposed factual finding 58).

Whatever may be standard U.S. Attorney's Office practice for obscuring the identity of undercover law enforcement who appear in video evidence, once Respondent decided to proffer Officer Adelmeyer's testimony instead of the Project

Veritas videographer to both authenticate the January 8 Planning Meeting video segments of the ACBB breakout session and testify as a purported percipient witness about that session, the video clips showing Officer Adelmeyer at the SURJ breakout meeting both before and after the footage of the ACBB breakout session became exculpatory and should have been produced before trial.

The Hearing Committee's findings establish that early on in her investigation, Respondent decided (i) not to identify Project Veritas as the source of her video evidence, (ii) to edit Officer Adelmeyer out of the ACBB breakout video clips she was producing, and (iii) use Officer Adelmeyer to authenticate the produced video clips of the ACBB breakout session, allowing her to continue concealing Project Veritas's involvement. FF 30, 33a-33b. Respondent's testimony confirms that these three decisions were roughly contemporaneous. *See* Tr. 705-07, 919-922 (Respondent describing receiving the videos, identifying and redacting Officer Adelmeyer, and deciding not to disclose Project Veritas in late February or early March 2017). Because Respondent decided to use Officer Adelmeyer to authenticate the video of the ACBB breakout and to testify as a percipient fact witness about statements made there, the excised footage showing Officer Adelmeyer attending a different breakout session right before and after the ACBB breakout could have been used to impeach his authentication. A reasonable prosecutor[16] would have understood this when she decided to use Officer Adelmeyer

[16] Respondent argues—unconvincingly, we believe—that Disciplinary Counsel can never meet its burden on Rule 3.8(e)'s "reasonable prosecutor" standard without

to authenticate video footage of a meeting she knew he did not fully attend, especially given that defense counsel immediately raised the issue of Officer Adelmeyer's precise whereabouts during the ACBB breakout session when learning from his testimony that Officer Adelmeyer did not attend the entirety of the meeting.[17] DCX 78 at 61. A reasonable prosecutor would have known that disclosing Officer Adelmeyer's presence in and location during the video clips in advance of trial would provide a basis for defense counsel to challenge his foundation for authenticating the video clips at issue and otherwise testify about statements made in the ACBB breakout session.[18]

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proffering testimony from another prosecutor. We address that contention *infra* at pp. 71-77.

[17] Defense counsel in the first trial filed a motion to strike any video evidence in which the authenticating witness was not in the position of videographer. *See* DCX 78 at 66. Respondent countered that the rules of evidence did not require her to establish the witness's presence for "every second" of the recorded meetings. *Id.* But by withholding the video clips demonstrating Officer Adelmeyer's location during the dispute breakout sessions, only Respondent could judge whether the particular "seconds" required for the witness's presence at ACBB relative to his presence at other meetings around the same time were sufficient for him to authenticate the edited video.

[18] We recognize that, unlike other evidence we have found exculpatory, there was no *Brady* ruling sought or obtained to support our finding of what a reasonable prosecutor would have known about the impact of the Officer Adelmeyer edits. Yet, we still find that Respondent's conduct was "obviously lacking" for the reasons described in this subsection. *Cf. In re Nwadike*, Bar Docket No. 371-00, at 28 (BPR July 30, 2004) (providing that expert testimony is not necessary when an attorney's "conduct is so obviously lacking that expert testimony showing what other lawyers generally would do is unnecessary"), *findings and recommendation adopted*, 905 A.2d 221 (D.C. 2006).

Thus, by clear and convincing evidence, the record amply supports the conclusion that Respondent violated Rule 3.8(e) by editing the January 8 Planning Meeting video in a manner that obscured the identities of Officer Adelmeyer and the Project Veritas videographer, and that removed the three preliminary video segments showing the general assembly from the disclosures. The withheld evidence was exculpatory, which Respondent's actions demonstrate she must have appreciated and was fully prepared to exploit by proffering Officer Adelmeyer's testimony to authenticate both the video and underlying substance about what transpired at the ACBB breakout session. Introduction of this testimony engendered extensive argument before Judge Leibovitz about Officer Adelmeyer's precise whereabouts during the ACBB breakout session, which was depicted in the videos from which his presence had been excised.

4. Matt's Upper Echelon Comment.

The Hearing Committee determined that the parting comments of Matt, the Project Veritas videographer, about IWW members not knowing about the upper echelon's plans for Inauguration Day protests was exculpatory, but that Respondent did not intentionally fail to disclose it because she was unaware of its existence. FF 35. The comments were captured by Matt's still-running button camera after he left the church on January 8 and were preceded by about ninety seconds of silence. HC Rpt. at 74; FF 33c. The Hearing Committee credited Respondent's entirely plausible and consistent testimony that she was not aware anything of substance had been lost by Detective Pemberton's final edit and concluded that no Rule 3.8(e)

violation arose from the unwitting failure to disclose this exculpatory information. HC Rpt. at 74-75. We agree with the Hearing Committee's credibility finding, which is supported by substantial evidence.[19]

Disciplinary Counsel contends that the Hearing Committee's findings are inconsistent because FF 35 establishes that Respondent was unaware of the edit at issue, while pages 74-75 of the Report conclude that Respondent reasonably believed that "the recording was complete" when the Project Veritas operative left the meeting and zipped his coat. ODC's Brief at 34. Disciplinary Counsel argues the record demonstrates that Respondent knew additional footage existed but unreasonably concluded it contained nothing of substance. *Id.* at 34-35.

In either event, the Hearing Committee credited Respondent's testimony on this point: "We credit . . . [Respondent]'s testimony that she was unaware of that portion of the tape." HC Rpt. at 74 (citing FF 34-35). As the Hearing Committee found, a "gap" in the footage "might reasonably have led *any listener* to believe that the recording was complete." *Id.* at 74-75 (emphasis added). Nothing in the Report appears to suggest that Respondent was aware of the "upper echelon" comment. And Disciplinary Counsel does not ask the Board to overturn the Hearing Committee's credibility finding on this point, which would be a tall order because

[19] Because Respondent's lack of awareness defeats the allegation that she violated Rule 3.8(e) on this basis, we need not address Respondent's argument that the comment was not exculpatory. *See* Respondent's Brief at 18. We note, however, that Respondent's characterization of a statement by Chief Judge Morin is misleading; he found that it was unclear whether the comment was admissible, not whether it was exculpatory. *See* RX 37 at 38.

the Board does not overturn credibility findings about a respondent's subjective intent unless they are unsupported by substantial evidence or based on a mistake of law. *Krame*, 284 A.3d at 752-55.[20] Neither exists here.

5. Expert Testimony Was Not Required.

Against all of the foregoing, Respondent argues that she neither knew—nor would a reasonable prosecutor know under these circumstances—that the information she consciously withheld was exculpatory. Respondent contends that Disciplinary Counsel failed to establish any standard of care was violated because it did not call an expert witness or any other prosecutor to testify, but instead relied on the testimony of biased defense counsel. Respondent's Brief at 30-31; Reply at 6-9. Respondent was the only prosecutor to take the stand before the Hearing Committee—where she testified about her subjective belief that the various items of withheld evidence were not exculpatory. Ergo, the argument goes, Respondent must prevail here because her testimony was not rebutted by any other prosecutor, and the Hearing Committee is not otherwise competent to judge what another "reasonable prosecutor" would do under the circumstances presented. According to Respondent, the Hearing Committee is therefore duty-bound to accept her testimony as the only

[20] Disciplinary Counsel also asserts that the Hearing Committee's finding was "inconsistent with the contemporaneous record," citing the statement of a different U.S. Attorney who said he *thought* Respondent "neglected" to mention the "upper echelon" comment and that "the government was aware" of its existence. ODC's Brief at 36-37. As we noted in a different context (*infra* pp. 77-78), deference is owed to a hearing committee's well-supported findings of fact even where other evidence "may support a contrary view as well." *See Szymkowicz*, 124 A.3d at 1084.

evidence about what a reasonable prosecutor would do in this matter. Respondent's Brief at 27-34.

Disciplinary Counsel counters—effectively, in our view—that while *Dobbie* discusses a reasonable prosecutor "standard," 305 A.3d at 793, the operative language is found in Rule 3.8(e)'s text: whether a prosecutor knew or "reasonably should know" that consciously withheld information is exculpatory. ODC's Brief at 39. The Hearing Committee was competent and entitled to reach conclusions about the exculpatory nature of the withheld evidence and what Respondent knew—or should have known—under the circumstances presented, based on the substantial record presented. *See, e.g.*, *In re Dobbie*, Board Docket No. 19-BD-018, at 16-23 (BPR Jan. 13, 2021) (finding that the respondents "reasonably should have known" that undisclosed evidence was exculpatory), *recommendation adopted in relevant part*, 305 A.3d 787. The basis for those findings includes the Hearing Committee's own credibility assessment of Respondent's testimony about her mindset and subjective intentions—testimony which the Hearing Committee was free to accept or discount. It found her view that evidence was not exculpatory to be objectively unreasonable. *See* HC Rpt. at 9-10, 64-68.

Additional record support for the Hearing Committee's conclusions on this issue is provided by Chief Judge Morin's *Brady* findings. As Disciplinary Counsel points out, the Hearing Committee did not simply defer to Chief Judge Morin's findings, but it did adopt His Honor's reasoning. *See* ODC's Brief at 26-27; HC Rpt. at 62-65, 69-70. And as Disciplinary Counsel observed, Chief Judge Morin's

ability to find a *Brady* violation without viewing the Action Camp videos—but based in part on Respondent's own summaries—only underscores their palpably exculpatory nature. ODC's Brief at 26 n.6. The perceived need for expert testimony about what a "reasonable prosecutor" would know under the circumstances never arose.

Respondent contends that Chief Judge Morin's *Brady* ruling does not support a contrary finding, stressing that on the government's reconsideration motion, Chief Judge Morin mentioned that he did not believe Respondent had "malevolent motive" to mislead the defense and that he never reviewed the Action Camp videos and therefore had no basis for declaring them exculpatory. Respondent's Brief at 42-43 & n.2, 50-51; Reply at 9-11. In that order, Chief Judge Morin wrote only that he did not believe the government intended to mislead the court. *See* FF 115-120. That finding does nothing to negate any element of a Rule 3.8(e) violation—where the intent at issue is solely to withhold, not to mislead. In any event, at the point he issued his order on the government's reconsideration motion, Chief Judge Morin was not fully aware of Respondent's conduct in the other Inauguration Protest cases. Nor did he have the benefit of the complete record that Disciplinary Counsel investigated, developed, and presented to the Hearing Committee in its 2025 proceedings.[21]

[21] Going beyond what Chief Judge Morin was required to do given the posture of remaining Inauguration Protest cases before him when the Action Camp videos came to light, the Hearing Committee did, in fact, review the Action Camp videos and concluded they were substantively exculpatory. *See* FF 60; HC Rpt. at 64-65.

Respondent also claims that her narrow view of the government's discovery obligations was influenced by various comments, discovery rulings, and evidentiary rulings by various judges in the underlying Inauguration Protest cases. Respondent's Brief at 14-18. For example, she claims reliance on Judge Leibovitz's April 2017 warning not to "dump-truck" cell phone video discovery on the defense, evidentiary rulings limiting introduction of other videos unrelated to the alleged riot,[22] as well as what Respondent characterizes as Chief Judge Morin's even later finding that "the government was permitted to obtain information only about the charged conduct and the charged defendants." *Id.* at 15; *see id.* at 16; Reply at 13-14.

Respondent also claims she interpreted Chief Judge Morin's subsequent instruction at a motions hearing to produce "the entirety of whatever is in the government's possession" to be limited to the January 8 videos because his statement followed a discussion of those videos. Respondent's Brief at 17-18. The Hearing Committee found Respondent's explanations of her subjective interpretations of the orders credible, but concluded, like Chief Judge Morin, that it was unreasonable for her to apply those instructions to exculpatory material like the Action Camp videos, which did not raise the sorts of concerns being expressed by the court. HC Rpt. at 67-70 ("[W]e do not credit Respondent's argument that she was constrained by

[22] The Hearing Committee noted that the videos deemed irrelevant by Judge Leibovitz were "far afield from the riot," such as evidence of the inauguration or a visit to a beer garden. HC Rpt. at 67 n.15. Moreover, Judge Leibovitz did not address the Action Camp videos. *See id.* at 67.

Court order to withhold the Action Camp videos—it is simply an untenable argument."); FF 96.

Respondent's argument comes dangerously close to asserting that only another prosecutor is in a position to judge a prosecutor's ethical obligations. The established law is otherwise. *See generally Kline*, 113 A.3d at 206, 211-12, 214 (finding a violation of Rule 3.8(e) notwithstanding testimony of a prosecutor responsible for training on *Brady* compliance that the respondent was not required to turn over certain evidence to the defense). In every contested disciplinary matter presented to the Board and its hearing committees, attorneys in a variety of practice settings are accused of violating ethical duties. It is not beyond a hearing committee's province to assess the evidence presented in every such case and determine whether the duties at issue have been breached. *See Haines* Bd. Rpt. at 38 n.26 ("To the extent that Respondent Haines is arguing that expert testimony was necessary to permit the Board to find that the fact of the debriefing was exculpatory, we believe that expert testimony was not required in light of the clarity of the law on this point."). Sometimes, the presentation of expert witness testimony will likely aid a hearing committee's determination when unique aspects of a particular specialty of legal practice are not widely-understood and bear substantially on the questions presented. *See, e.g.*, *In re Vohra*, 68 A.3d 766, 778 (D.C. 2013) (considering expert testimony regarding immigration law); *In re Evans*, 902 A.2d 56, 60 (D.C. 2006) (per curiam) (appended Board Report) (considering expert testimony regarding probate and real estate matters). But we are aware of no Court

of Appeals precedent obligating Disciplinary Counsel to present testimony from an expert prosecutor—or evidence about the conduct of other prosecutors involved in the underlying matter—in order to meet its burden of proof in a Rule 3.8(e) case. That approach contravenes the Court of Appeals admonition in *Zanders*, 999 A.2d at 164, that "the 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*." (emphasis added). Respondent's approach throughout this case runs afoul of *Zanders*'s teaching that "[i]t 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." *Id.*

Otherwise, there is no demonstration in the record that the Hearing Committee failed to adequately grasp the circumstances under which Respondent was operating. It considered, but rejected, Respondent's assessments of the exculpatory value of information. In particular, while she argued before the Hearing Committee and this Board that withheld Action Camp videos were actually *in*culpatory (Respondent's Brief at 12), that position remains at odds with her failure to disclose the information.[23] The Hearing Committee found that Respondent attempted to

[23] At one juncture, the Hearing Committee observed that "Respondent *still* does not regard videos of a defendant participating in 'de-escalation actions at Action Camp' as exculpatory information." FF 58 (emphasis added). We are uncertain what this finding conveys, but if it serves as a finding of credibility about Respondent's subjective mental state, it appears to be at odds with the Report's lengthy treatment and contrary findings on that issue. HC Rpt. at 62-64. By use of the word "*still*," the

"minimize the exculpatory significance" of the Action Camp videos by providing Chief Judge Morin with an incomplete summary of its contents. HC Rpt. at 64. And the Hearing Committee cited numerous instances where Respondent appeared to acknowledge the exculpatory nature of the type of evidence she was withholding. FF 50-54.

The substantial record evidence about the palpably exculpatory nature of relevant information knowingly withheld by this Respondent obviates the need for any other confirmatory evidence. Presented with these record facts, the Hearing Committee was not duty-bound to simply accept Respondent's testimony about whether *she* believed the evidence she withheld was exculpatory. This substantial record leaves no room to argue that a different prosecutor, acting reasonably under the same circumstances, would have acted similarly to Respondent and withheld the various items of evidence at issue.

B. Respondent Violated Rule 3.3(a) by Knowingly Making False Statements.

The Hearing Committee found that Respondent violated Rule 3.3(a) by knowingly making false statements to a tribunal in her edits to a court-ordered disclosure about the substance of undisclosed Action Camp videos in her possession, thereby concealing material information. The Hearing Committee found that

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Hearing Committee seems to express skepticism with her testimony, which is understandable given other evidence about the Action Camp meetings which Respondent actively solicited at trial on direct examination of Officer Adelmeyer, all while sitting on video evidence of those same meetings. *See* DCX 78 at 114-124.

Disciplinary Counsel failed to prove that Respondent's remaining challenged statements—where she seemingly denied the existence of additional videos in her possession and continually denied the grand jury misidentification of defendant Beale after discovering otherwise—violated the Rule. Even though the totality of the record evidence provides substantial support for a contrary conclusion that Respondent violated Rule 3.3 on multiple occasions, because the Hearing Committee's underlying credibility assessments are entitled to deference and its own findings are supported by clear and convincing evidence, we ultimately agree with its conclusions on this charge.

Rule 3.3(a) 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).

The Rule 3.3 obligation to speak truthfully to a tribunal is one of a lawyer's "fundamental obligations." *In re Ukwu*, 926 A.2d 1106, 1140 (D.C. 2007) (appended Board Report). Unlike Rule 8.4(c), violations of which may arise solely on the basis of reckless conduct, a lawyer does not transgress Rule 3.3 unless she "knowingly" makes a false statement to a tribunal. The term "knowingly" "denotes actual knowledge of the fact in question," and of course 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) (per curiam).

The Hearing Committee Report (at page 83) also emphasized Comment [2] to Rule 3.3, which instructs 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 violated Rule 3.3(a)).

1. Respondent's Possession of Additional Videos.

In pre-trial and trial proceedings before Judge Knowles, Respondent made several questionable statements to the court about the videos in her possession. After disclosing an additional three video segments from DisruptJ20's January 8 Planning Meeting 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. These statements, limited to the January 8 Planning Meeting videos, were strictly accurate. But 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. Respondent's categorical denial of having "no recording, audio or otherwise, of any other planning meeting . . . on the Anti-Capitalist Bloc" was inaccurate and highly misleading (*see* FF 109) because Respondent did have other video evidence "on" planning meetings attended by ACBB organizers, but the Hearing Committee concluded that insufficient evidence supports a finding that this statement was knowingly false—*i.e.*, that at the time she made the categorical denial to the court, Respondent had a present recollection of another video that expressly discussed plans for the ACBB

march: the January 17 meeting video she obtained from Project Veritas early in her investigation. FF 57; HC Rpt. at 83-84.

In its briefing to the Board, it is unclear whether Disciplinary Counsel takes exception to this finding. Disciplinary Counsel's briefing cites Respondent's denials that she possessed additional footage (*see, e.g.*, ODC's Brief at 43), but does not identify Respondent's statement to Judge Knowles, nor explain whether Respondent's remaining challenged statements were knowingly versus recklessly false. In either event, given the high bar of a "knowingly false" statement and the Hearing Committee's assessment of Respondent's testimony on this statement, we are constrained to agree with the conclusion that it does not meet the test for a Rule 3.3(a) violation.

2. Respondent's Court-Ordered Summary of Action Camp Videos.

The Hearing Committee found that Respondent violated Rule 3.3(a) when she edited a written summary for submission to Chief Judge Morin of the undisclosed Project Veritas videos—edits which deleted exculpatory information, particularly references to de-escalation training. HC Rpt. at 83-85.

Respondent contends that the edits to her email did not conceal the existence of exculpatory information because she did not remove all references to de-escalation training and argues that Disciplinary Counsel did not present independent evidence on her intent aside from the email itself. Respondent's Brief at 49-50. The Hearing Committee Report aptly addresses these concerns, and we agree with its well-supported reasoning and conclusions.

Uneasy about Respondent's discovery disclosures, Chief Judge Morin ultimately ordered the government to provide a full written summary of any undisclosed Project Veritas videos. *See* FF 107. Respondent prepared a written summary of undisclosed videos and, after discussion with a colleague, edited it for submission to the court. *See* FF 108. The Hearing Committee had the benefit of comparing Respondent's original version of the summary—prepared from notes she took when she first reviewed the videos in early 2017 (FF 56)—with the edited version Respondent provided for submission to Chief Judge Morin. DCX 171. Before submitting the summary, Respondent deleted certain phrases that plainly disclose the exculpatory nature of the undisclosed videos. For example, she deleted reference to another "break-out session for role-playing and practice how to de-escalate." FF 109. She deleted the summary phrase, "if you see violence, you should report it to the ACLU and sometimes to law enforcement." *Id.* And Respondent deleted a disclosure that a previously edited video excised "a phone conversation between the videographer and a third person." *Id.*

This last item involves the deleted "upper echelon" comment that Chief Judge Morin held violated *Brady* or Criminal Procedure Rule 16 (FF 101-02). We noted above how the Hearing Committee credited Respondent's testimony that at the time this deleted scene first came to light before Chief Judge Morin, Respondent did not know about it. *See supra* pp. 69-71. But this is later: Respondent's edits occur *after* she learned about the excised "upper echelon" comment, after defense counsel's *Brady* motion challenging her office's failure to disclose it, and after Chief Judge

Morin ruled that the failure to disclose was either a *Brady* violation or a violation of Criminal Procedure Rule 16. FF 101-102; *see* DCX 168; DCX 169; DCX 171. The record leaves no room for excusing this knowing deletion of exculpatory information from the summary Respondent prepared for submission to the court.

The Hearing Committee found—by clear and convincing evidence, in our view—that all of Respondent's deletions to the summary could *only* have been intended to deceive the court about the exculpatory nature of video footage that Respondent had not disclosed. HC Rpt. at 84-85. Even at this late date, while under an affirmative court order to truthfully summarize the undisclosed videos in her possession, Respondent knowingly fudged her assignment and made false statements—including omissions that knowingly failed to make a complete and truthful disclosure about the material substance of these videos. *Id.*; *see Samad*, 51 A.3d at 499 & n.8.[24] We agree with the Hearing Committee that Disciplinary Counsel proved by clear and convincing evidence that Respondent's edits to this court-ordered summary knowingly suppressed material facts, in violation of Rule 3.3(a).

[24] As the Hearing Committee concluded, we cannot accept the argument that these deletions were the product of "mistake or haste." HC Rpt. at 85. "The deletions are too systematic in their nature—uniformly excluding descriptions" that raised the exculpatory content in the undisclosed videos. *Id.* The Hearing Committee adopted the well-supported view that Respondent's specific edits to the summary "were the knowing concealment of a material fact (namely the exculpatory nature of the videos that were yet to be disclosed)." *Id.*

3. Cassandra Beale Misidentification.

The Hearing Committee found that Respondent did not violate Rule 3.3(a) when she failed to correct earlier statements that denied defendant Beale had been misidentified to the grand jury as a participant in the ACBB breakout session of January 8 Planning Meeting at St. Stephen's Episcopal Church. According to the Hearing Committee, Respondent testified credibly that she did not know the statement was false when she made it, and because she reasonably relied on her supervisors to correct the record after being sidelined from the case because of her other *Brady* violations. HC Rpt. at 85-88. Disciplinary Counsel does not take exception to this conclusion and, although we are troubled by Respondent's sustained and disingenuous refusal to address defendant Beale's misidentification with opposing counsel, her supervisors, or the court, we must adopt it and conclude that Disciplinary Counsel failed to demonstrate that this conduct violated Respondent's Rule 3.3(a) duties.

C. Respondent Did Not Violate Rule 3.8(d).

At the time of the underlying conduct, 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 . . . .

The Hearing Committee concluded that Disciplinary Counsel failed to prove a violation of Rule 3.8(d) because Respondent did not turn a blind eye to possible exculpatory evidence—indeed, she pursued and obtained exculpatory evidence but failed to disclose it and resisted defendants' requests for her to turn it over. HC Rpt.

at 98-99. Disciplinary Counsel has not taken exception to the Hearing Committee's finding on this charge, which we adopt.

D. Respondent's Charged Rule 8.4(c) Violations Are Well-Supported on the Record.

Under Rule 8.4(c), it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Court of Appeals decisions construing the Rule's terms—dishonesty, deceit, and misrepresentation—dictate our analysis.

The dishonesty at issue in a Rule 8.4(c) case may include "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 at 496 (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). If 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 . . . .").

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).

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. *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." (citations omitted)); *see, e.g.*, *In re Reback*, 513 A.2d 226, 228-29 (D.C. 1986) (en banc) (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 [Rule 8.4(c)]." (quoting Board Report)).

Dishonest or deceitful intent may 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 Respondent "consciously disregarded the risk" created by her 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).

Importantly for this matter, the entire context of a respondent's actions and their credibility on the stand before the hearing committee is relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam); *see also Dobbie*, 305 A.3d at 807 (holding that prosecutors who failed to disclose exculpatory information 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," and by forcing the defense to rely on a misleading summary of a piece of evidence instead of disclosing it in full).

Based on the entirety of the record before it, the Hearing Committee concluded that Respondent violated Rule 8.4(c) by the charged misconduct of (a) repeated failures to disclose exculpatory information to the defense, and (b) concealing the exculpatory nature of undisclosed videos when responding to Chief Judge Morin's order to submit a summary of these materials. HC Rpt. at 92. The Hearing Committee concluded, based on its earlier Rules 3.8(e) and 3.3(a) analysis, that Respondent acted with "reckless disregard for whether the defense would ever know the truth about" the withheld information, to include the identity of Project Veritas and the remaining undisclosed videos she obtained from that group. *Id.* (quoting *Dobbie*, 305 A.3d at 807).

As noted above at section III.A.3, based on clear and convincing record evidence this Board finds that Respondent's edits of the January 8 Planning Meeting video segments, which concealed the appearance of Officer Adelmeyer at that day's SURJ breakout session, were exculpatory and knowingly withheld by Respondent in violation of Rule 3.8(e). We further find that Respondent's failure to disclose this information demonstrated a reckless disregard for the risks created by her actions. The excised video clips showed that an important government witness (Officer Adelmeyer) did *not* attend the ACBB breakout session for which she sponsored his testimony. Respondent's failure to disclose this information amply demonstrates her reckless disregard for whether the defense would have sufficient information to adequately prepare to challenge the admissibility of the ACBB video and cross-examine Officer Adelmeyer. *See supra* pp. 65-69.

At this juncture, we must return to Respondent's reliance on Chief Judge Morin's order on the government's reconsideration motion. *See* Respondent's Brief at 20, 50-51. Recall that after being removed from the Inauguration Protest cases after Chief Judge Morin found that Respondent committed various *Brady* violations, Respondent's replacements at the U.S. Attorney's Office filed a motion seeking the court's clarification or reconsideration of its earlier findings. In November 2018, after the government had dismissed all remaining Inauguration Protest cases without prejudice, Chief Judge Morin obliged the government by ruling that "at this time, the Court has no reason to believe that the government had additional malevolent motives, such as intentionally suppressing evidence." FF 120. Based on the record before His Honor "at [that] time," Chief Judge Morin concluded that the government's *Brady* violations were based on an "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.*

Respondent argues that given Chief Judge Morin's later clarifications, a Rule 8.4(c) violation cannot stand *if* Disciplinary Counsel presented no other evidence about her bad intent or "obviously wrongful" conduct. Respondent's Brief at 51 (citing *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003) as requiring evidence of an attorney's dishonest intent "when the act itself is not of a kind that is clearly wrongful, or not intentional").

While Respondent's argument has some facial appeal, for various reasons it is unavailing. First, it begs the *Romansky* question whether Respondent's conduct

was "of a kind that is clearly wrongful" or "not intentional." Given Respondent's sustained pattern and practice of actively suppressing various items of exculpatory evidence in the Inauguration Protest cases—and obfuscating in response to related inquiries from the bench and defense counsel—we believe the record substantially supports a finding of Respondent's intent and that her conduct was "clearly wrongful." As noted above and emphasized in the Hearing Committee Report, Respondent's withholding of that information was "obviously wrongful and intentionally done." HC Rpt. at 92 (quoting *Romansky*, 825 A.2d at 315). Citing *Romansky*, the Hearing Committee found that "performing the act itself is sufficient to show the requisite intent for a violation." *Id.*

Second, in a lengthy assessment of Respondent's testimony before it, the Hearing Committee was not persuaded by Respondent's explanations for her misconduct. *See* HC Rpt. at 62-85. It is this analysis to which the Hearing Committee refers when it addresses Rule 8.4(c) and concludes that "[f]or reasons we have outlined in prior sections of this Report, we think it clear that Respondent's conduct violated Rule 8.4.(c)." *Id.* at 92. The Hearing Committee was competent to assess Respondent's credibility—with or without testimony from an "expert" prosecutor—and its willingness to accept or reject Respondent's explanations for the charged misconduct cannot be assailed now unless they lack substantial record support. *See supra* pp. 3-4, 70-77.

We also emphasize that Chief Judge Morin did not have the benefit of a comprehensive record of Respondent's conduct in the different Inauguration Protest

cases, as did the Hearing Committee. Chief Judge Morin knew what Respondent had been representing to *him*, but not necessarily to Judges Leibovitz and Knowles in the related matters. Chief Judge Morin's reconsideration findings are also difficult to square with His Honor's initial *Brady* ruling that "notwithstanding an all-encompassing order that the government disclose Project Veritas videos in its possession, [Respondent] interpreted this order as limited to only the video to which it had made redactions," while both the court and defense counsel understood the directive as intended. FF 96. As the Hearing Committee observed, Chief Judge Morin's initial *Brady* ruling made plain that the misperception left by Respondent's statements to the court was substantial. *Id*. Clearly, the damaging tone and substance of that initial order is what inspired Respondent's colleagues to seek reconsideration in their later motion after she had been removed from these cases. The reconsideration order is not binding on the Hearing Committee, and its persuasive value is also mitigated by the other factors noted above.[25]

[25] The Hearing Committee also noted that Respondent appeared to engage in a pattern of deceitful conduct by stating in proceedings in the second trial that she had "nothing else" recorded by the Project Veritas videographer, despite the fact that she had just provided the above-referenced written summary to Chief Judge Morin, which demonstrates that the contrary was true. HC Rpt. at 92-96. Respondent thereby prevented defendants in the second trial group from learning about the additional footage that came to light in Chief Judge Morin's cases. Although these apparent misrepresentations are "of a piece" with the other charged misconduct, Disciplinary Counsel articulated no challenge to this incident and therefore the Hearing Committee did not find a Rule violation in connection with it, nor was it cited in their sanction recommendation. *Id.* at 90, 96 (quoting *Dobbie*, 305 A.3d at 807). We also decline to cite or rely upon this uncharged conduct in our assessment

E. Respondent Violated Rule 8.4(d).

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).

The Hearing Committee found that Respondent violated Rule 8.4(d) because her failures to disclose exculpatory evidence substantially disrupted the judicial process in the different Inauguration Protest cases by triggering multiple pre-trial hearings and the dismissal of many indictments. HC Rpt. at 97 (citing *Haines*, 341 A.3d at 634). As with her exception to the Rule 8.4(c) violations found by the Hearing Committee, Respondent relies on the statement in Chief Judge Morin's reconsideration order that the government did not intentionally suppress evidence. Respondent's Brief at 52 (citing DCX 215). She contends that the Hearing Committee was engaged in speculation, with the benefit of hindsight, when it found that her *Brady* violations led to the decision to dismiss the indictments of all

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of the Hearing Committee's Report, and it played no role in our sanction recommendation.

remaining defendants. *Id.* Though she cites *Hopkins*, she does not address its specific criteria and, thus, does not attempt to refute the findings that her conduct bore directly upon the judicial process with respect to an identifiable case or tribunal and tainted the judicial process in more than a *de minimis* way. *See* Respondent's Brief at 51-53.

Rule 8.4(d) is violated if an attorney's misconduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266-67 (D.C. 2009). The Rule covers not only affirmative actions, but also negligent inaction and the failure to correct wrongful actions by an attorney's 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"); *see also In re Agee*, Bar Docket No. 243-01, at 30, 33, 37 (BPR May 14, 2004) ("A failure to act need not be intentionally improper or reckless in order to violate Rule 8.4(d)."); *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)).

Respondent's conduct here easily meets the *Haines* standard for finding a Rule 8.4(d) violation. As the Hearing Committee stated:

> Not only was her conduct of discovery improper, it substantially disrupted the judicial process, 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.

H.C. Rpt. at 97.

Equally problematic, the Hearing Committee noted that the dismissal of these cases in the wake of Respondent's misconduct allowed some more-culpable defendants to escape punishment for their wrongdoing. *Id.* at 97-98. "In short, Respondent's conduct was highly disruptive of the judicial system and had a significantly adverse impact." *Id.* We agree with the Hearing Committee that Disciplinary Counsel proved Respondent's violations of Rule 8.4(d) by clear and convincing evidence.

IV. SANCTION

The sanction imposed in attorney disciplinary matters must protect the public and courts, maintain the legal profession's integrity, and deter Respondent and other attorneys from engaging in similar misconduct. *See In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback*, 513 A.2d at 231 (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). We are also mindful that the sanction 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., *Hutchinson*, 534 A.2d at 923-24; *Martin*, 67 A.3d at 1053; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

In determining appropriate sanctions, the Court of Appeals considers a number of nonexclusive 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)).

The Hearing Committee recommended a three-month suspension. *See* HC Rpt. at 100-110. The Hearing Committee's recommendation is based on a view that Respondent's misconduct here was "significantly more egregious" than the misconduct at issue in other recent cases involving prosecutorial misconduct, citing *Kline*, 113 A.3d at 215-16 (no sanction due to lack of clarity in Rule 3.8(e)), *Dobbie*, 305 A.3d at 812-15 (six-month suspension stayed in favor of probation where there was deficient supervisory conduct), and *Haines*, 341 A.3d at 638 (sixty-day suspension stayed in favor of probation where there was a finding of an honest mistake and no dishonesty). HC Rpt. at 102-04. The Hearing Committee concluded

that Respondent's sustained pattern of denying the existence and nature of undisclosed exculpatory evidence, and the absence of significant mitigating factors, distinguishes this case from earlier Court of Appeals prosecutorial misconduct cases resulting in no served suspensions. *Id.* at 103-05. The Committee considered recommending the six-month suspension offered by Disciplinary Counsel, despite not finding each charged Rule violation, but concluded that "the goals of deterrence and error correction" would be adequately served by a shorter term of suspension. *Id.* at 109.

Objecting to the Hearing Committee's recommended sanction, Disciplinary Counsel maintains that Respondent should be suspended for six months instead of three. ODC's Brief at 46-50. Respondent contends that the Hearing Committee's recommended sanction (a) exceeds the sanctions handed down in prior Court of Appeals cases dealing with prosecutorial misconduct under Rule 3.8(e); (b) is inappropriately punitive and considers uncharged misconduct; and (c) does not appropriately account for mitigating circumstances. Respondent's Brief at 54-59; Reply at 22-24.

A. Application of Sanction Factors.

We agree in large part with the Hearing Committee's assessment of traditional sanctions factors in this matter. Contrary to Respondent's argument, this case does not "break new ground" nor involve any "new understanding" under the longstanding Rule 3.8(e). Respondent's Brief at 54-55. In the 2015 *Kline* decision, the Court of Appeals resolved perceived uncertainties about how *Brady* and Rule

3.8(e) obligations should be interpreted. *See* 113 A.3d at 212-16. That ground is no longer "new," nor do the Court of Appeals decisions in *Dobbie* and *Haines* leave in doubt any of the legal issues presented by Respondent's misconduct here.

Both the recommended three-month suspension and Disciplinary Counsel's proposed six-month sanction are within the range of sanctions authorized by the Rules and Court of Appeals precedents addressing similar misconduct. The Hearing Committee's earlier discussion of uncharged conduct—which involved another instance of Respondent's dishonesty to the tribunal denying the existence of undisclosed Project Veritas video evidence—was not addressed in its sanctions analysis. Nor could the additional incident move the needle on what was already a sufficient record supporting the recommended sanction. Finally, in our view the Hearing Committee gave *over*due weight to some of the mitigation factors presented, as discussed in more detail below.

1. Seriousness of the Misconduct.

Respondent's misconduct was serious, involving her sustained suppression of evidence and dishonesty to three different Superior Court judges presiding over Inauguration Protest cases, and her conduct substantially impacted the administration of justice. 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." *Dobbie*, 305 A.3d at 811 (citation omitted). This factor weighs heavily in favor of a meaningful sanction for the charged misconduct.

2. Prejudice to the Client.

A federal prosecutor's client is the "general public," rather than any specific government official, agency, or 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 both the maintenance and failure of the Inauguration Protester prosecutions. *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." (citation omitted)); *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."). This factor also weighs in favor of a meaningful sanction for the charged misconduct.

3. Dishonesty.

Based on a substantial record of repeated instances of dishonesty to the tribunal, the Hearing Committee's factual findings detail multiple instances of Respondent's dishonesty, and we agree with the Committee's conclusions that Respondent violated Rules 3.3(a) and 8.4(c). This factor therefore weighs heavily in favor of a strong sanction against Respondent for charged misconduct involving dishonesty.

4. Violations of Other Disciplinary Rules.

Respondent violated 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 course of conduct, but Respondent's violations of Rules 3.3(a) and 8.4(c) are independent violations. We emphasize as well that the charged Rule violations found by the Hearing Committee involved not just a momentary lapse of judgment, but multiple failures to disclose various items of withheld evidence, and obfuscations before different Superior Court judges sustained for over a year during Respondent's handling of the various Inauguration Protest cases. This factor weighs heavily in favor of a meaningful sanction for the charged misconduct.

5. Previous Disciplinary History.

Respondent has no record of prior discipline—a factor which therefore mitigates against a significant sanction here.

6. Acknowledgement of Wrongful Conduct.

The Hearing Committee Report expresses some frustration that Respondent did not acknowledge any part of her conduct was wrongful. *See, e.g.*, FF 58 ("Respondent still does not regard videos of a defendant participating in 'de-escalation actions at Action Camp' as exculpatory information."). Despite Respondent's uncredited testimony to the contrary, the Hearing Committee's extensive analysis concluded that the exculpatory nature of undisclosed evidence was "manifest" in this matter, and that Respondent's excuses for withholding it were unpersuasive, unreasonable, and not credible. *See, e.g.*, HC Rpt. at 62-73, 104

(finding that proffered explanations for Respondent's conduct often "strain[ed] credulity"). But in its sanctions analysis, the Hearing Committee also recognized that under Court of Appeals precedent, "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." HC Rpt. at 101-02 (quoting *In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014)). Like the Hearing Committee, we view this factor as having little measurable impact on the sanctions analysis, except to note that this is not a case where a Respondent's candid admission of responsibility and expression of regret mitigates toward a reduced sanction.

7. Other Circumstances in Aggravation or Mitigation.

The Hearing Committee considered character reference letters that Respondent submitted and also acknowledged that Respondent may have been handling the Inauguration Protest cases with inadequate assistance to manage the administrative burdens of so many criminal conspiracy cases. HC Rpt. at 102; *see also Dobbie*, 305 A.3d at 812-13 (finding deficient supervision of junior prosecutors contributed to mitigating circumstance). Prosecuting these matters was undoubtedly time-consuming and complicated, circumstances that would have a greater impact on the sanctions analysis if this case presented instances of mere neglect or inadvertence. Instead, Respondent's misconduct was intentional and sustained over the course of the underlying matters, so administrative burdens did not play an appreciable role in the Rule violations established by the Hearing Committee.

We are also mindful that Respondent suffered harassment as the result of her being lead prosecutor in the Inauguration Protest cases. The Hearing Committee acknowledged this as unacceptable but, nonetheless, observed that "[t]roubles of this nature are not what this factor contemplates." HC Rpt. at 102 (quoting *Haines*, 341 A.3d at 637 (citing *Dobbie*, 305 A.3d at 812-13)). We agree. Unless Respondent's misconduct was in some way in response to or aggravated by the harassment she received, it is difficult to recognize this experience as a mitigating factor for her misconduct in these matters.

Throughout her briefing to and oral argument before the Board, Respondent also emphasized her career as a prosecutor and the "leniency extended to [] prosecutors" under prior Court of Appeals precedents. Respondent's Brief at 54-58; Reply at 21-23. But Rule 3.8(e) is an ethics rule promulgated expressly for prosecutors; it applies only to prosecutors. Only prosecutors are capable of violating Rule 3.8(e), and therefore it cannot be a mitigating factor that a respondent to such a charge is indeed a prosecutor.

It is also a matter of grave public concern when a government prosecutor is seen violating the other ethics rules at issue in this matter—including Rules 3.3(a) (knowing false statement to tribunal), 8.4(c) (dishonesty, fraud, deceit, and/or misrepresentation), and 8.4(d) (serious interference with the administration of justice). We therefore view Respondent's status as a career prosecutor in the U.S. Attorney's Office to be a substantial *aggravating* factor in recommending a sanction for misconduct that includes dishonesty to a tribunal, as discussed further below.

B. Sanctions Imposed for Comparable Misconduct.

In three prior cases, the Court of Appeals and this Board have imposed discipline upon prosecutors who engaged in roughly equivalent conduct. In *Kline*, the Court suggested that sanctions for a single, isolated Rule 3.8(e) violation should range between a public reprimand and a six-month suspension. 113 A.3d at 215-16. That 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. *Kline*, 113 A.3d at 204-05, 214. But the Court declined to impose a sanction because of the novelty of the Rule 3.8(e) interpretation announced in that 2015 decision. *Id.* at 215-16. The Court of Appeals 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. By contrast, the Hearing Committee in this case found several other Rule violations, some involving dishonesty. And since Respondent's misconduct post-dates *Kline*, there can be no genuine argument about a new rule or interpretation being applied here.

In *Dobbie*, the Court of Appeals imposed a six-month suspension for violations of Rules 3.8(e), 8.4(c), and 8.4(d) that arose from junior prosecutors' *Brady* violations. *Dobbie*, 305 A.3d at 812. There were significant mitigating factors in that matter which are absent here, including the respondents' lack of bad faith and a finding that their agency supervisors played a meaningful role in the challenged misconduct. 305 A.3d at 787, 812-13. In *Dobbie*, the prosecutors concealed a 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. Like the Respondent here, the *Dobbie* respondents also engaged in reckless dishonesty (*id*. at 804-07) but, over the dissent of one member of the panel, a Court of Appeals 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*, the Rule violations at issue arose "out of essentially the same conduct" and, while recklessly dishonest, that conduct was not deemed to be "intentionally malicious" and was, in the view of the majority, of less substantial gravity. *Id.* at 811-12. The Hearing Committee distinguished *Dobbie* on grounds that the Respondent here engaged in a sustained pattern of misconduct that cannot be characterized as an isolated, single incident. HC Rpt. at 107. Respondent's dishonesty was a deliberate, sustained effort to conceal exculpatory evidence and her own prior misconduct in failing to disclose that evidence. Nor does this case present significant issues about supervisory failures: Respondent was a senior, career prosecutor supervising other attorneys in the Inauguration Protest cases and therefore bore a greater responsibility under the rules. We agree with the Hearing Committee's analysis that the *Dobbie* Court stayed an otherwise appropriate six-month suspension in favor of one year of probation based on mitigating factors that are not present here. 305 A.3d at 814.

Most recently, in *Haines*, the Court of Appeals 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 again imposed a fully stayed sixty-day suspension with one year of probation. 341 A.3d at 637-38. There, the prosecutor concealed a portion of a letter revealing that the key government witness lied about his prior contacts with the government as cooperating witness in other matters. *See* 341 A.3d at 621-24, 634. The Court of Appeals 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 *Haines* Court also noted that she had not engaged in dishonesty, and therefore stayed the suspension imposed. *Id.* at 637-38. Like the Hearing Committee, we regard *Haines* as readily distinguishable from Respondent's sustained pattern of multiple *Brady* violations and related instances of dishonesty presented by the record in this matter. *See* HC Rpt. at 107-08.

In recommending a three-month suspension in this matter, the Hearing Committee thus weighed each of these recent Court of Appeals decisions involving prosecutorial conduct against the facts presented here. HC Rpt. at 102-09. The Hearing Committee considered a six-month suspension, but decided that the goals of deterrence and error correction would be better served by three-month suspension. *Id.* at 109-110. Like the Hearing Committee, we recognize that the Court of Appeals has exercised its discretion to stay sixty-day suspensions in two of these recent Rule 3.8(e) matters, but we nonetheless conclude that because Respondent's conduct was significantly more egregious, willful, and sustained than the misconduct at issue in *Kline*, *Dobbie*, or *Haines*, we recommend that the Court impose a six-month suspension here.

The Hearing Committee expressed dismay that Respondent's conduct repeatedly fell below the standard of acceptable behavior for a prosecutor and was "simply untenable." *Id.* at 104. Respondent persisted in her course of conduct, obscuring both the existence and nature of exculpatory videos in discovery (FF 40-42, 95-96), in her presentations to the grand jury (FF 46), at trial (FF 77), and in response to unmistakably clear inquiries from Superior Court judges as well as judicial statements of contrary understanding. *See, e.g.*, FF 36-37, 52-53, 106. And when one judge demanded a written accounting of withheld video evidence, Respondent edited that disclosure to conceal the videos' exculpatory nature. FF 107-09.

This extensive course of misconduct convinces us—as it did the Hearing Committee—that the overarching willfulness of Respondent's sustained Rule violations render her ineligible for the supposed "leniency extended to [] prosecutors" that Respondent perceives in earlier Court of Appeals precedents. Reply at 23. As the Hearing Committee observed, and we agree, it simply cannot be the law that the absence of suspensory sanctions on prosecutors to-date immunizes all prosecutorial misconduct from enforced suspensions, or that the first time an approved suspension is enforced by the Court of Appeals will "break new ground" or "establish a new [] rule," as Respondent argues. Respondent's Brief at 54-55.

Egregious prosecutorial misconduct that violates promulgated ethics rules presents grave issues under the rule of law and must be meaningfully addressed.

Respondent's significant and sustained ethics violations warrant a served suspension given the number and gravity of the Rule 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.

Given the egregious prosecutorial misconduct and vital public interests at stake in this matter, we conclude that Respondent should serve a six-month suspension.

V. CONCLUSION

For the foregoing reasons, the Board finds that Respondent violated Rule 3.8(e), Rules 3.3(a) and 8.4(c), and Rule 8.4(d). We further conclude that Respondent should receive and serve a six-month suspension from the practice of law. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar Rule XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Tom Gilbertsen
Tom Gilbertsen, Acting Chair

All members of the Board concur in this Report and Recommendation except Mr. Walker, Ms. Cassidy, and Mr. Brozost, who are recused.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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)	:	

CONCURRING STATEMENT OF MICHAEL E. TIGAR

I join the Board's unanimous report, but submit this separate concurrence to underscore a significant issue presented in this matter. In her reply brief, Respondent claims she is deserving of "the leniency extended to [] prosecutors" in disciplinary cases, citing the Court of Appeals decision in *In re Dobbie*, 305 A.3d 780 (D.C. 2023). Reply Br. at 23. No such leniency should exist under the ethical rules generally—prosecutors must be held to the same (if not higher) standard of ethical conduct every other lawyer must meet. Nor can "leniency for prosecutors" be extended under Rule 3.8(e), which was adopted expressly for, and applies exclusively to—prosecutors. I expect that the sanction the Court of Appeals ultimately imposes will be both commensurate with the circumstances of the case, as discussed in the Board Report, and a useful guide for prosecutors who find themselves in similar situations to Respondent as well as those responsible for making charging decisions involving group liability. I offer some of my own takeaways below.

As Justice Brandeis famously observed almost 100 years ago, "[G]overnment is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also Dobbie*, 305 A.3d at 826 (Deahl, J., dissenting) ("It is especially important that we 'hold prosecutors accountable in light of their pivotal role in the justice system, the great discretion they are given, and the few tools available to oversee their compliance with the legal standards that govern their conduct.'" (quoting *In re Howes*, 52 A.3d 1, 23 (D.C. 2012))).

Much of this matter involves whether this Respondent—a seasoned prosecutor—appreciated (knew) what constitutes exculpatory evidence in a conspiracy case. Below, I cite cases where criminal conspiracy convictions were reversed for a prosecutor's failure to disclose exculpatory evidence. I understand that the standards applied in such cases and the standard we apply under Rule 3.8(e) are not coterminous. A disciplinary rule violation is not judged through the same lens as a criminal conviction. *See In re Kline*, 113 A.3d 202, 208-09 (D.C. 2015) ("[A]lthough significant overlaps exist in a pretrial versus post-trial ethical analysis, it makes little common sense to premise a violation of an ethical rule on the effect compliance with that rule may have on the outcome of the underlying trial, because there can be 'no objective, ad hoc way' for a prosecutor 'to evaluate before trial

whether [evidence or information] will be material to the outcome.'" (quoting *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979))).

Yet, the discipline system and the judicial review of wrongful convictions share a number of principles and values. Rule 3.8 is headed "Special Responsibilities of a Prosecutor." These words are a *textual* commitment to fairness; hence the word "Special." They echo the Supreme Court's statement in *Berger v. United States*, 295 U.S. 78, 88 (1935): "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . ." In an iconic and oft-cited case, Judge Learned Hand wrote:

> All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950).

The sad history of wrongful convictions—and even of wrongful executions—documented in an ongoing study of exonerations reveals that prosecutorial wrongdoing is a repeated theme in those cases. *See* The National Registry of Exonerations, https://exonerationregistry.org/. In such cases, the justice system and the community—not the offending prosecutor—pay the price of the prosecutor's

wrongdoing. Rule 3.8(e) bestows on the discipline system the power—and I emphasize, the duty—to deny wrongdoers the ability to "sin by proxy [a]nd do penance by way of someone else." Christopher Fry, *The Lady's Not for Burning* 28 (2nd ed., 1968); *see also Dobbie*, 305 A.3d at 822 (Deahl, J., dissenting) ("Some prosecutors don't care about *Brady* because courts don't make them care." (emphasis omitted) (quoting *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting))).

We should always be conscious that—writ large—our Rule 3.8(e) decisions are part of a larger context. Another reflection of this principle lies at the very heart of our disciplinary system: Our cases are decided by lawyers who bring their basic understanding of the ethics rules by which they as well as disciplinary respondents must govern their professional lives. Indeed, in this case one of the lawyers serving on the Hearing Committee had been a long-tenured prosecutor in the Department of Justice. Public members bring a sense of what the community expects of us**.**

The Hearing Committee cogently recognized that the overall theory of the government's case was that, notwithstanding the great variations in individual actions during the riots at issue, all defendants had unlawfully joined a conspiracy to riot and were therefore 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. The Supreme Court has warned of the risk of "wrongful attribution" when prosecutors (and even judges) cast the net of culpability too wide. *Dennis v. United States*, 384 U.S. 855, 873

(1966). Because of this risk, the type of evidence qualifying as exculpatory is necessarily broader, requiring honest and full disclosure. *See id.* at 872-74.

> [Otherwise, a] conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. *See, e.g.*, *United States v. Bufalino*, 285 F.2d 408, 417-418 (2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge, and the jury should have the assurance that [any] doors [which] may lead to truth [(*i.e.*, exculpatory evidence)] have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts.

Dennis, 384 U.S. at 873.

Bufalino contains a stern warning to prosecutors, cautioning them against substituting "a feeling of collective culpability for a finding of individual guilt." 285 F.2d at 417. Justice Jackson, joined by Justices Frankfurter and Murphy, expressed the same principles while concurring in *Krulewitch v. United States*, 336 U.S. 440, 445-458 (1949), and in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), a well-known antiwar protest case, the Court of Appeals for the First Circuit wrote:

> [The government's argument] demonstrates a fundamental error . . . . Adopting the panoply of rules applicable to a conspiracy having purely illegal purposes, the government introduced numerous statements of third parties alleged to be co-conspirators. This was improper. The specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof. . . . The metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*.

416 F.2d at 173 (citations omitted).

The warning to draw lines "*strictissimi juris*" in a case involving concerted political action comes from Justice Harlan's opinion for the Court in *Noto v. United*

States, 367 U.S. 290, 298-300 (1961), reversing a membership conviction under the Smith Act:

> But it should also be said that this element of the membership crime, like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

367 U.S. at 299-300.