DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
G. PAUL HOWES,	:	
	:	
Respondent.	:	Bar Docket No. 131-02
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 434709)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSBILITY

The Board on Professional Responsibility hereby submits its unanimous findings of fact and conclusions of law in this case, in a Report and Recommendation drafted by the Board's Vice-Chair, Ray S. Bolze. There is no majority position of the Board as to the appropriate sanction.

Mr. Bolze's report recommends a three-year suspension, and is joined by Board Chair Charles J. Willoughby and Ms. Kapp. In a separate statement, Mr. Mercurio, joined by Ms. Cintron, recommends a one-year suspension. Ms. Jeffrey recommends disbarment, in a statement joined by Ms. Coghill-Howard and Mr. Smith. Mr. Frank joins in the recommendation of disbarment in his separate statement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /CJW/
Charles J. Willoughby
Chair

Dated: July 27, 2010

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
G. PAUL HOWES,	:	
	:	
Respondent.	:	Bar Docket No. 131-02
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 434709)	:	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY AND SEPARATE STATEMENT OF MR. BOLZE AS TO SANCTION

We have before us the comprehensive Report and Recommendation of Hearing Committee Number One (the "Report" or "HC Rpt.") finding multiple violations of the Rules of Professional Conduct by Respondent, G. Paul Howes, while serving as an Assistant United States Attorney ("AUSA") in the District of Columbia. The misconduct arose out of Respondent's investigation and prosecution of very serious and high-profile drug/homicide gang cases in the Superior Court of the District of Columbia (the "*Card/Moore*" case), and in the United States District Court for the District of Columbia (the "*Newton Street Crew*" case), as well as his investigation of an unrelated sexual assault (the "*Jones*" matter). The misconduct occurred between 1993 and 1995 and entailed, *inter alia*, Respondent's provision of a large volume of witness vouchers to persons not entitled to them, and a subsequent failure to disclose these voucher payments to defense counsel or the courts.

The Board unanimously agrees with the Hearing Committee's findings of fact and conclusions of law, and we have adopted them with some exceptions, as set forth below. There is no agreement by the Board regarding the appropriate sanction. This report thus includes a

separate statement recommending a three-year suspension, joined by two Board members. In a separate statement, Mr. Mercurio, joined by one Board member, recommends a one-year suspension. Four Board members recommend disbarment, in separate statements by Ms. Jeffrey and Mr. Frank.

I. BACKGROUND

Following an internal investigation of Respondent's conduct by the Office of Professional Responsibility of the United States Department of Justice ("OPR") from 1996-98, an OPR Report was disclosed under seal to the United States District Court for the District of Columbia,[1] after which post-conviction litigation led in 2002 and 2004 to substantial reductions of sentences for defendants in the *Card/Moore* and *Newton Street Crew* cases[2] and the corresponding withdrawal of defense motions to vacate convictions and for new trials. Respondent had left his position as an AUSA in May 1995 to join the law firm of Milburg Weiss in California, and by 2001 was fully engaged as lead counsel for plaintiffs in the Enron civil litigation. Tr. at 1232-34, 941, 943.[3]

In March 2002, Bar Counsel learned of Respondent's misconduct from newspaper articles, and in October 2002, obtained a partial, redacted version of the OPR Report and instituted its own investigation. This culminated in the negotiation of a substantial Stipulation of Facts and Charges (the "Stipulation") between Bar Counsel and Respondent and his counsel in June 2006. Therein, Respondent admitted multiple violations of six disciplinary rules

[1] *See* Report of the Office of Professional Responsibility, Department of Justice, February 9, 1998 ("OPR Report" or "OPR Rpt.") (Bar Exhibit ("BX") 3). The Justice Department's investigation addressed only Respondent's conduct in the federal court *Newton Street Crew* case. *See generally id*.

[2] In the Federal *Newton Street Crew* case, defendant Mark Hoyle's sentence of "8 life terms, plus 25 years" was reduced to "28 years"; defendant John McCollogh's from "9 life terms, plus 85 years," to "28 years"; defendant Anthony Goldstein's from "4 life terms, plus 5 years," to "18 years"; and defendant Mario Harris's from "5 life terms, plus 25 years" to "18 years." Stipulation of Facts and Charges (BX 1) at 13, ¶ 27(a)-(d). There were similar sentence reductions in the *Card/Moore* case. *Id*. at 8, ¶ 19(a)-(c).

[3] "Tr." refers to the transcript of the hearing held on May 7-11, 2007.

(repeated in each of the three counts), including knowing material false statements to a tribunal (Rule 3.3(a)), intentional failure to disclose exculpatory material (Rule 3.8(e)), and acts of dishonesty or misrepresentation (Rule 8.4(c)). *See* Stipulation (BX 1) at 15, ¶ 32. A Petition Instituting Formal Disciplinary Proceedings and accompanying Specification of Charges, which included eight Rule violations in each of three counts, was filed February 1, 2007, and a five-day evidentiary hearing was held in May 2007. The Hearing Committee issued its Report on August 19, 2009. Respondent filed his exceptions to the Hearing Committee Report on August 31, 2009, the parties filed their briefs with the Board thereafter, and the Board heard oral argument on January 14, 2010.

Although Respondent has "take[n] exception to certain factual findings and legal conclusions" of the Hearing Committee, as well as to the recommended sanction, he concedes that he stipulated to violations of six separate Rules in each of the three counts (Rules 3.3(a), 3.4(c), 3.8(e), 8.4(a), 8.4(c), and 8.4(d)),[4] and takes no exception to the Hearing Committee's finding of a violation of a seventh, Rule 8.4(b) — one of the two contested rules violations. Respondent's Brief to the Board, October 20, 2009 ("R. Brief") at 1-2. The lone remaining violation pursued at the hearing, Rule 3.4(b), was rejected by the Hearing Committee for lack of evidence, and Bar Counsel takes no exception to this finding. In sum, the following findings of 20 violations of the disciplinary rules are before us uncontested:[5]

1. Rule 3.3(a) (knowingly making a false statement of material fact or law to a tribunal) (Counts I, II, and III);
2. Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) (Counts I, II, and III);

[4] The Hearing Committee accepted these stipulated violations as to all three counts, with the exception of Rule 3.8(e) in Count III, because that matter did not proceed past the investigative stage. *See* HC Rpt. at 60.

[5] The Rules referenced herein are those in effect at the relevant time.

3. Rule 3.8(e) (as prosecutor in a criminal case, intentionally failing to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, evidence of information that Respondent knew or reasonably should have known tended to negate the guilt of the accused) (Counts I and II only);

4. Rule 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, and/or doing so through the acts of another) (Counts I, II and III);

5. Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness) (Counts I, II and III);

6. Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) (Counts I, II and III);

7. Rule 8.4(d) (engaging in conduct that seriously interferes with the administration of justice) (Counts I, II and III).

See HC Rpt. at 2-3; Stipulation (BX 1) at 15, ¶ 32. The Hearing Committee split on the recommended sanction. The attorney member would have recommended disbarment, but felt compelled to defer to Bar Counsel's recommendation of a two-year suspension with a fitness requirement. HC Rpt. at 90; s*ee also In re Cleaver-Bascombe*, 892 A.2d 396, 412 n.14 (D.C. 2006) ("*Cleaver-Bascombe I*") (recognizing that the Court of Appeals may impose a more severe sanction than proposed by Bar Counsel but that this "should be the exception, not the norm"). The public member recommended disbarment, finding that the gravity of the misconduct supports an upward departure from Bar Counsel's recommended sanction.[6] HC Rpt. at 90.

[6] A quorum of two Hearing Committee members participated in the decision of this case. *See* Board Rule 7.12. The Hearing Committee Chair recused himself prior to the issuance of the Hearing Committee Report. HC Rpt. at 3 n.1.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his brief to the Board, Respondent notes his general objection to certain factual findings of the Hearing Committee — although not to the Hearing Committee's overall findings/conclusions of 20 violations of the Rules. *See* R. Brief at 1-2. Following review of the record, the briefs of both parties and oral argument, the Board adopts the findings and legal conclusions of the Hearing Committee, except as specifically noted in the footnote below.[7] *See* HC Rpt. at 64-90.

A. Respondent's Objections to the Factual Findings of the Hearing Committee

Both in his brief and at oral argument, Respondent has asserted that the Hearing Committee failed to come to grips with the "massive factual record in this case", developed over "five days of testimony and . . . thousands of pages of exhibits . . . ." R. Brief at 5. We disagree. The Hearing Committee's findings, set forth in a 90-page Report, are supported by extensive references to the factual record, including numerous transcript quotes in support of its factual findings and legal conclusions. *See* HC Rpt. at 24-64. D.C. Bar R. XI, § 4(e)(4) requires the submission to the Board of the Hearing Committee's "findings and recommendations." This Hearing Committee has more than fulfilled that requirement. The

[7] Our areas of disagreement with the Hearing Committee's factual findings and conclusions of law are not material to the sanction. For example, we agree with Respondent that the vouchers submitted to the United States Marshal's Service ("USMS"), an agency of the Department of Justice, are not false statements to a tribunal in violation of Rule 3.3(a), as found by the Hearing Committee. We conclude, however, that Respondent violated Rule 3.3(a) in the *Card/Moore* and *Newton Street Crew* cases by virtue of other false statements to the courts detailed in the Hearing Committee's Report. *See*, *e.g*., Stipulation (BX 1) at 5, ¶ 16. We find no violation of Rule 3.3(a) in the *Jones* investigation, which never ripened into a court proceeding. *See* HC Rpt. at 22. But Respondent's false statements to the USMS in all three matters violated other rules, including, *inter alia*, Rule 8.4(b) (criminal act reflecting adversely on honesty, trustworthiness or fitness), Rule 8.4(c) (dishonesty, fraud, deceit or misrepresentation), as well as criminal statutes 18 U.S.C. §§ 1001 and 1018.

We also agree with Respondent's position that friends and relatives of incarcerated cooperators were not paid to visit their loved ones in prison, as the Hearing Committee finds, but rather for visits to the courthouse or the United States Attorneys Office ("USAO"). *Compare* HC Rpt. at 67 (summary reference to prison visits), *with id*. at 33-36 (detailed discussion of the particular visits found to give rise to false vouchers repeatedly places those visits at the courthouse or the USAO). The location of the visits was not germane to the Hearing Committee's analysis.

Hearing Committee Report sets forth explicit and detailed Findings of Fact relating to and underlying each of its recommended conclusions of law and its sanction recommendation. *See* HC Rpt. at 4-20, ¶¶ 1-55 (findings of fact); 21-64 (conclusions of law), 64-90 (sanction recommendation). The Findings of Fact are drawn from the parties' written Stipulation of Facts and Charges, which consists of stipulations of fact and law that underlie 17 of the 20 rule violations found by the Hearing Committee. The Findings of Fact also are supported by the substantial materials in the hearing record. *See, e.g.*, *id*. at 6-7, 10-11, 15-17, 20, FF ¶¶ 10, 11, 23, 38-44, 53. Indeed, Finding of Fact 44 quotes at length Respondent's testimony justifying his issuance of pay vouchers to incarcerated witnesses out of fear for their safety: "What I was doing was making sure that those individuals, at least for the first day, until they got their bearings, didn't go home and walk into getting killed." *Id*. at 17, FF ¶ 44 (quoting Tr. at 1051-52).

Beyond the Findings of Fact, the Hearing Committee's 69-page discussion of its conclusions of law and recommended sanction displays a firm grasp of the factual record, as well as a reasoned and measured use of the record to support the Hearing Committee's recommendations. *See id*. at 21-90. In answer to Respondent's assertion that the Hearing Committee's review of this complex record was superficial, a record that even "a seasoned prosecutor" would find to be a "mind-boggling task", R. Brief at 5, we discuss below examples from the Hearing Committee's Report to put Respondent's argument to rest. We also note that the findings are consistent with the OPR Report, which was based on an independent inquiry into Respondent's conduct.

1. Improper Payments to Relatives of Witnesses

As a federal prosecutor, Respondent was authorized to provide payment vouchers to fact witnesses as compensation for attendance at judicial proceedings and pre-trial conferences with government attorneys. *See* 28 U.S.C. § 1821; 28 C.F.R. Part 21; Stipulation (BX 1) at 2, ¶ 3. Respondent stipulated, *inter alia*, that he had "improperly authorized" federal payment vouchers for "friends and relatives of incarcerated government witnesses" in the *Newton Street Crew* case. *Id*. at 10-12, ¶ 25. The Stipulation then names 18 friends and relatives of six different cooperating incarcerated government witnesses, who during that federal case, received over $42,000 in witness payments but were never called to testify. *Id*. Far beyond just accepting Respondent's stipulation that these payments were improper, which the Hearing Committee could justifiably have done,[8] the Hearing Committee carefully examined the stipulation in light of the rest of the factual record. HC Rpt. at 32-41. For example, the Hearing Committee Report analyzed the $8,409 in payments to Michelle Washington, girlfriend of incarcerated government witness Frank Lynch, Jr., in light of not only the stipulation, but also the interview given by Ms. Washington to the OPR investigators and Respondent's testimony before the Hearing Committee. *Id*. at 36. Ms. Washington, as related in the Hearing Committee Report, told OPR investigators she was often called to Respondent's office or to the courthouse to "provide information or to 'comfort' Lynch with her presence." *Id*. (quoting OPR Rpt. (BX 3) at 36). She stated that "she had no evidence about their crimes . . . ." *Id*. Yet she was paid $8,409 in witness vouchers for 103 days of attendance in the federal *Newton Street Crew* case, including payments on the days leading up to her boyfriend's

[8] *See Madison Hotel v. District of Columbia Dep't of Employment Serv.*, 512 A.2d 303, 307 (D.C. 1986) (binding stipulations may relieve the parties of "offering independent evidence of the stipulated facts.").

testimony and immediately thereafter. Stipulation (BX 1) at 11, ¶ 25(e); *see also* BX 70.[9] She was never called as a witness. Stipulation (BX 1) at 11, ¶ 25(e).

The Hearing Committee concluded that the record evidence "supports the view that Respondent issued numerous witness vouchers to relatives of incarcerated witnesses to compensate them, not for . . . provid[ing] information in all instances, but rather for visiting incarcerated government witnesses to maintain their resolve to testify for the government." HC Rpt. at 40. The Hearing Committee also concluded that "most of the [voucher] payments" were proper in that the recipient (*e.g.*, a relative of the witness) provided some "case-related information (although the visit may have also served other purposes, such as providing moral support to a government witness)." *Id*. at 33. The OPR Report noted that certain of the cooperating government witnesses were "afraid of the defendants and the defendants' associates", OPR Rpt. (BX 3) at 47, and the Hearing Committee noted the concern of the prosecutors as to the defection of any of its cooperating witnesses and the "calming influence of 'leaders' among the incarcerated [cooperating] witnesses themselves, and . . . visits from family members and other close associates." HC Rpt. at 33-34.

We also note the finding of the Hearing Committee, as well as the OPR, of the absence of clear and convincing evidence of any "financial inducement of any witness." *Id*. at 33. The OPR concluded, "there is no evidence that any witness ever changed his testimony because he, or a relative or girlfriend, received witness vouchers." OPR Rpt. (BX 3) at 71.

2. Issuance of Vouchers from the Incorrect Court and *Brady* Violations

While prosecuting the *Card/Moore* murder/conspiracy case in Superior Court, Respondent authorized payment to numerous witnesses, and relatives or associates of

[9] These thousands of dollars in payments were never brought up during Respondent's examination of Lynch when eliciting testimony as to the few minor benefits the government provided him. HC Rpt. at 45.

witnesses, with federal court voucher forms under the *Newton Street Crew* caption. By using federal vouchers with the caption of a different criminal case than the one being tried in the Superior Court, it became more difficult for defense counsel to discover the extent of payments to cooperating government witnesses and their relatives, girlfriends and the like. HC Rpt. at 41-42; Stipulation (BX 1) at 4, 5, ¶¶ 11, 16 and 17. In this manner, Respondent paid out over $17,000 in incorrectly captioned (wrong court and wrong case) vouchers to eight government witnesses and their friends, relatives, and associates. Stipulation (BX 1) at 5, ¶ 17. The Hearing Committee again went well beyond the pretrial stipulations in examining Respondent's conduct. *See* HC Rpt. at 41-45. The Hearing Committee credited Respondent's explanation that some of his witnesses had information relevant to both the *Newton Street Crew* case in Federal Court and the *Card/Moore* case in Superior Court, and so his use of federal vouchers in the *Card/Moore* Superior Court trial "began as a time and effort saving shortcut, albeit an improper one." *Id*. at 42. The Hearing Committee examined testimony from the *Card/Moore* case, and concluded that Respondent "became aware after the miscaptioning had begun that it impeded discovery, and knowingly and intentionally persisted in concealing it . . . ." *Id*. at 43-45. The Board believes this conclusion is fully supported by substantial evidence in the record.

The Hearing Committee concluded that Respondent's conduct in using miscaptioned vouchers was evasive and done with the intent to "mislead and distract any inquiry that was venturing close to a problematic subject", *i.e.*, the systematic miscaptioning of witness vouchers and undisclosed use of these vouchers for non-testifying family and friends. *Id*. at 44. The Hearing Committee also cites other examples of evasive conduct, including Respondent's statement to defense counsel that government witness, Kalvin Bears, had not received payment

vouchers (witness fees), while failing to disclose payments to Kalvin Bears' girlfriend, Jacqueline Hayes. *Id.*; Stipulation (BX 1) at 5, ¶ 17.

As noted in the Hearing Committee Report, Respondent "openly acknowledged concealing witness voucher payments he should have turned over to the defense or at least brought to the attention of the Court (*in camera*)." HC Rpt. at 44. Respondent further conceded:

> WITNESS (HOWES): [A]t the time of my conduct, I weighed disclos[ur]e to Judge Jackson of relatives and friends against protecting them and if I did disclose them I would necessarily put a target on them when I might not use them even in rebuttal. I weighed that against the obligation[s] as you have read them. I came down on the side of protecting my folks and it was based on the fact that no one asked me to disclose statutory witness fees and at the time I did not have any idea how much anybody, any particular person, had gotten. Counting up days and counting amounts on a day-to-day basis during the trial was something I never even though about. I was far, far busier.
>
> * * *
>
> In objective, dispassionate view, I should have gone to Judge Jackson and said here is the situation. Tell me whether I need to disclose it and I would have done what the Court required.

Id. at 54 (quoting Tr. at 1261, 1262).

3. Department of Justice OPR Investigation

The report by the Justice Department's OPR after its own independent two-year investigation further refutes Respondent's assertion that the Hearing Committee failed to understand the "massively complicated" facts underlying Respondent's conduct. R. Brief at 5-6.[10] Respondent claims he had to wait for years, until May 2007, to finally "present his side of the story" before the Hearing Committee and "explain that his actions were for the most part consistent with long-established policies in the United States Attorneys Office." R. Brief at 28.

[10] The OPR Report was placed in evidence before the Hearing Committee without objection. HC Rpt. at 34. Robert R. Chapman, a Senior Assistant United States Attorney who assisted the OPR investigation team in its work, identified the OPR Report and testified extensively about it before the Hearing Committee. *See* Tr. at 43-200.

Yet he appeared for three days before the OPR attorneys in 1997 to answer their questions over the alleged improprieties surrounding his prosecution of the *Newton Street Crew* case, and to present a defense to the allegations of misconduct. Tr. at 62-63. Aside from interviewing persons receiving pay vouchers (including incarcerated witnesses and their friends and relatives) over the period 1993-94 (the time of the *Hoyle* or *Newton Street Crew* cases), the three federal attorneys and two senior FBI agents on the OPR team interviewed prosecutors (Respondent included), FBI agents and police officers. *Id*. at 53-54. The OPR also examined 719 witness vouchers – 684 of which "were signed by or on behalf of G. Paul Howes." OPR Rpt. (BX 3) at 42. They entailed payments to government witnesses totaling $140,918.14. *Id*.

Although the Justice Department investigation determined that "many of the vouchers turned out to be completely legitimate", *id*. at 43, many individuals "received payments that could not be explained adequately by anyone [OPR] interviewed." *Id*. at 44. Referring to payments to relatives and friends of witnesses, OPR noted, "[i]t is impossible to say with certainty that Howes committed misconduct with respect to any one particular voucher in this group. However, given the circumstances of the vouchers and the admissions by Howes, there is no doubt that Howes committed misconduct with respect to a significant number of these vouchers." *Id*. at 65. In particular, OPR came to the following conclusions:

- Howes "viewed the voucher system as a resource to be used as he saw fit in order to accomplish the goal of convicting some very violent, homicidal drug dealers."

- "[W]e . . . [found] strong evidence that Howes intentionally abused the witness voucher system in several ways . . . . [W]e conclude that Howes committed intentional professional misconduct."

Id. at 63, 84-85. OPR found that mitigating factors existed:

- "[T]here was no indication that Howes ever profited personally from the vouchers."

- Howes "undoubtedly used the vouchers with the intention of advancing the interests of the prosecution."

- "[T]here is no evidence that any witness ever changed his or her testimony because of the receipt of vouchers."

Id. at 80. However, OPR ultimately concluded that "the aggravating factors clearly outweigh the mitigating factors." *Id*. at 81.

III. SEPARATE STATEMENT OF MR. BOLZE AS TO SANCTION

Respondent concedes that "under ordinary circumstances and taking into consideration all the facts and circumstances and all the violations stipulated to", a three to six-month suspension "may be appropriate." R. Brief at 37. Respondent concludes, however, in consideration of all the delay since the events in question and Respondent's ethical and honest practice "for the last 14 years", that a 30-day suspension without a fitness requirement is more appropriate. *Id*. Bar Counsel argued for a suspension of "at least two years" plus fitness before the Hearing Committee, and now has modified that somewhat to: "at least two years with a fitness requirement, if not a greater sanction up to and including disbarment." *Compare* Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction, June 25, 2007 at 96 (arguing for "at least two years" plus fitness), *with* Bar Counsel's Brief to the Board, Dec. 4, 2009 ("BC Brief") (suggesting disbarment would be acceptable).

The purposes of sanctions, as stated by the D.C. Court of Appeals, are the protection of the public and the courts, maintaining the integrity of the legal profession, and "deter[ring] other attorneys from engaging in similar misconduct." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc). Clearly, the scope of misconduct here calls for a severe sanction. Deciding the precise sanction is not an exact science, particularly where there are few precedents on these facts.

A. The Nature of the Violation

Although Respondent "was an exceptionally tenacious and talented prosecutor with a strong work ethic, [who] handled some of the [USAO's] most complex and challenging matters", HC Rpt. at 87-88, his misuse of witness vouchers as a prosecutor, coupled with his failure to disclose exculpatory *Brady/Giglio* material to the court and the defendants, were serious abuses of defendants' fair trial rights. This misconduct led directly to wholesale post-conviction proceedings and significant sentence reductions.

We readily acknowledge, as did the Hearing Committee, the highly stressed atmosphere that pervaded Respondent's team as they dealt with these matters. The evidence presented to the Hearing Committee clearly depicts a "war room"-type clearinghouse run by Respondent and his colleagues that processed crime and threat information on a massive scale over a period of years; served as a nucleus of activity for literally dozens of federal agents and local police detectives (as well as law enforcement officials in other cities beset by the same or related gangs); and regularly received and debriefed an array of informants, checking and re-checking any new information with multiple cooperators to ensure its veracity. Tr. at 862-72, 886, 1008. Moreover, as the Hearing Committee noted:

> [M]any of the payments to witnesses and their relatives came after the testimony and even the trial as a whole was completed, sometimes, years later, reflecting that some of the murder cases had been severed from related drug conspiracy cases and that uncharged crimes were also being investigated through the same process.

HC Rpt. at 38.

Public prosecutors are vested with broad discretionary powers in the exercise of their authority. They have the obligation to serve justice. The courts, opposing counsel and the public must rely on public prosecutors' integrity because of the enlarged powers placed in their

hands. In this case, justice was not served when Respondent subverted the integrity of the voucher system and committed the other violations of the disciplinary rules found by the Hearing Committee. The public's faith in the criminal justice system is seriously damaged when misconduct of this scale is unearthed. It is true, as both the OPR and the Hearing Committee found, that "Respondent was pursuing legitimate goals and did not personally profit" from his violation of the disciplinary rules. Stipulation (BX 1) at 4, ¶ 13 (discussing OPR Rpt. (BX 3)). Nevertheless, the Hearing Committee has found serious violations of the Rules of Professional Conduct, calling for an appropriately severe sanction.

B. Witness Vouchers

The Hearing Committee Report sets forth the relevant statute (28 U.S.C. § 1821) and its implementing regulations (28 C.F.R. Part 21) that cover the issuance of witness vouchers, and notes that Respondent "readily admit[s] that a large percentage of the vouchers he signed or authorized cannot be justified by 18 U.S.C. § 1821." HC Rpt. at 24-28. The Hearing Committee further rejects Respondent's argument that 28 U.S.C. § 524 (authorizing funds for the "Attorney General for payment of . . . compensation and expenses of witnesses and informants") can be used to justify many of Respondent's pay vouchers. *See* HC Rpt. at 28. We agree. *See United States v. Johnpall*, 739 F.2d 702 (2nd Cir. 1984). Respondent's misuse of pay vouchers breaks down into five areas.

The first area involves the issuance of pay vouchers to non-testifying cooperators. This comprised "the overwhelming majority of vouchers at issue." HC Rpt. at 24. In light of evidence of "an office policy [at the USAO] of issuing vouchers to non-testifying cooperators", the Hearing Committee could not conclude that Respondent's conduct in issuing such vouchers seriously or adversely "affected the administration of justice." *Id*. at 29-30.

The second area of voucher misuse involves the issuance of pay vouchers to family and friends of government witnesses "for purposes other than providing information." *Id*. at 32. The Hearing Committee concluded that "most of the [voucher] payments" in this category were "payments for case-related information" and therefore proper. *Id*. at 33. However, it also determined that numerous vouchers "to relatives of incarcerated witnesses" were not compensation for appearing and providing information, "but rather for visiting incarcerated government witnesses to maintain their resolve to testify." *Id*. at 40. As such, Respondent's authorization of these pay vouchers violated the disciplinary rules. However, both the Hearing Committee Report and the OPR Report note the lack of proof of any "*quid pro quo* or explicit financial inducement of any witness", or that any witness altered his testimony due to these improper payments. *Id*. at 33; OPR Report (BX 3) at 57.

Third, Respondent's misuse of witness vouchers included payments to compensate two retired police officers as "case agents." HC Rpt. at 45. Both had been working on these large gang cases with Respondent before their retirement. Each testified for one day or three days, respectively, but was reimbursed for the many additional days he worked with the trial team assisting in the prosecutions — payment for 68 days and 167 days, respectively. *Id*. at 45-46. The Hearing Committee "d[id] not doubt" that these two retired officers provided assistance out of loyalty to Respondent, but correctly found there was no valid basis to pay them in this fashion. *See id*. at 46 n.10 ("But these facts do not make the payments proper.").

Fourth, Respondent improperly issued vouchers to five incarcerated witnesses, in the amounts of $504 to one, and $160 to each of the others. *Id*. at 47. Such payments were admittedly prohibited. *Id*. The Hearing Committee noted the "laudatory motive" behind Respondent's conduct. Respondent had justified his actions as follows:

> I had protected them all along. I had invested hours and hours trying to get them ready to go back so that they wouldn't revert and they wouldn't get – they wouldn't get killed and I made a choice. There was no federal money there. They showed up in my office where there should have been Safe Streets money. It wasn't available and there they stood. That's what I did.

Id. at 48 (quoting Tr. at 1283).

Fifth, Respondent improperly provided witness pay vouchers to Marjorie Jones and her three grandchildren for numerous visits to his office concerning an investigation of an alleged sexual assault of one of the children. *Id*. Respondent admitted that two of the three grandchildren attended solely to provide moral support to their sister, and not because they had information. *Id*. at 48-49. The Hearing Committee found these vouchers to be improper, although the OPR Report noted that it was "very likely" Respondent issued the vouchers to the boys because the grandmother "needed to bring them along." *Id*. at 20; OPR Report at 70.

In analyzing the breadth of Respondent's misconduct regarding his issuance of improper pay vouchers, we do not believe his conduct is comparable to the misappropriation of client funds under *In re Addams* 579 A.2d 190 (D.C. 1990) (en banc) and its progeny, as found by the Hearing Committee and three of the Board members who recommend disbarment. *See* HC Rpt. at 68-73; Separate Statement of Ms. Jeffrey as to Sanction (the "Jeffrey Report") at 26-27. Admittedly, many of the vouchers Respondent authorized did not comply with the requirements of 18 U.S.C. § 1821. *See* HC Rpt. at 24-25. However, Respondent did not abuse the witness voucher system by "appropriating to his own use funds of others entrusted to him", as is the case in misappropriation. *See Addams*, 579 A.2d at 194 (quoting *Attorney Griev. Comm'n of Maryland v. Cockrell*, 499 A.2d 928, 935 (1985)). As confirmed by both the OPR and our Hearing Committee, "there is no indication that Howes ever profited personally from the vouchers." OPR Rpt. (BX 3) at 80; HC Rpt. at 87 n.28. Rather, he abused the vouchers to assist in his investigation and prosecution of two highly complex criminal gang cases. As

explained in the OPR Report, Respondent "viewed the voucher system as a resource to be used as he saw fit in order to accomplish the goal of convicting some very violent, homicidal drug dealers." OPR Rpt. (BX 3) at 63. The OPR Report also noted:

> [Respondent] and the MPD officers who initially worked on the NSC [Newton Street Crew] investigation were faced with several murders that were difficult to solve and were met with bureaucratic obstacles: neither the MPD nor the USAO was accustomed to devoting resources to a long-term investigation of an entire drug crew; rather, the institutions preferred to work on individual cases. Howes portrayed himself to us as a very talented, dedicated, and persistent prosecutor who was frustrated at his supervisors' lack of vision with respect to the NSC investigation . . . . [H]is supervisors, with one strong exception, confirmed that Howes was dedicated and talented, and several of them acknowledged that he was willing to bend rules to achieve results.

Id. at 63-64.

We also believe that the Jeffrey Report's comparison of Respondent's conduct to that involved in the following cases is misplaced, because all involved dishonesty for personal gain: *In re Pelkey*, 962 A.2d 268 (D.C. 2008) (attorney disbarred for, *inter alia*, theft of his business partner's funds and flagrant dishonesty to the judicial authorities about his conduct); *In re Mitrano*, 952 A.2d 901 (D.C. 2008) (theft/misappropriation of funds for personal gain); *In re Milton*, 642 A.2d 839 (D.C. 1994) (per curiam) (government [EEOC] attorney negotiated settlement of a discrimination action and secretly arranged for improper claims whereby he received a portion of the settlement funds); *In re Patterson*, 833 A.2d 493 (D.C. 2003) (per curiam) (attorney stole money from government for his own benefit); and *In re Cleaver-Bascombe*, 986 A.2d 1191 (D.C. 2010) ("*Cleaver-Bascombe II*") (attorney submitted fraudulent pay voucher via fabrication by "seeking compensation for services that she knew she had not rendered," and thereafter gave false testimony about her intentional misappropriation). Nor do we believe Respondent's misconduct compares in magnitude to *In re Peasley*, 90 P.3d 764 (Ariz. 2004) (en banc) (attorney had key witness give false testimony and thereafter lied to the

Court about it); *In re Corizzi*, 803 A.2d 438 (D.C. 2002) (attorney counseled his clients to give false testimony in order not to disclose financial arrangement respondent had with a chiropractor for referrals of business); or *In re Jackson*, 980 A.2d 1081 (D.C. 2009) (per curiam) (criminal conviction for mail and wire fraud).

In evaluating Respondent's misconduct, it is important to recognize that in some respects, "Respondent relied on standard office practice concerning witness payments to non-testifying cooperators, as did at least some of his colleagues." HC Rpt. at 29. For example:

> [I]t was standard practice within the USAO for prosecutors to provide witness vouchers to witnesses who appeared at the USAO or the courthouse to provide information to a prosecutor or a police officer, even if that witness did not appear at trial, before the Grand Jury, or in any other court proceeding, and even if such appearance was not contemplated at the time the witness appeared at the USAO or courthouse.

Id.

The OPR Report, while concluding that Respondent "intentionally abused the witness voucher system in several ways", also found a "lack of controls or clearly articulated guidelines [in the USAO] for the use of vouchers" which "gave rise to an environment that made it easy to issue a large number of vouchers without adequate justification." OPR Rpt. (BX 3) at 84-85. The OPR Report referenced one Principal AUSA who stated that he "was not aware of any formal guidelines within the USAO on the use of witness vouchers in the District Court." *Id*. at 73. The OPR Report summarized: "[W]e did not discover any formal . . . guidelines that clearly warn a prosecutor not to dispense witness vouchers freely or to persons who are not necessarily going to be witnesses." *Id*. at 76. Inasmuch as Respondent's misuse of pay vouchers (1) was not a matter of taking money for his own benefit (misappropriation), (2) did not consist of abuse of a system through the fabrication of facts or evidence, and (3) to some degree can be explained by the lack of USAO guidelines on the correct use of pay vouchers, we

believe the appropriate sanction for this aspect of his misconduct would be a suspension for a period of months, rather than years.

C. Failure to Disclose *Brady/Giglio* Evidence

As to Respondent's failure to disclose all *Brady/Giglio* exculpatory evidence, *see* HC Rpt. at 50, what Respondent "failed to fully disclose, or failed to disclose at all", were the pay vouchers he had improperly provided to "family and friends of government witnesses, incarcerated government witnesses and former police officers." *Id*. at 51 (quoting Stipulation (BX 1) at 3, ¶ 9). Respondent also "repeatedly and falsely assured the court and defense counsel that he had provided" all exculpatory information. HC Rpt. at 51; Stipulation (BX 1) at 5, ¶ 16. Quoted at length in the Hearing Committee Report is Respondent's rationale for not disclosing witness vouchers to relatives and friends of cooperating government witnesses: his concern for the safety of his cooperating witnesses if their identities were somehow disclosed. HC Rpt. at 53-55.[11] Rather than raising this stated concern with the Court, he kept the exculpatory information from both the Court and defense counsel:

> I weighed disclos[ur]e to Judge Jackson of relatives and friends against protecting them and if I did disclose them I would necessarily put a target on them . . . .

HC Rpt. at 54.

Although Respondent stipulated to failing to disclose voucher payments, there is no finding that his nondisclosure of witness pay vouchers would have had a material impact on the outcome of the trials.[12] However, in light of the government's decision to offer substantially

[11] The potential danger to a cooperating witness from disclosure of his identity was also attested to by one of Bar Counsel's witnesses—Robert Chapman, a senior prosecutor at the USAO. *See* Tr. at 138.

[12] On appeal of the convictions of Javier Card, Jerome Edwards, and Antoine Rice, the Court reviewed the failure by Respondent to timely disclose certain *Giglio/Brady* information and concluded there had been no prejudice. *Card v. United States*, 776 A.2d 581, 601 (D.C. 2001). However, the misuse and miscaptioning of witness vouchers was not before the Court. It had not been revealed as of that time.

reduced sentences rather than fully contest defendants' motions for new trials, we acknowledge the distinct possibility that disclosure of the vouchers could have had such an impact. *Id*. at 18-19. The record contains testimony of an attorney for one of the defendants that access to pay vouchers to a girlfriend would have been "incredibly important." Tr. at 457. However, the record also contains Judge Thomas Penfield Jackson's statement that in his experience, in more instances than not, "counsel makes nothing of [the decision not to disclose witness vouchers]." *Id*. at 979.[13]

In our view, the failure to disclose *Brady/Giglio* exculpatory material in these circumstances does not rise to the level of a disbarable offense. The authority most directly on point is *In re Stuart*, 942 A.2d 1118 (D.C. 2008), a reciprocal case from the New York Supreme Court. There, a prosecutor failed to produce a police report on a witness believed to have exculpatory information in a homicide case. Thereafter, "when faced with a direct inquiry from the court", he falsely denied knowledge of the witness's whereabouts. *Id.* at 1119. Due to the prosecutor's misconduct, the case had to be retried. Under the deferential reciprocal discipline standard of review, the Court imposed a sanction identical to that imposed by the New York Supreme Court: a three-year suspension with a fitness requirement. *See id.* The Court also noted the attorney's disciplinary record of similar misconduct in a prior prosecution, a key factor not present in the instant matter. In light of Respondent's testimony regarding his concern for the safety of his witnesses, the Hearing Committee's finding that Respondent "intentionally conceal[ed]" certain voucher payments in the Superior Court (*Card*/*Moore*) case thus "thwarting defendants' legitimate discovery efforts", HC Rpt. at 67, does not in our opinion rise to the level of *Stuart* (failing to produce a highly material exculpatory document

[13] *See also* HC Rpt. at 39-40 (quoting portions from *Newton Street Crew* post-conviction proceedings in 1999). Judge Jackson mentioned possible benefits to the prosecution from trying to make life comfortable for friends and relatives of witnesses. *See id.*

and then falsely stating he was unaware of the whereabouts of a key witness). Although Respondent should have raised his concerns regarding his witness's safety with the court; *see id.* at 74, this concern nevertheless serves to lessen the severity of his misconduct.

Nor does Respondent's conduct fall into the category of "dishonesty of a flagrant kind" present in *Cleaver-Bascombe II*, 986 A.2d at 1199. In *Cleaver-Bascombe II*, respondent submitted a patently fraudulent voucher seeking compensation (personal gain), and gave false testimony to the hearing committee to conceal her misconduct. She was disbarred for conduct the Court compared to *Addams*, 579 A.2d 190 (misappropriation), and *Patterson*, 833 A.2d 493 (felony theft). The Hearing Committee in this case found no perjured testimony by Respondent, nor was he motivated by personal gain. HC Rpt. at 17, 72, 87 n.28; OPR Rpt. (BX 3) at 71. Unlike the respondent in *Stuart*, Respondent has no significant disciplinary history. Although censured in the New Mexico Supreme Court for conduct in 1988, those actions related to a dispute between Respondent's superiors at the Justice Department and the state bar associations. The Justice Department issued letters affirming his conduct. HC Rpt. at 81-83. Should the Court, nonetheless, treat this case as involving flagrant dishonesty, we believe the mitigating factors (Respondent's pursuit of legitimate goals, absence of personal profit from the improper pay vouchers, a lack of proof of financial inducement or altered testimony of any witness, noted concern for protection of witnesses, and hard work in handling some very serious and complex gang cases) are so unusual that a three-year suspension serves the purpose of the discipline system and protects the public. *See id*. at 33, 48, 87-88; OPR Rpt. (BX 3) at 70, 80.

Disciplinary sanctions from other jurisdictions dealing with prosecutorial misconduct run the range from public reprimand to lengthy suspensions. In *Price v. State Bar of*

California, 638 P.2d 1311 (Cal. 1982), a former prosecutor was found to have (1) altered a documentary exhibit to conform with his witnesses' testimony in a criminal trial, and (2) sought after trial to prevent discovery of his misconduct by offering to seek favorable sentencing of the defendant in return for his agreeing not to appeal. In mitigation of his misconduct, the court cited the absence of any prior discipline, the respondent's full cooperation in the disciplinary process and remorse, his stipulation to the essential facts, his having been under mental and emotional stress due to several years of a heavy workload, character testimony regarding his community involvement, integrity, and trustworthiness, and his present ability to better handle stress in his law practice. *Id*. at 545. In light of the mitigating factors, including his inability to practice law pending his successful defense against criminal charges, the court decided that disbarment was not required to protect the public and profession, and instead ordered that respondent be suspended for five years with all but two years stayed, and further ordered that respondent be placed on probation for five years, with additional conditions. *Id*. at 549. *In re Jordan*, 913 So.2d 775 (La. 2005) involved a prosecutor's failure to produce as exculpatory material one of the several statements by an eye witness. During the disciplinary case, he defended his actions by asserting that he provided as *Brady* material only those witness identifications that were corroborated by documentary evidence. *Id*. at 778. The conviction was reversed on other grounds, but the court noted that the withheld statement clearly should have been produced. *See id*. at 779. The Louisiana Supreme Court found that the respondent had knowingly withheld the exculpatory statement in violation of *Brady*, and thereby violated Rule 3.8. *See id*. at 782. Citing in mitigation the lack of prior discipline, absence of dishonest motive, full and free cooperation with the disciplinary authorities, and good character and reputation evidence, the court imposed a three-month

deferred suspension conditioned on respondent not committing further misconduct over the next year. *See id*. at 784.

Other cases involving prosecutorial misconduct, which provide some guidance, include *In re Attorney*, 47 P.3d 1167 (Colo. 2002) (holding that prosecutor who failed to timely produce two exculpatory documents during a critical stage of the proceedings, did not do so with the intent required by Rule 3.8); *Disciplinary Board v. Hatcher*, 483 S.E.2d 810, 816-817 (W.Va. 1997) (per curiam) (disciplinary charges that prosecutor knowingly failed to produce tape recordings held to be unproven by clear and convincing evidence, due to the age of the case and various lost files of the attorneys); *Bar Ass'n v. Gerstenslager*, 543 N.E.2d 491 (Ohio 1989) (prosecutor publicly reprimanded for failing to produce *Brady* information due to his gross negligence); *Disciplinary Counsel v. Jones*. 613 N.E.2d 178 (Sup. Ct. Ohio 1993) (per curiam) (failure to disclose exculpatory evidence resulted in six months suspension); *Read v. State Bar*, 357 S.E.2d 544 (Va. 1987) (Disciplinary board's recommendation of disbarment of prosecutor for failure to disclose during trial the change in the position of the eye witness, was rejected by court since defense became aware of this key fact anyway); *Committee on Prof. Ethics v. Ramey*, 512 N.W.2d 569 (Iowa 1994) (prosecutor who (1) falsely stated serial numbers of monies matched and (2) failed to produce exculpatory statement, was suspended indefinitely with no possibility for reinstatement for three months); *In re Zapf*, 375 N.W.2d 654 (Wisc. 1985) (per curiam) (public reprimand of prosecutor for, *inter alia*, failure to disclose exculpatory statement of witness); and *In re Grant*, 541 S.E.2d 540 (S.C. 2001) (per curiam) (public reprimand of prosecutor for failure to fully disclose statements given by the state's key witness in a murder prosecution).

The present case is distinguishable from the above cases because: (1) the amount of exculpatory material that Respondent failed to disclose in this case was significantly greater than in the above cases, and (2) the present case involves not only multiple *Brady* violations (Rule 3.8(e)), but other serious violations surrounding the misuse of pay vouchers. Alternatively, there was strong evidence in many of the above cases that the material went directly to the credibility of a key government witness, whereas we have no clear finding here regarding Respondent's failure to produce the pay vouchers.

D. Sanction Recommendation

We believe the appropriate sanction here, both for Respondent's failure to disclose pay vouchers and his improper use of pay vouchers, is a suspension of three years. Again, we do not believe the disbarment opinions are applicable: *Addams*, 579 A.2d 190 (misappropriated his client's funds); *Mitrano*, 952 A.2d 901 (theft/misappropriation of funds rightfully belonging to another); *In re Slattery*, 767 A.2d 203 (D.C. 2001) (in a position of trust, attorney withdrew funds of his fraternal organization for his personal benefit (theft)); *In re Gil*, 656 A.2d 303 (D.C. 1995) (used power-of-attorney given him by a friend to transfer her money to his own account (larceny or theft)); *Patterson*, 833 A.2d 493 (theft of money from U.S. Government); *In re Sneed*, 673 A.2d 591 (D.C. 1996) (attorney participated with two friends in scheme to submit fraudulent overtime pay vouchers to the Department of Labor to their personal benefit); *In re Appler*, 669 A.2d 731 (D.C. 1995) (law firm partner diverted fee payments from his client to his own personal account); *In re Devaney*, 870 A.2d 53 (D.C. 2005) (per curiam) (had elderly client sign codicils to her will giving the attorney and his family increased amounts of her assets); or *Cleaver-Bascombe II*, 986 A.2d 1191 (fraudulent preparation and filing of false pay voucher for personal gain and lying to Hearing Committee to cover up misconduct). Here, there was no taking of money for personal gain — no embezzlement, no fraud, no theft. As has

been acknowledged by Bar Counsel, "Respondent was neither charged with, nor guilty of, taking funds for his own personal financial gain, as in most misappropriation cases." BC Brief at 36.

Nor do we believe the following two disbarment cases are controlling precedent here: *Corizzi*, 803 A.2d at 439-40 (attorney disbarred for (1) counseling two of his clients, "in separate cases, to commit perjury in their depositions" as to the respondent's referral relationship with a chiropractor,[14] and (2) making false statements to Bar Counsel as to his conduct); and *In re Goffe*, 641 A.2d 458 (D.C. 1994) (per curiam) (fabrication of evidence to use with the IRS, lying under oath before the Tax Court, lying before the Hearing Committee, forging signatures in a separate civil suit, and falsely notarizing documents, all in order to gain an economic benefit for himself). Unlike *Goffe* and *Corizzi*, the instant matter involves no perjury, no fabrication of false documents for personal benefit, and no falsehoods to Bar Counsel or the Hearing Committee.

We submit that the following cases are applicable precedent here, although even these cases are distinguishable. *Stuart*, 942 A.2d 1118, discussed *supra* at 20-21, resulted in the imposition of the identical reciprocal discipline of a three-year suspension with fitness. Unlike the current matter, the respondent in *Stuart* had been disciplined for prior similar misconduct and *Stuart* lacked the mitigating factors present herein. *In re Parshall*, 878 A.2d 1253 (D.C. 2005) concerned a trial attorney for the Justice Department's Tax Division who intentionally misled the court by filing a false status report, and received an eighteen-month suspension. Admittedly, the misconduct was not as extensive as this case, but there were also not the same compelling mitigating factors. *In re Steele*, 868 A.2d 146 (D.C. 2005) (per curiam) related to

[14] The Respondent in *Corizzi* was intent on hiding his pecuniary relationship with a chiropractor "to whom respondent had a regular practice of referring personal injury clients and who in turn referred patients to respondent for legal representation." 803 A.2d at 440.

an attorney suspended for three years for the mishandling of multiple clients' matters, dishonesty to one client, and fabrication of a subpoena to mislead the court. Finally, *In re Cerroni*, 683 A.2d 150 (1996), involved an attorney suspended for one year based on a conviction for preparing and filing of false statements and reports to the U.S. Department of Housing and Urban Development ("HUD") that the buyer had paid the closing costs on several transactions, when in fact, as the attorney well knew, such costs had come out of the proceeds of the seller.

Although these cases do not involve the number of violations herein, none of them include the strong mitigating factors here, in particular: (1) Respondent's cooperation with Bar Counsel leading to an agreement on a detailed Stipulation; (2) his handling of "some of the [USAO]'s most complex and challenging matters", HC Rpt. at 87-88, and Judge Thomas Penfield Jackson's testimony to that effect before the Hearing Committee (*id*. at 88 n.29); (3) his lack of any meaningful prior disciplinary history; (4) the lapse of time since the conduct in question; (5) the array of testaments as to Respondent's good conduct in the practice of law since the events involved here; (6) Respondent's stated motive for providing pay vouchers to cooperating witnesses about to leave custody (*i.e.*, money to stay away from the old neighborhood); and (7) his motive for not disclosing certain voucher payments (*i.e.*, might disclose identities of cooperatives and was thus a security concern).[15]

[15] He should obviously have had the Court decide this, but his motive is nevertheless relevant in the sanction determination. *See* OPR Report at 64 n.21; HC Report at 54-55.

We recommend a three-year suspension. We do not recommend a fitness requirement, as proposed by Bar Counsel. In light of the unchallenged array of testaments by fellow attorneys, and two judges, as to Respondent's unblemished law practice since leaving the USAO over ten years ago, we find that Bar Counsel has failed to establish by clear and convincing evidence that there is a serious doubt regarding Respondent's fitness to practice after the expiration of the suspension. *See In re Cater*, 887 A.2d 1, 24 (D.C. 2005).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /RSB/
Ray S. Bolze
Vice Chair

Dated: July 27, 2010

All members of the Board concur in the Findings of Fact and Conclusions of Law set forth in this Report and Recommendation, and Ms. Kapp and Mr. Willoughby join in the recommended sanction of a three-year suspension. Mr. Mercurio has filed a separate statement recommending a one-year suspension, joined by Ms. Cintron. Ms. Jeffrey has filed a separate statement recommending disbarment, joined by Ms. Coghill-Howard and Mr. Smith. Mr. Frank recommends disbarment in a separate statement.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
G. PAUL HOWES,	:	
	:	
Respondent.	:	Bar Docket No. 131-02
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 434709)	:	

SEPARATE STATEMENT OF MS. JEFFREY AS TO SANCTION

This matter involves an intentional course of dishonest conduct by a federal prosecutor. As an Assistant United States Attorney, G. Paul Howes ("Respondent"), prosecuted some of the most violent and dangerous offenders known to the District for gang- and drug-related multiple murders, at a time when the city's homicide rate was at an all-time high. He worked extraordinarily hard, spending 13 consecutive months in trial on two of the cases that led to the disciplinary complaint now before us. By all accounts, he was a dedicated and tenacious prosecutor, and no one questions his skill or his devotion to public safety.

But in pursuing these laudable goals, Mr. Howes engaged in misconduct so serious as to demand the most severe sanction in our arsenal. He violated the trust placed in him by deliberately misusing public funds, issuing witness vouchers for tens of thousands of dollars to multiple individuals not entitled to receive them, including friends and family of incarcerated cooperating witnesses; making, and causing others to make, numerous false statements to procure payment of these witness vouchers; misleading the court about payments to witnesses and others; and intentionally withholding information from defendants about the witness payments (proper and improper) that he was constitutionally required to disclose. That conduct jeopardized the very convictions that he had worked so hard to obtain. When defendants learned

about the abuse and nondisclosure of the voucher payments, they filed motions for new trials. Recognizing that the motions would probably be granted, the United States was forced to agree to substantial sentence reductions, pursuant to which violent offenders originally sentenced to multiple life terms will be released in the not too distant future. And while there is no question that Respondent's conduct could have been worse—he did not enrich himself financially, buy witness testimony or frame individuals accused of crimes—the violations were neither "technical" nor *de minimis*. In three separate cases,[1] Respondent subverted the administration of justice. He violated a public trust and abused his position as a prosecutor. He misled courts, juries and opposing counsel. He knowingly violated the constitutional rights of defendants by withholding impeachment information that bore directly on the credibility and bias of critical prosecution witnesses. He made scores of false statements to the United States Marshals Service ("USMS"), the courts, and defense counsel, and diverted thousands of dollars to individuals not entitled to the money.

Respondent stipulated, and the Hearing Committee found, that in each of these cases, Respondent violated the following rules:

- Rule 3.3(a)—false statement of material fact to a tribunal;
- Rule 3.4(c)—disobeying an obligation under the rules of a tribunal;
- Rule 3.8—as a prosecutor, intentionally failing to disclose exculpatory evidence;[2]

[1] The Hearing Committee found misconduct evident in: (1) the investigation and prosecution of Javier Card and police officer Fonda Moore in the Superior Court (the "*Card/Moore* case"); (2) the investigation and prosecution of a group of violent offenders known as the Newton Street Crew (the "*Newton Street* case"); and (3) the investigation of the alleged sexual assault of a child (the "*Jones* matter"). *See* Report and Recommendation of Hearing Committee Number One ("HC Rpt."), dated August 19, 2009.

[2] Although Respondent stipulated to this violation in the *Jones* matter, the Hearing Committee correctly concluded that Respondent was under no duty to disclose exculpatory evidence because the investigation never resulted in a prosecution. HC Rpt. at 22.

- Rule 8.4(a)—violating or assisting another's violation of the Rules of Professional Conduct;
- Rule 8.4(c)—engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and
- Rule 8.4(d)—engaging in conduct that seriously interferes with the administration of justice.

The Hearing Committee also found that Respondent in each of the cases committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness to practice law, in violation of Rule 8.4(b), but declined to find that he offered a prohibited inducement to a witness, in violation of Rule 3.4(b). The Hearing Committee members each concluded that the misconduct warranted disbarment, and the Hearing Committee Report marshaled the findings and principles in support of that sanction. HC Rpt. at 66; *see generally id*. at 64-90.

Although Respondent's many years of dedicated service make this a sad case, it is not, in my view, a close one. For this grave and repeated dishonest conduct by a prosecutor, disbarment is the only appropriate sanction.

SANCTION RECOMMENDATION

The purposes of a disciplinary sanction, our Court has explained, are protection of the public and the courts, maintaining the integrity of the legal profession and "deter[ring] other attorneys from engaging in similar misconduct." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc). Factors to be considered in fashioning an appropriate sanction include: the nature and seriousness of the misconduct, including whether it involved dishonesty or misrepresentation; the duration of the misconduct; whether clients suffered prejudice as a result; any violations of other disciplinary rules; the respondent's disciplinary history; the respondent's attitude, including remorse; and any other mitigating and aggravating circumstances. *See In re Elgin*, 918 A.2d 362, 376 (D.C. 2007) (citing cases); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc);

In re Austin, 858 A.2d 969, 975 (D.C. 2004); *In re Jones-Terrell*, 712 A.2d 496, 500-01 (D.C. 1998); *In re Shay*, 749 A.2d 142, republished at 756 A.2d 465, 480 (D.C. 2000) (appended Board Report). Another important consideration is the rule of consistency embodied in D.C. Bar R. XI, § 9(h)(1), which prevents the Board from recommending a sanction that would foster a tendency towards inconsistent dispositions for comparable cases.

Weighing the record as a whole, I conclude that the gravity of Respondent's misconduct, including betrayal of a prosecutor's obligation to serve justice, makes disbarment the only appropriate sanction. Mitigating circumstances that might in a less serious case warrant a reduction of the sanction—otherwise excellent service protecting the public from violent criminals, delay, and a 14-year record of ethical conduct following the events that give rise to this proceeding—are not sufficient to outweigh the need for the ultimate sanction given Respondent's flagrant dishonesty and subversion of the administration of justice. *See In re Cleaver-Bascombe*, 986 A.2d 1191, 1199 (D.C. 2010) ("*Cleaver-Bascombe II*").

A. The Nature, Seriousness and Duration of the Misconduct

As the Hearing Committee observed, "[i]t would be difficult to overstate the seriousness of Respondent's misconduct." HC Rpt. at 66. Respondent's conduct evinces a long and calculated course of dishonesty: false certifications to federal agencies, intentional diversion of federal funds to individuals not entitled to receive them, deliberately withholding from criminal defendants exculpatory information to which they were constitutionally entitled, and false and misleading statements to courts that bore directly on the credibility and bias of key government witnesses. Though Respondent received no personal financial benefit, he was entrusted with control over federal funds, violated federal law and abused that trust to defraud the federal government of tens of thousand of dollars. When compliance with his disclosure obligations

under *Giglio v. U.S.*, 405 U.S. 150 (1972), would have exposed his widespread misuse of the voucher system, he lied to courts, defense counsel and juries.

1. Witness vouchers

By virtue of his official position as an Assistant United States Attorney ("AUSA"), Respondent had authority to issue vouchers for payment of witness fees to individuals eligible to receive them pursuant to 28 U.S.C. § 1821. The Hearing Committee found that he deliberately misused this authority repeatedly over a two-year period. Each time that he improperly issued a voucher, Respondent falsely certified that the recipient had attended a judicial proceeding as a witness and was therefore entitled to payment. Each of these false certifications was a crime under 18 U.S.C. §§ 1001 and 1018.[3] As to the following four categories of individuals, each voucher was a deliberate act of dishonesty and a fraud on the government:

Retired police officers serving as case agents: Respondent treated the funds set aside to compensate witnesses as a private payroll from which to compensate two retired police officers for unofficial service as case agents during a two-year period. HC Rpt. at 45-46; *see* Bar Counsel's Exhibit ("BX") 3 (Report of the Office of Professional Responsibility, Department of Justice, February 9, 1998) ("OPR Report") at 66-67, 78. One detective received payments

[3] 18 U.S.C. § 1001(a) states:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
> shall be fined under this title, imprisoned not more than 5 years . . . .

18 U.S.C. § 1018 states:

> Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined under this title or imprisoned not more than one year, or both.

totaling $4,949.50 for 68 days of attendance, but testified for only a single day in the *Card/Moore* case. HC Rpt. at 46. Another testified for three days in the *Newton Street* case, but was given vouchers for 167 days, totaling $9,835. *Id*. However cost-effective this arrangement may have been,[4] "there was no credible basis for an AUSA, in effect, to hire a small staff of part-time 'case agents' for his own professional convenience through the use of United States District Court witness vouchers." *Id*.

Another detective who did not serve as a case agent also received compensation to which he was not entitled. That detective testified for one day in the *Card/Moore* case, traveling roundtrip from Philadelphia on the day of his appearance. Tr. at 1304-05.[5] The trial transcript shows that Respondent knew of his travel arrangements. *Id*. Yet Respondent issued vouchers compensating him for three days of attendance and meals and lodging, totaling $293. HC Rpt. at 49-50.

The Jones family: Respondent authorized vouchers for 53 days of attendance between December 1, 1993 and June 13, 1995 for Mrs. Jones and her three grandchildren, one of whom had allegedly been sexually assaulted. As he knew, two of those children were not fact witnesses but were present either for the convenience of their caretaker, the grandmother, or to comfort the child-victim. Tr. at 1055; *see also* BX 3 (OPR Report) at 56 (noting that it took one year to "get her to be confident enough to testify"). The vouchers were issued under the caption for the *Newton Street* case, although the sexual assault was not related to that matter. Moreover, although Respondent left the U.S. Attorney's Office by May 26, 1995, he signed a voucher dated

[4] Respondent contends that "two outstanding career detectives, who knew these murder cases backwards and forwards, agreed to continue to assist in the prosecution of two phenomenally violent and dangerous gangs for a mere $40 a day plus mileage." Respondent's Brief to the Board, October 20, 2009 ("R. Brief") at 15. He suggests that this was a "pittance compared to what was being spent overall," that "the cost benefit was hugely in favor of the government and the public," and that the violation "is a close call" for which "the sanction should be minimal." *Id*.

[5] "Tr." refers to the transcript of the hearing held on May 7-11, 2007.

June 13, 1995 that covered attendance by the Joneses on May 31, June 2, June 8 and June 13. HC Rpt. at 49. He could not explain how or why this occurred. BX 3 (OPR Report) at 56-57.

Friends and family of incarcerated government witnesses: The Hearing Committee found that "the evidence supports the view that Respondent issued numerous witness vouchers to relatives of incarcerated witnesses to compensate them, not for attending at the [United States Attorney's Office (the "USAO")] to provide information in all instances, but rather for visiting incarcerated government witnesses to maintain their resolve to testify for the government." HC Rpt. at 40.[6] Each voucher for a visit in which the visitor provided no "real or substantial information" (*id*. at 33) required false certifications of eligibility for payment. For example, the grandmother of Newton Street Crew member Kenneth Forgy received vouchers totaling $7,518 during the period July 2, 1993 to May 1, 1995. *Id*. at 34. Respondent testified that she provided information on every occasion for which he issued a voucher (Tr. at 1272, 1284), consistent with his prior statement to OPR that he asked her "at least one question", such as whether there had been any threats and whether she had anything new to report, and that "perhaps one-third of the time, it was the absence of information that was significant." HC Rpt. at 35 (quoting BX 3 (OPR Report) at 33-34). The Hearing Committee rejected Respondent's assertion, finding that "to a large degree and on many occasions," she was paid solely for bolstering her grandson's morale. HC Rpt. at 35. Moreover, to the extent that it occurred, the Q&A exchange described by Respondent was a pretext, "nothing more than a *pro forma* gesture at compliance with the

[6] By contrast, the Hearing Committee determined that it was not a disciplinary violation to give a voucher to an individual who provided information but was never intended to testify as a witness. HC Rpt. at 24-31. Though the voucher statute does not authorize such payments, the evidence established a widespread belief among Respondent's contemporaries that those payments were permissible. *See id*.; *cf. In re Fair*, 780 A.2d 1106, 1112-13 (D.C. 2001) (finding no intentional misappropriation where payments without prior authorization violated statute and court rule, but an ambiguous probate culture tacitly permitted the practice).

witness voucher rules. Certainly the amount of information exchanged did not require an appearance at the USAO." *Id.*[7]

Respondent also issued vouchers to the girlfriend and mother of the child of incarcerated *Newton Street* witness Frank Lynch, Michelle Washington, who told OPR investigators that "she had no evidence about the[] crimes . . . ." BX 3 (OPR Report) at 50. Yet she was paid $8,409 in witness vouchers for attendance on 103 days over the course of 22 months, including for the days leading up to her boyfriend's testimony and immediately thereafter. BX 1, ¶ 25(e); BX 70.[8] Some of these vouchers were obviously issued for motivational purposes, since Ms. Washington did not have enough information to justify 103 days of attendance. HC Rpt. at 36.

In a thoughtful analysis, the Hearing Committee also concluded, however, that Bar Counsel had not proven that the vouchers given to friends and family were a *quid pro quo* or improper inducements to the inmate witnesses. *Id*. at 37-41.

Prisoners: Respondent issued a total of $800 to five witnesses for appearances while they were incarcerated. *Id*. at 47. The witness voucher statute and its implementing regulations expressly prohibit such payments. 28 U.S.C. § 1821(f) ("[A]ny witness who is incarcerated at the time that his or her testimony is given . . . may not receive fees or allowances under this section . . . ."); 28 C.F.R. § 21.4(d) ("A witness in custody . . . is ineligible to receive the attendance and subsistence fees provided by this section.").[9]

[7] Respondent makes much of the Hearing Committee's finding that friends and family members were paid to visit incarcerated cooperators "in prison." *See* R. Brief at 21; Respondent's Reply Brief to the Board dated December 14, 2009 ("R. Reply Brief") at 2. We attach no significance to the fact that the visits took place when the cooperators had been brought to the USAO from prison.

[8] Respondent omitted these thousands of dollars in payments during his examination of Lynch when eliciting testimony as to the few minor benefits the government provided him. HC Rpt. at 45.

[9] Each of the inmates had also signed a plea agreement waiving any entitlement to witness fees. BX 1A (Additional Stipulation of Facts) at 1-2, ¶ 2.

Respondent knew that these payments were prohibited at the time that he authorized them. HC Rpt. at 47; Tr. at 1283 ("I just know that I knew that incarcerated witnesses shouldn't receive witness vouchers and I made a conscious choice in that situation for just moral reasons."); *see also* Tr. at 1130-31. He knew that, in addition to his own false attestations, these witnesses would have to attest falsely that they were entitled to witness fees. Tr. at 1146. He told the Hearing Committee that he issued the vouchers based on moral considerations; no other funds were available, and he feared that the witnesses would be in danger of being killed upon release if they returned to Newton Street. *Id*. at 1283; *see also id*. at 1280 ("For the people leaving jail, I used it to try to protect them for a day."). He chose not to discuss the matter with his superiors in the USAO because he knew that he would be told not to use the vouchers. *Id*. at 1282-83.

Respondent may have acted out of a sincere desire to provide some limited protection to the cooperating inmates upon their release from custody. However, as the Hearing Committee observed, this was "another example of Respondent treating the witness vouchers as if they were available to provide compensation as he deemed appropriate." HC Rpt. at 48. He made the deliberate choice to give away money that was not his to give away. Tr. at 1317. To make these funds available, he falsely certified that the five inmates were eligible to receive witness fees, when he knew that the opposite was true.

It is undisputed that Respondent did not benefit financially from the misapplication of funds. Had he done so, that would have been an aggravating circumstance. Personal gain, however, is not the only indicium of serious dishonesty. As one court has noted, "there are instances in which the misconduct of a prosecutor can be prompted by a dishonest or selfish motive. Obtaining a conviction at any cost is one of them." *In re Peasley*, 90 P.3d 764, 774 (Ariz. 2004). The Hearing Committee found that Respondent knowingly engaged in a long

course of dishonesty for his own convenience and with disregard for the law in authorizing the improper payments, and that conclusion is supported by substantial record evidence.

2. Failure to disclose exculpatory evidence and false statements to the courts and defense counsel

In *Giglio*, the Supreme Court held that a prosecutor must disclose to the defense information that could be used to impeach the reliability of witnesses whose testimony may determine guilt or innocence. 405 U.S. at 154-55. The prosecution's case in the *Card/Moore* and *Newton Street* cases depended largely on cooperating incarcerated coconspirators whose relatives received witness vouchers. BX 1, ¶ 8. In both cases, the defense hotly contested the credibility of those witnesses, making highly relevant the substantial payments made by the government to their friends and relatives. HC Rpt. at 50-53.[10] Respondent stipulated that the defendants were entitled to information about these payments; that he knew that they were seeking such information[11]; that he withheld it intentionally; and that he repeatedly falsely assured the courts and defense counsel that all *Brady* and *Giglio* information had been disclosed. *See, e.g.*, BX 1, ¶ 24 ("Respondent failed to disclose, or fully disclose, these payments to defense counsel who were entitled to know of these benefits to government witnesses."); *id*., ¶ 16 ("Respondent repeatedly and falsely assured the court and defense counsel, that he had provided all *Brady* and *Giglio* information to the defense . . . ."); *see also id*., ¶¶ 8-9.[12] Moreover, he

[10] The Hearing Committee found that Respondent should have disclosed not only the vouchers provided for bolstering the inmates' resolve to testify, but also the vouchers issued in connection with information provided by the friends and relatives. HC Rpt. at 53.

[11] The *Newton Street* defendants filed motions expressly seeking information about witness voucher payments and other benefits provided to witnesses and their families. BX 87, 97; HC Rpt. at 55. The *Card/Moore* defendants made such requests with respect to specific witnesses. HC Rpt. at 57.

[12] Rule 3.8(e) makes clear that a disciplinary violation occurs only when a prosecutor *intentionally* fails to disclose information that he knows or reasonably should know to be exculpatory. Not every *Brady* violation rises to the level of a disciplinary offense because a *Brady* violation may occur through a good-faith error. *In re Brady*, 373 U.S. 87 (1963).

examined incarcerated witnesses and others in a manner calculated to mislead the court, defense counsel and the jury that his direct examination had revealed even the most trivial benefits provided to those witnesses. *See*, *e.g.*, HC Rpt. at 45 n.9 (by eliciting trial testimony that Kenneth Forgy was provided with lunches when meeting with prosecutors, allowed to make a telephone call after such lunches and permitted to visit his grandmother "a couple times", "Respondent left the impression that the prosecution had provided through its witness a conscientious recital of all benefits, even relatively trivial ones, the witness had received from the government."); *id*. at 75-76 (same regarding Frank Lynch).

Respondent made dishonest and evasive statements to defense counsel and the court in the *Card/Moore* case. There, defense counsel repeatedly asked for "each and every voucher issued to [government witness Theresa Bryant/Greene]." *Id*. at 42. The Hearing Committee Report sets forth at length the colloquy before Judge Dixon in which Respondent gave incomplete and evasive answers that Ms. Bryant/Greene had only received payments for three days of testimony before the grand jury. *Id*. at 42-43. By the time of this statement, Respondent had issued vouchers to her for an additional eight days of non-grand jury appearances, one of which he signed only 12 days prior to his contrary representations to the court. One month later, Respondent elicited from Ms. Bryant/Greene incomplete and inaccurate testimony that she had received no payments other than for three days of grand jury testimony. By that time, however, she had received payments for a total of 11 days of appearances. *Id*.[13] "The Committee believes that Respondent's overall conduct in relation to the Bryant/Greene vouchers leaves little doubt that he deliberately concealed these payments in order to thwart defendants' legitimate discovery

[13] Respondent correctly points out that the Hearing Committee erred in stating that this hearing took place in the presence of the jury. R. Reply Brief at 4.

efforts." *Id*. at 42;[14] *cf. In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (per curiam) (evasive answers that were literally or "technically true", but which failed to respond to the substance of an IRS agent's question, violated disciplinary rule prohibiting dishonesty).

As another example, the Hearing Committee cites Respondent's in-court statement to defense counsel that government witness Kalvin Bears had not received witness payment vouchers, yet failed to disclose payments to his girlfriend. HC Rpt. at 44; BX 1, ¶ 17(h); BX 25 at 60. At the time Respondent gave this answer, Mr. Bears' girlfriend had received witness fees of $40 per day for 30 days, and she would continue to receive payment vouchers from Respondent for another 70 or so days. BX 35. As testified by the defense attorney who cross-examined Kalvin Bears: "[V]ouchers to a girlfriend would have been an incredibly important, and, I think, fruitful area to have cross-examined him on, yes." Tr. at 457.

Respondent also intentionally withheld from the defense and the court in the *Newton Street* case the fact that he had authorized vouchers worth more than $42,000 to friends and relatives of cooperating government witnesses. BX 1, ¶ 25 (*e.g*., more than $11,000 paid to relatives of Kenneth Forgy; more than $10,000 to friends and relatives of Frank Lynch, Jr.; and more than $8,000 to relatives of William Woodfork). The defendants in the *Newton Street* case had filed motions specifically seeking information about witness payments and vouchers (BX 87 at 1, ¶ 4; BX 97 at 3, ¶ 8), and the government had represented to the court that it would inform opposing counsel of any pecuniary benefits received by the witnesses. BX 98 at 2, ¶ 8.

Respondent testified that he recognized that the vouchers raised an issue under *Giglio*, but did not wish to disclose them for fear that identifying non-testifying individuals would place

[14] The *Card/Moore* defendants' discovery efforts were further thwarted by the fact that Respondent issued the vouchers for that Superior Court case from the federal court, under the *Newton Street* caption. The Hearing Committee found that this practice began for reasons of convenience, not deception, but that Respondent continued it and failed to inform defense counsel of the practice long after he knew that it impeded their ability to discover the vouchers. HC Rpt. at 42.

them in danger. The proper procedure in such a case is to submit the issue to the court, which can address legitimate safety concerns by means of protective orders, redactions, gag orders or similar measures. *See Tinsley v. U.S.*, 868 A.2d 867 (D.C. 2005) (per curiam). Although he considered submitting the issue to presiding judge Thomas Penfield Jackson, Respondent admitted that he consciously chose not to do so because he was afraid that Judge Jackson would order him to disclose the information. HC Rpt. at 53-55; Tr. at 1262-63. Instead, Respondent assumed the role of the court and decided not to turn over the information. The Hearing Committee questioned Respondent closely on this subject, and his testimony is quoted at length at pages 53-55 of the Hearing Committee's Report.

Criminal cases, and especially gang prosecutions, may give rise to serious and legitimate concerns about the safety of witnesses and informants. Respondent had personal experience with the murder of an informant and threats directed at witnesses. Tr. at 1261-62. Balancing those considerations, however, is quintessentially a judicial function (*see id*. at 1262), which Respondent usurped in order to avoid impartial scrutiny by Judge Jackson. And, although the Hearing Committee Report quotes Respondent's testimony about his concern for the safety of non-testifying individuals, the Hearing Committee did not find as a fact that it was this concern that caused Respondent to withhold the voucher information. To the contrary, as the Hearing Committee pointed out, witness safety concerns could not explain why Respondent withheld information about vouchers and payments to Theresa Bryant/Greene, a witness in the *Card/Moore* case, whose identity was known to the defense. The Hearing Committee thus concluded that one motive was to conceal Respondent's misuse of witness vouchers:

> Although Ms. Bryant/Greene was a witness and her identity was known, *see* BX 40 at 387, turning over her witness vouchers would have created significant complications for Respondent, by

> potentially revealing (i) the systematic miscaptioning of witness vouchers used in connection with the *Card/Moore* matter, (ii) other undisclosed payments to *Card/Moore* witnesses out of the federal court, and possibly (iii) improper payment activity under the *Hoyle* (*Newton Street Crew)* caption, because defense counsel could be expected to try to subpoena all vouchers under that caption once the pattern of improper voucher issuance was revealed.

HC Rpt. at 44. Thus, Respondent's motives were at best mixed and not entirely altruistic as other Board Members have suggested. *Id*. ("Respondent's evasiveness in responding to Ms. Holt's questions clearly suggests to the Committee, in any event, that his intention was to mislead and distract an inquiry that was venturing close to a problematic subject.").

By failing to disclose the volume of witness vouchers, and specifically the vouchers issued to friends and relatives of key prosecution witnesses, Respondent deprived the defense of an opportunity to put before the jury an argument that those witnesses were being paid for their testimony. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995) (full disclosure "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."). Although Bar Counsel did not adduce clear and convincing evidence that the payments were a *quid pro quo* or other unlawful inducement for the incarcerated cooperators' testimony, HC Rpt. at 37-41, the defendants were entitled to explore at trial whether the payments did influence the testimony.

Taken as a whole, the serious nature of Respondent's misconduct cannot be disputed. The record shows a pattern of fraud and false statements over the course of two years by an attorney whose official position entrusted him with power to dispose of federal funds. Again and again, Respondent deliberately violated federal law to use those funds as he saw fit, notwithstanding their restricted purpose. And, again and again, he misled and deceived his opposing counsel and the court about those payments. That he did this in part to avoid exposure

of his prior false certifications and unlawful payments aggravates the misconduct. "[A] continuing and pervasive indifference to the obligations of honesty in the judicial system" warrants disbarment. *In re Pelkey*, 962 A.2d 268, 282 (D.C. 2008) (quoting *In re Corizzi*, 803 A.2d 438, 443 (D.C. 2002)).

This conduct is even more intolerable because it was committed by a prosecutor, who "has the responsibilit[ies] of a minister of justice," including "specific obligations to see that the defendant is accorded procedural justice." Rule 3.8, cmt. [1]. The power and visibility of the office mean that more is expected of a prosecutor than of other lawyers. As the Supreme Court noted in the leading case on prosecutorial misconduct:

> 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; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law . . . . [W]hile he may strike hard blows, he [may not] strike foul ones.

United States v. Berger, 295 U.S. 78, 88 (1935). Precisely because an AUSA is an officer of the United States with unique responsibility for the administration of justice, courts rely more heavily on the representations of an AUSA than they do the representations of other attorneys. Dishonesty by an AUSA is thus more serious because it represents an abuse of the greater trust placed in him by the courts (and the public). Indeed, *Brady* and *Giglio* rest almost entirely on a foundation of trust.

Unethical conduct in the performance of a prosecutor's official duties has systemic consequences more serious than those attending misconduct by private counsel. Dishonesty and unlawful conduct by a prosecutor undermine respect for the law and confidence in the administration of justice. The obligations of a prosecutor under *Brady* and *Giglio* are essential to

ensure that defendants get a fair trial. Defendants and defense attorneys, as well as the public, must have assurance that the criminal justice system operates fairly and lawfully. It would trivialize the rights of defendants to hold in this case that Respondent's desire to protect the public mitigates the seriousness of intentional dishonesty that defrauded the courts, the public and defendants, and deprived the latter of their constitutional rights to a fair trial.[15] A prosecutor who demonstrates blatant disrespect for the law cannot credibly hold defendants responsible for their lawless conduct.

B. General Deterrence

Prosecutorial misconduct is difficult to detect because critical prosecutorial functions take place with little or no judicial supervision and with minimal scrutiny by superiors. Effective general deterrence thus weighs heavily in favor of disbarring Respondent.

Our Court has recently reaffirmed the importance of general deterrence as a consideration in the determination of a sanction. In *Cleaver-Bascombe II*, the Court explained:

> In the interest of effective general deterrence, the severity of a sanction should take into account the difficulty of detecting and proving the misconduct at issue. That principle argues strongly in favor of disbarring Respondent, because inflated [CJA] vouchers are difficult to detect and prove. To deter unscrupulous attorneys who know they are not likely to be caught if they inflate their charges, voucher fraud must incur a heavy penalty.

986 A.2d at 1199-2200 (quoting *In re Cleaver-Bascombe*, 892 A.2d 396, 414 ("*Cleaver-Bascombe I*") (Glickman, J. dissenting in part)).

As the record establishes, prosecutors are trusted not to abuse their authority to issue witness vouchers, and there are no institutional checks to prevent or detect voucher misuse. The

[15] Moreover, insofar as Respondent's argument that public safety considerations justified or mitigate his actions (*see* R. Brief at 13-14), that consideration is counterbalanced by the degree to which his misconduct foreseeably placed the public at risk by compelling the United States to agree to substantial sentence reductions for many dangerous offenders.

USMS will pay a witness voucher signed by a prosecutor without any review of its bona fides, (*see* BX 3 (OPR Report) at 75-76; Tr. at 71-72), nor were such vouchers reviewed by supervisors within the USAO. Respondent's misapplication of tens of thousands of dollars of federal funds came to light by mere happenstance, when an inmate asked another prosecutor to give him a voucher like the ones supplied by Respondent to five other incarcerated witnesses. Tr. at 249-54. That request prompted an investigation, which resulted in disclosures to defense counsel, which in turn prompted defense motions for new trials. The government recognized that the motions in the *Newton Street* case had "substantial merit" and were likely to be granted because information potentially material to the outcome had been improperly withheld. *Id*. at 78; HC Rpt. at 79-81.

This case thus also illustrates the difficulty of detecting intentional violations of a prosecutor's constitutional duty to disclose exculpatory evidence. No prosecutor other than Respondent was in a position to know the extent to which witness vouchers were used and abused. Neither the defendants nor the courts would have learned of this serious misconduct but for the conscientious actions of honest prosecutors, upon learning of the improper payments and Respondent's failure to disclose them.

Also important is the fact that the disciplinary system may be the only forum in which a prosecutor is held accountable for intentional misconduct. Prosecutors are absolutely immune from civil suit for even the most egregious misconduct as advocates. *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity, even for egregious misconduct, needed to ensure prosecutorial zeal). In upholding that immunity, the Supreme Court noted that enforcement of prosecutorial ethics through the disciplinary system should deter misconduct that would otherwise go unaddressed. *Id*. at 429 ("Moreover, a prosecutor stands perhaps unique, among

officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.") (citation omitted).[16]

We trust that most prosecutors, like Respondent's successors, are ethical lawyers who fulfill their professional duties willingly, with proper appreciation of the special obligations that accompany the trust that the public reposes in them. But to those, like Respondent, who may be tempted from time to time to rationalize misconduct, a heavy penalty in this case will give reason to pause.

C. Prejudice to Others

There has been considerable prejudice to the United States and to the public as a result of Respondent's misconduct. The substantial sentence reductions to which the USAO agreed flowed directly from Respondent's decision not to disclose the payments to non-testifying individuals and others. *See* HC Rpt. at 79-80 (itemizing sentence reductions of, for example, multiple life terms to 18 years). The time and expense associated with the investigation and post-conviction proceedings are only partially reflected in the finding that Respondent violated Rule 8.4(d). Moreover, Respondent violated the duties that he owed to the defendants, and the deprivation of their constitutional rights is prejudice properly laid at his door.

The report by Mr. Bolze attaches unwarranted importance to the absence of a finding that the disclosure of witness payments would have materially affected the outcome of the trials. *See* Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction (the "Bolze Rpt.") at 19-20. That finding, however, is

[16] Other mechanisms identified by the Court in *Imbler* and its progeny to deter prosecutorial misconduct—the threat of criminal prosecution and the possibility of adverse employment action—will often be of limited value. 424 U.S. at 428-29. Having left his employment at the USAO long ago, Respondent is no longer subject to employment action. Moreover, the criminal law may not be a meaningful deterrent. Because the public may not attach much value to the rights of defendants who are perceived to be dangerous, jury nullification may make it difficult to prosecute even egregious prosecutorial misconduct unless an innocent person can be shown to have been wronged. *See* BX 3 at 71.

implicit in the conclusion that Respondent violated *Giglio*, which requires disclosure of evidence bearing on the credibility of a key witness that "could . . . in any reasonable likelihood [affect] the judgment of the jury." 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). The USAO's determination that the new trial motions had merit and were likely to be granted by definition implicitly recognized the reasonable likelihood that disclosure of the concealed payments would have affected the verdict. Respondent's stipulation that the non-disclosure violated his obligations under *Giglio* likewise represents such a concession.

D. Disciplinary History

The one instance of prior discipline involving Respondent occurred in New Mexico over 20 years ago, involved conduct undertaken by Respondent with the backing of his superiors within the USAO, and resulted in a public censure. The Hearing Committee correctly determined not to put any weight on it as an aggravating factor. HC Rpt. at 81-83.

E. Acknowledgment of Wrongdoing

There is an inevitable tension between expressing remorse and defending against charges by placing the alleged misconduct in a context that suggests it to be less serious than it might at first appear. The sanction analysis must not be applied in a fashion that inhibits attorneys from making the full presentation of the facts and circumstances that may be necessary to assist a Hearing Committee in a careful weighing of culpability. At the same time, grudging acceptance of responsibility is not the same as acknowledgment of wrongdoing.

The record sustains the Hearing Committee's conclusion that "Respondent's acceptance of responsibility[ ] is partial and conflicted." HC Rpt. at 84; *see generally id.* at 84-87. After five days of hearings in which to assess Respondent's demeanor, the Hearing Committee concluded, and the record supports, that he does not fully appreciate the seriousness of his

misconduct.[17] Indeed, what OPR, the Hearing Committee and every member of the Board have found to be serious misconduct, Respondent describes as "relatively minor," excused by the important goals that he pursued and warranting the 30-day suspension reserved for isolated and relatively inconsequential misrepresentations. R. Brief at 5 n. 6, 37-38. On this record, Respondent's partial and conflicted acknowledgement of wrongdoing does not strongly support his argument for leniency.

F. Mitigating and Aggravating Circumstances

Respondent suggests that the Hearing Committee ignored or gave too little credit to mitigating factors bearing on the selection of an appropriate sanction, including delay, Respondent's character and other conduct and acknowledgement of wrongdoing, addressed above. R. Brief at 23-29.

1. Delay

Fourteen years have elapsed since the misconduct that is the subject of these proceedings. That delay resulted from many factors: the complexity of the case,[18] the unavailability of OPR's work product, some unexplained delay on the part of Bar Counsel, delay in issuing the Hearing Committee Report and, more recently, requests by Respondent to postpone the proceedings. The delay is regrettable, and all stakeholders in the disciplinary system should take measures to minimize such delay in the future.

Although the time lapse is extraordinary, it does not warrant mitigation under *In re Ponds*, 888 A.2d 234, 240-44 (D.C. 2005) and the cases discussed therein. Respondent has

[17] Were the record limited to the apparently unambiguous acknowledgment of wrongdoing in the stipulations, we would be inclined to credit Respondent on this criterion. But the stipulations must be understood as part of the entire record, which, taken as a whole, shows that Respondent's acceptance of responsibility is qualified at best.

[18] Respondent suggests that it "may well be the most complicated factual and legal matter to ever proceed through the District of Columbia disciplinary system." R. Brief at 5 (emphasis in original).

suffered no cognizable prejudice, apart from the disadvantage that attends allegations of serious misconduct. He has been continuously employed in the private practice of law since he left the USAO in 1995 and has become a prominent plaintiffs' class action securities litigator, serving as lead counsel in the Enron case until the filing of disciplinary charges required him to take a less public role. R. Brief at 28. That delay allowed him to amass the track record of good character on which he relies to mitigate the sanction and obviate the need for a fitness requirement. *Id*. at 23-34. Moreover, the unusually serious nature of the violations here outweighs the mitigating effect of any delay.

2. Respondent's other conduct and character

The Hearing Committee found that Respondent was a talented and tenacious prosecutor who worked hard and sought out some of the USAO's most difficult and challenging cases, including the gang prosecutions now before us. As did the Hearing Committee, all of the members of the Board respect his dedication, the many hours he devoted to these prosecutions, and the high level of his legal skills, which were praised by Judge Jackson, before whom he tried the *Newton Street* case. We readily acknowledge, as did the Hearing Committee, the highly stressed atmosphere that pervaded Respondent's team as they dealt with these matters. "The evidence presented to the Committee clearly depicts a 'war room' type clearinghouse run by Respondent and his colleagues that processed crime and threat information on a massive scale over a period of years, served as a nucleus of activity for literally dozens of federal agents and local police detectives (as well as law enforcement officials in other cities beset by the same or related gangs), and regularly received and debriefed an array of informants, checking and re-checking any new information with multiple cooperators to ensure its veracity." HC Rpt. at 38; *see also* Tr. at 861-64, 886, 1008-09.

Had the misconduct been isolated and spontaneous, I might well find the conditions under which Respondent operated to be substantially mitigating. Here, however, the misconduct was deliberate and repeated, and it ramified over time, as Respondent compounded the voucher fraud with misrepresentations to defense counsel and the courts and decided to withhold evidence, the impeaching nature of which was clear to his successors and to the Hearing Committee. Moreover, Respondent admitted that he made many of his decisions after reflection. *See, e.g.*, Tr. at 1317 (admitting that he had made a "weighing choice").

Respondent's unblemished record since the events in question is not in dispute. He submitted an impressive array of letters from fellow attorneys and testimony before the Hearing Committee from two retired federal judges, including Judge Jackson, attesting to his good character.

Weighed against the extremely serious misconduct reflected in the record, however, I agree with the Hearing Committee that these circumstances do not have substantial mitigating force. HC Rpt. at 87-88.

3. Other mitigating and aggravating circumstances

Having considered the absence of personal gain to Respondent in assessing the seriousness of the misconduct, I do not consider it a second time in mitigation. Furthermore, while dishonesty for personal gain is inherently serious, it does not follow that dishonesty for other ends is necessarily less so, as the Bolze Report assumes. *See* Bolze Rpt. at 21, 24-26. The Court has disbarred individuals who engaged in serious dishonesty without a financial motive. In *Corizzi*, for example, the Court disbarred an attorney who encouraged two clients to lie under oath in their depositions to avoid revealing that the attorney had a reciprocal referral relationship with the chiropractor who was acting as their expert. 803 A.2d at 440. Corizzi had also failed to

report settlement offers to a client, lied to opposing counsel and the court about the timing of his engagement as counsel, and lied to Bar Counsel. *Id*. at 440-41. Noting that "whether he benefited financially is not determinative", *id*. at 443, the Court disbarred Corizzi, stating that "[d]ishonesty is at the heart of the respondent's violations, and honesty continues to be an 'indispensable component of our judicial system.'" *Id*. at 442 (quoting *In re Mason*, 736 A.2d 1019, 1024 (D.C. 1999)). The Court observed that Corizzi's instruction to his clients to lie virtually destroyed their prospects of recovery in their personal injury actions and exposed them to potential prosecution for perjury. *Corizzi*, 803 A.2d at 440. Here, Respondent himself (i) lied to opposing counsel and to the courts about the payments to witnesses and others and his compliance with disclosure obligations; (ii) knew that individuals seeking compensation via witness vouchers would have to submit his false certifications and make false certifications of their own; (iii) elicited false testimony from witnesses; and (iv) risked the possibility that courts would overturn multiple convictions because of his actions. Whereas Corizzi's conduct affected the property interests of individuals, Respondent's conduct affected the liberty of many individuals and the safety of entire communities and the public at large.

G. Sanctions in Other Cases

Our disciplinary case law requires disbarment for "dishonesty of a flagrant kind", which the Court has described to include egregious criminal conduct, extremely serious acts of dishonesty, and the misuse of funds in violation of a position of trust. *See Cleaver-Bascombe II*, 986 A.2d at 1199; *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008). This record reflects the kind of flagrant dishonesty that calls for disbarment. Although there are no original D.C. disciplinary cases involving a prosecutor's failure to provide discovery in violation of Rule 3.8(e), the Court has addressed such a violation in a reciprocal discipline case, *In re Stuart*, 942 A.2d 1118 (D.C.

2008). In that case, New York imposed a three-year suspension (including a fitness requirement) on an Assistant District Attorney who failed to produce to the defense in a homicide case a police report concerning a witness believed to have exculpatory information, falsely represented to the court that he did not know the witness's whereabouts, and failed to correct the misrepresentations during the trial. As a result, retrial was required. *Id.* at 1120 (quoting *In re Stuart*, 22 A.D.3d 131, 133 (N.Y. App. Div. 2d Dep't 2005) (per curiam)).

In three separate opinions, each of the judges of our Court acknowledged that the respondent's misconduct could well have merited disbarment if the case had been brought here as an original proceeding. *Id.* at 1120 (Ruiz, for the majority), 1121 (Kramer, concurring) and 1122 (Nebeker, dissenting). However, in recognition of the strong presumption in favor of identical discipline in reciprocal cases, the majority imposed a suspension of three years, with reinstatement contingent on proof of fitness. *Id*. at 1120; *see also id*. at 1121-22 (Kramer, concurring) (stating that she "fe[lt] compelled" to join the majority opinion because of this presumption). But for the reciprocal posture of the case, it is clear that the majority would have disbarred Stuart. As Judge Nebeker wrote:

> As a public prosecutor, this man fraudulently and contemptuously violated his constitutional duty by failing to disclose *Brady* material he well knew he possessed and by lying to a trial judge in open court about it. In considering the appropriate discipline for such conduct, we must take into account the need to ensure and enhance public confidence in the prosecution of criminal offenses. In my view, this three-year suspension does not go far enough in that regard.

Id. at 1122. Judge Kramer, though she ultimately felt obligated to respect the great deference accorded to the sanction imposed by the original disciplining jurisdiction, wrote separately to emphasize "that a prosecutor, who, in response to a question from the court, falsely denies having knowledge of the location of a witness with information possibly exculpatory to a

defendant deserves more than a three-year sanction and serious consideration of disbarment" in part because "such conduct by a prosecutor undermines the public's confidence in the criminal justice system." *Id*. at 1121.[19]

Stuart involved a single failure to disclose, and a single dishonest statement to a court regarding the location of a witness. Here, we have a long course of *Brady/Giglio* violations in two cases, including false and misleading assurances to courts and defense counsel that all *Brady* and *Giglio* information had been disclosed, as well as eliciting false and misleading testimony from prosecution witnesses. Moreover, the undisclosed information about the witness vouchers itself implicated Respondent and others in serious misconduct, i.e., fraud on the government in the form of false certifications and misapplication of government funds. Stuart's *Brady* violation resulted in the reversal of a single conviction. In the case now before us, the government concluded that all of the *Card/Moore* and *Newton Street* defendants would be entitled to new trials and therefore was forced to agree to reduce their sentences to a fraction of the terms originally imposed. The Bolze Report describes *Stuart* but does not explain why Respondent's misconduct is substantially less serious. Moreover, the Bolze Report has rejected the fitness requirement that was essential to the Court's decision to refrain from disbarring Stuart. *See id*. at 1119; Bolze Rpt. at 27.

---

[19] The Bolze Report attaches undue significance to a passing observation that Stuart had been disciplined nine years earlier for inflammatory and improper argument to a jury in an unrelated case; nothing in the Court's opinion suggests that the appropriateness of disbarment turned on that prior disciplinary history. In fact, Stuart's prior disciplinary history consisted solely of a "letter of caution", which is nothing more than a warning to be more careful in the future, with no finding of professional misconduct. *Stuart*, 22 A.D.3d at 133 (noting that he received a letter of caution); Attorney Matters, Appellate Division, Second Judicial District available at http://207.29.128.60/courts/ad2/attorneymatters_ComplaintAboutaLawyer.shtml (letter of caution is sent when a grievance committee concludes that the attorney "acted in a manner which, *while not constituting clear professional misconduct*, involved behavior requiring comment") (emphasis added).

Like Stuart, Respondent once made improper arguments to a jury so serious as to require reversal of a conviction. A second-degree murder conviction obtained by Respondent was reversed in part because he repeatedly suggested and argued that the jury should infer guilt from the defendant's consultation with counsel and subsequent failure to speak with police or offer an innocent explanation of his conduct. *Henderson v. United States*, 632 A.2d 419, 432-35 (D.C. 1993).

Misappropriation jurisprudence also provides useful guidance, in that the Court has analogized the misapplication of government funds by means of false certifications to intentional misappropriation of client funds. Misappropriation is defined as "any unauthorized use of client's funds entrusted to [a lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, *whether or not [he] derives any personal gain or benefit therefrom.*" *See, e.g.*, *In re Mitrano*, 952 A.2d 901, 925 (D.C. 2008) (citations omitted) (emphasis added). In *Cleaver-Bascombe II*, the Court ordered the disbarment of an attorney appointed to represent an indigent criminal defendant, who submitted a fraudulent CJA voucher recording a visit to an incarcerated client that had never taken place. The Court saw "no basis for distinguishing for the purpose of disciplinary sanction between stealing clients' funds and stealing public funds. The fundamental element of basic dishonesty is the same. Both reflect the lack of moral rectitude needed to be a member of the legal profession." 986 A.2d at 1199. The absence of improper personal gain did not substantially reduce the seriousness of her dishonesty; disbarment was required even though the respondent was probably entitled to a payment equal to, if not more than, the amount of the false voucher for services that she had provided but not billed.[20]

This misconduct in *Cleaver-Bascombe II* was aggravated because in that case, the respondent lied to the Hearing Committee to exculpate herself from the disciplinary charges. *See id*. at 1198 (Respondent committed perjury at disciplinary hearing). Here, although Respondent did not testify falsely before the Hearing Committee, he made multiple false and misleading statements and omissions about the vouchers to opposing counsel and courts in the underlying prosecutions. And, as the Hearing Committee determined, some of those false statements were

[20] The need for general deterrence, discussed *supra* at 16-18, also figured prominently in the Court's analysis. *Cleaver-Bascombe II*, 986 A.2d at 1199-1200.

to avoid revealing his systematic dishonest use of the witness vouchers. HC Rpt. at 44 (Respondent misled the Court and defense counsel regarding payments to Theresa Bryant/Greene when the inquiries verged close to a problematic subject, discussed *supra* at 11-13). When an attorney dishonestly conceals misconduct, I see no reason that the false statements are more serious if offered to a Hearing Committee than if presented to a court. Moreover, whereas Cleaver-Bascombe submitted a single fraudulent voucher, Respondent issued multiple vouchers with false certifications, and the impact of his misconduct on the administration of justice, the right of defendants to procedural fairness, the public fisc and public safety is substantially greater. A government lawyer's intentional misapplication of substantial public funds entrusted to his control may be every bit as serious and harmful as misappropriation or theft from a private client.

Respondent takes exception to the Hearing Committee's discussion (in connection with its sanction recommendation) of 18 U.S.C. § 641, which prohibits, *inter alia*, intentional conversion of federal funds to the use of another. R. Brief at 3-4. Respondent's Stipulations and testimony admitted the elements of this felony—that he intended to deprive the United States of money or property valued at more than $1,000. *See* Criminal Jury Instructions for the District of Columbia, Instruction 5.351. A federal employee with authority to disburse federal funds violates that statute by knowingly making payments to individuals not legally entitled to receive them. *United States v. Milton*, 8 F.3d 39 (D.C. Cir. 1993) (EEOC attorney violated § 641 by authorizing payment of claims by individuals whom he knew were not entitled to share in settlement fund). The Hearing Committee correctly considered that violation as a partial analogy for purposes of evaluating the seriousness of Respondent's misconduct and consistency of sanction. HC Rpt. at 70; *see also In re Slattery*, 767 A.2d 203, 214-15 (D.C. 2001). It is well

established that a felony violation of § 641 is a crime of moral turpitude *per se*, making disbarment mandatory. *See In re Patterson*, 833 A.2d 493 (D.C. 2003) (per curiam) (felony of stealing property belonging to the United States Government in violation of § 641 is a crime of moral turpitude *per se*); *see also In re Dowdey*, 861 A.2d 602 (2004) (per curiam) (§ 641 felony is a crime of moral turpitude *per se*). On the equities, I see no compelling reason why Respondent, who dishonestly converted federal funds to the use of others, should receive qualitatively different treatment.[21]

H. More lenient sanctions are inappropriate

The one-year suspension, without fitness, proposed by Board Member Mercurio is unduly lenient, not sustained by the record and likely to have pernicious effects if adopted. *See* Separate Statement of Mr. Mercurio as to Sanction ("Mercurio Report"). Mr. Mercurio contends that, because Respondent shared the USAO's widespread misconception that vouchers could be given to non-testifying cooperators, it was somehow less culpable for him to make false attestations and to issue vouchers that he admittedly knew were impermissible.[22] But a good-faith error in one area does not mitigate deliberate misconduct in another.

More mischievous is the argument, offered by Mr. Bolze (*see* Bolze Rpt. at 18) and Mr. Mercurio (*see* Mercurio Rpt. at 5-6), that the misconduct was less serious because the USAO did not monitor or supervise the use of vouchers. This turns general deterrence on its head: the harder it is to detect misconduct, the more severe must be the sanction. *See Cleaver-Bascombe II*, 986 A.2d at 1199-1200, discussed *supra* at 16. Respondent was able to exploit the lack of

[21] Respondent's acts could also be characterized as a violation of 18 U.S.C. § 371, which makes it a crime to conspire to defraud the United States or one of its agencies for any purpose. The offense is punishable by five years imprisonment and a fine. The Court has held that conspiracy to defraud the United States in violation of § 371 is a crime of moral turpitude *per se*. *See In re Meisnere*, 471 A.2d 269 (D.C. 1984) (per curiam); *In re Lipari*, 704 A.2d 851 (D.C. 1997).

[22] Contemporaries of Mr. Howes in the USAO understood that it was improper to issue vouchers to police officers, inmates and their friends and relatives who did not provide information, and the Hearing Committee found no basis for any belief that such payments were allowed. *See* HC Rpt. at 32-41, 45-48.

monitoring precisely because AUSAs were trusted not to abuse the system. Moreover, Respondent admittedly *chose* not to consult with his superiors (or, in the case of his failure to disclose *Giglio* material, with the judge) because he knew or feared that they would not condone his actions. Tr. at 11261-63, 1282-83.

It is dangerous to indulge the argument that prosecutorial fraud and dishonesty merit leniency when undertaken for the purpose of convicting bad people, the underlying theme of the Bolze and Mercurio Reports. Most prosecutorial misconduct occurs in the service of law enforcement; accepting this argument would therefore hold prosecutors to a lower standard, when their responsibilities to courts, defendants and the administration of justice demand that they be held to a higher one. That rationalization encouraged Respondent to consider his misconduct relatively minor and led him to act as he did. Lending credence to it will lead to more prosecutorial misconduct.

CONCLUSION

Disbarment is necessary and appropriate to express the condemnation that Respondent's conduct merits and to deter others from similar misconduct. The unique opprobrium carried by that sanction will make clear that the Court requires the highest ethical standards of officers of criminal justice and will not tolerate from them deliberate and systematic dishonesty that denies a fair trial to any defendant.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /DJJ/
Deborah J. Jeffrey

Dated: July 27, 2010

Ms. Coghill-Howard and Mr. Smith join in this separate statement.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
G. PAUL HOWES,	:	
	:	
Respondent.	:	Bar Docket No. 131-02
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Membership No. 434709)	:	

SEPARATE STATEMENT OF MR. FRANK AS TO SANCTION

I agree with Ms. Jeffrey's recommendation that Respondent be disbarred. *See* Separate Statement of Ms. Jeffrey as to Sanction (the "Jeffrey Report"). However, I believe that the Jeffrey Report does not adequately recognize the difficulties Respondent faced in prosecuting two complex criminal cases where the lives of his witnesses, members of their family or their friends were at risk. Thus, while I believe that disbarment is warranted, I base my conclusion on narrower grounds than those set forth in the Jeffrey Report.

There is no question that Respondent violated the Rules of Professional Conduct; he has admitted to violating six rules, the Hearing Committee concluded that he violated a seventh, and, while we do not accept the Hearing Committee's findings across the board, we find the bulk of its findings fully supported by the record. *See* Stipulation of Facts and Charges (BX 1)[1] at 15, ¶ 32(a-f); HC Rpt. at 3; *see generally* Report and Recommendation of the Board on Professional Responsibility and Separate Statement of Mr. Bolze as to Sanction (the "Bolze Report"). Thus, the issue before the Board is not whether Respondent should be sanctioned, but what the appropriate sanction should be. Based on the record here, it is relatively easy to conclude, as in the Jeffrey Report, that Respondent was an uncontrolled prosecutor bent on obtaining a

[1] "BX" refers to Bar Counsel's exhibits. "HC Rpt." refers to the Hearing Committee Report issued on August 19, 2009. "Tr." refers to the hearing that took place on May 7-11, 2007.

conviction without regard to the rules governing witness compensation or the norms the criminal justice system imposes on the government, and thus should be disbarred. My problem with that view is that the ethical violations involved here were committed during two lengthy, complex and pressure-filled criminal prosecutions conducted more than fifteen years ago, which involved numerous defendants charged with serious crimes that terrorized major portions of the city. Respondent was concerned for the safety of his witnesses, their families and friends. *See* HC Rpt. at 48, 54. Indeed, as Mr. Mercurio notes, one of Respondent's potential witnesses was murdered during the course of the investigations. *See* Separate Statement of Mr. Mercurio as to Sanction at 14. We are reviewing Respondent's actions years after they occurred and have the luxury of a being able to view the matter in an antiseptic environment which permits a dispassionate analysis of niceties that oft get lost under the pressure of a difficult case in which lives are potentially at stake. Given those pressures and the circumstances surrounding the matters Respondent was handling, I believe that Respondent is entitled to be given more latitude than the Jeffrey Report is willing to afford.

The Bolze Report recognizes those factors, but I think it goes too far in accommodating Respondent by concluding that a three-year suspension is appropriate. Were the only violations the misuse of the vouchers, I would agree that a suspension was appropriate. Although the misuse of those vouchers entailed a large amount of money, Respondent did not benefit personally from the funds. *See* HC Rpt. at 17, ¶ 46; *Id*. at 71. And his desire to protect the lives of those on whom his witnesses depended is understandable, if not admirable, even if his method of doing so was improper. It is also arguable that his misuse of the vouchers did not entail any increased expenditure of federal funds as he might have been able to obtain the funding necessary to pay the detectives and others had he gone through the proper channels.

But Respondent is not charged solely with the misuse of the voucher system. He also is charged with, and found by the Hearing Committee and the Board, to have (a) intentionally withheld the misuse of those vouchers from defense counsel, who could have used it for impeachment purposes, (b) intentionally misrepresented to defense counsel that he had disclosed all the *Brady/Giglio*[2] information, (c) falsely assured the Court and defense counsel that he had fulfilled his *Brady/Giglio* obligations, and (d) intentionally misled the Court and defense counsel by soliciting a negative response from a key witness' girlfriend as to the benefits the witness had received from the government, even though Respondent knew that the witness' girlfriend had been given a large number of vouchers to visit the witness.[3] HC Rpt. at 42-44, 53, 73. I think this kind of intentional deception of the court and defense counsel, when coupled with the other violations, crosses the line from misconduct which warrants a suspension to misconduct that requires disbarment.

In reaching that conclusion, I recognize that the Court has frequently suspended and not disbarred lawyers who lied to a tribunal. *See, e.g., In re Mayers,* 943 A.2d 1170 (D.C. 2008) (per curiam) (false statement to Court regarding child support); *In re Powell*, 898 A.2d 365 (D.C. 2006) (per curiam) (knowingly making false statements on a Bar application); *In re Steele*, 868 A.2d 146 (2005) (falsifying a subpoena); *In re Soininen,* 853 A.2d 712 (D.C. 2004) (falsifying status of Bar admission); *In re Brown*, 851 A.2d 1278 (D.C. 2004) (per curiam) (intentional omissions in connection with securities fraud); *In re Uchendu*, 812 A.2d 933 (D.C. 2002) (forging signatures on documents filed with Probate Division); *In re Owens*, 806 A.2d 1230

[2] *Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

[3] Were it not for the *Brady/Giglio* obligations, the question might not have been improper, and it would have been up to defense counsel to ask the follow-up question. But those decisions impose a higher standard on prosecutors than on counsel in civil cases, and, as the Hearing Committee found, Respondent used the question to hide the vouchers from defense counsel. HC Rpt. at 42-44.

(D.C. 2002) (per curiam) (false statements to an administrative law judge); *In re Phillips*, 705 A.2d 690 (D.C. 1998) (per curiam) (false and misleading petition in federal court).

However, the Court has also disbarred lawyers for engaging in the kind of conduct and falsehoods Respondent engaged in, conduct that impugns the integrity of the judicial process. Indeed, the Court has placed a very high premium on a lawyer's honesty and integrity. As it noted in *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc): "A lawyer's representation to the court must be as reliable as a statement under oath", and it has disbarred lawyers for: dissembling with respect to material information, *see In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (per curiam); encouraging clients to lie, *see In re Corizzi*, 803 A.2d 438 (D.C. 2002); creating false evidence, *see In re Goffe*, 641 A.2d 458 (D.C. 1994) (per curiam); and for lying to a tribunal. Indeed, in *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) ("*Cleaver-Bascombe II*") the Court emphasized, citing *In re Mason*, 736 A.2d 1019, 1024-25 (D.C. 1999), that "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest *at all times*, for honesty is 'basic' to the practice of law." (Emphasis in original). S*ee also In re Anya*, 871 A.2d 1181 (D.C. 2005) (per curiam) (making false statements of material fact to a third person; falsifying official court records); *In re Gil*, 655 A.2d 303 (D.C. 1995) (falsely notarizing documents); *Corizzi*, 803 A.2d 438 (*inter alia*, counseling two separate clients to commit perjury and making false statements to Bar Counsel); *Goffe*, 641 A.2d 458 (fabricating evidence, lying under oath to the Tax Court and the Hearing Committee, forging signatures and falsely notarizing documents for his personal benefit).

The Bolze Report finds that the latter two cases are distinguishable here because this case does not involve perjury, fabrication of documents or falsehoods to Bar Counsel or the Hearing Committee. Bolze Rpt. at 25. I do not find those differences persuasive. Respondent's conduct

in asserting that he had produced all the *Brady/Giglio* material when he knew he had not, in soliciting testimony from a witness that he knew was deceptive and would mislead defense counsel, even if the testimony was true, and his continued use of incorrectly captioned vouchers in the *Card/Moore* case for the purpose of hiding the vouchers from defense, impugn the integrity of the judicial system and undermine the legitimacy of the criminal justice system in the same manner as fabricating documents or perjury. And, although Respondent did not lie to Bar Counsel or the Hearing Committee in connection with this matter, I do not believe those facts are sufficiently redeeming to overcome Respondent's conduct here in falsely assuring the Court that he had complied with his *Brady/Giglio* obligations, soliciting misleading testimony from a witness, and intentionally misleading defense counsel in their pursuit of information to which they were entitled, especially when the underlying facts concerning his conduct were set forth in the report of the Office of Professional Responsibility of the Department of Justice, and lying would not have gotten him anywhere.[4]

Moreover, I believe the decision in *Cleaver-Bascombe II* sets a new, higher standard than applied previously to situations where an attorney lies to a tribunal,[5] and that Ms. Cleaver-Bascombe's disbarment requires a comparable sanction here. Ms. Cleaver-Bascombe falsified a Criminal Justice Act ("CJA") voucher and maintained throughout her disciplinary proceedings that it was correct. In its decision, the Board found that, while she falsified the statements of what she did in her voucher, it was likely that she had devoted the amount of time to the representation for which she sought compensation. *In re Cleaver-Bascombe*, Bar Docket No.

[4] I also find it disturbing that, after entering into stipulations with Bar Counsel, Respondent attempted to back away from those stipulations both at the hearing and before the Board. *See* Tr. at 1293-96; Respondent's Brief to the Board ("R. Brief") at 21-25, 92-95; *see also* HC Rpt. at 51-53 (discussing Respondent's attempts to back away from stipulations).

[5] *See also* Order, *In re Kanu*, No. 08-BG-1401 (D.C. Feb. 26, 2010) (ordering briefing on effects of *Cleaver-Bascombe II*).

183-02 (BPR July 21, 2006) at 3-4. Although the Court found that she lied about other facts as well, *Cleaver-Bascombe II*, 986 A.2d at 1200 n.12, it did not dispute the Board's statement that she likely devoted the time to the client's defense and was entitled to the compensation she sought. The Court found that that conduct inflicted a "serious injury to the judicial system and the administration of justice", *id*. at 1200 n. 11, and that she "lack[ed] the moral fitness to remain a member of the legal profession." *Id*. at 1200-01.[6]

Respondent's conduct went well beyond the injury to the judicial system and the administration of justice involved in Ms. Cleaver-Bascombe's falsehoods. His misconduct caused a far greater injury to the judicial system than Ms. Cleaver-Bascombe's. It required the government to negotiate reduced sentences for a number of the defendants, allowing them back on the streets of the District of Columbia much earlier than would otherwise have been the case, a fact that the Bolze Report plays down. And, while he did not lie under oath as she did, he engaged in a form of dishonesty in open court that demonstrates a lack of integrity and respect for the judicial system which I believe the ethical rules require of lawyers.

The strongest argument advanced by the Bolze Report is its reliance on *In re Stuart*, 942 A.2d 1118 (D.C. 2008), a reciprocal discipline matter from New York. In that case, the respondent, a prosecutor, had not only failed to disclose potentially exculpatory information to the defense but also lied to the court when asked about it. *See id*. at 1119. New York imposed a three-year suspension and a requirement that the respondent petition for reinstatement before resuming the practice of law. *See id*. In a two to one decision, the Court of Appeals, relying on

[6] Ms. Cleaver-Bascombe also introduced testimony from a prison employee who supported her claim that she visited her client at the prison. *Cleaver-Bascombe*, Bar Docket No. 183-02 (Hr'g Comm. Rpt. May 5, 2004) at 8-9, ¶¶ 16-17. The Hearing Committee held that the prison employee was not credible and rejected his testimony. *Id*. at 9-10, ¶ 17. The Board did not alter that finding. BPR Rpt. at 6. However, that fact was not crucial to the Court's decision that Ms. Cleaver-Bascombe lacked the moral character to practice law. Rather, it noted that she "presented the testimony of another witness" whose testimony was discredited, *Cleaver-Bascombe II*, 986 A.2d at 1200, but its decision rested predominantly, if not exclusively, on Ms. Cleaver-Bascombe's falsification of the voucher and the Board's finding that she lied to the Hearing Committee.

the policy favoring the imposition of reciprocal discipline unless certain exceptions apply, imposed identical reciprocal discipline, suspending the respondent for three years and, as recommended by the Board, requiring that he demonstrate fitness before reinstatement. *See id*. at 1119-20, 1121. The dissenting judge would have disbarred the respondent because he "fraudulently and contemptuously violated his constitutional duty by failing to disclose *Brady* material he well knew he possessed and by lying to a trial judge in open court about it." *Id*. at 1122 (Nebeker, dissenting). Judge Kramer, who concurred, noted that she was doing so only because "the law of this jurisdiction gives great deference to the sanction imposed by the original disciplining jurisdiction. Because of that deference, firmly imbedded in our disciplinary system . . . I feel compelled to join the opinion." *Id*. at 1121-22 (Kramer, concurring). Given the heightened standard of deference in reciprocal discipline cases, I think *Stuart* is limited to reciprocal discipline matters and is not controlling here.

In sum, Respondent's intentionally deceptive conduct here, misleading the Court, soliciting misleading testimony from a witness, and intentionally misleading defense counsel in their pursuit of information to which they were entitled, went to the heart of Respondent's obligation as a prosecutor to pursue a just verdict and to protect the integrity of the criminal justice system. It showed a lack of respect for the judicial process. When coupled with his other misconduct, that conduct requires more than a suspension; it requires his disbarment.

By: /TDF/
Theodore D. Frank

Dated: July 27, 2010

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
G. PAUL HOWES,	:	
	:	
Respondent.	:	Bar Docket No. 131-02
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 434709)	:	

SEPARATE STATEMENT OF MR. MERCURIO AS TO SANCTION

I disagree with the sanction recommendations of my colleagues and file this statement to provide the record support for factors that have led me to conclude that (1) disbarment greatly exceeds what I would consider a fair sanction for Respondent's misconduct under the circumstances in this matter, and (2) a three-year suspension exceeds what, in my view, is warranted.[1]

A. ATTITUDE OF THE OFFICE OF THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA TOWARD WITNESS VOUCHERS WHILE RESPONDENT SERVED THERE

Bar Counsel and Respondent stipulated that "by law, [Respondent] was authorized to provide federal vouchers to fact witnesses, associated with federal cases, to compensate them *for attendance at certain judicial proceedings* in federal court matters." BX 1 (Stipulation of Facts

[1] Two filings by other members in this matter are referred to in this statement. The filing of Vice-Chair Bolze, with the concurrence of Chair Willoughby and Ms. Kapp, is referred to herein as the "Bolze Report" and the statement of Ms. Jeffrey, with the concurrence of Ms. Coghill-Howard and Mr. Smith, is referred to as the "Jeffrey Report."

and Charges) p. 2, ¶ 3 (emphasis added);[2] *see* 28 U.S.C. § 1821(a)(1).[3] The Hearing Committee, however, found that:

> [I]t was standard practice within the [Office of the United States Attorney for the District of Columbia] for prosecutors to provide witness vouchers to witnesses who appeared at the [office] or the courthouse in order to provide information to a prosecutor or a police officer, even if that witness did not appear at trial, before the Grand Jury, or in any other court proceeding, and *even if such appearance was not contemplated at the time the witness appeared at the [office] or courthouse*.

HC Rep. p. 7, FF ¶ 11 (emphasis added).

The practice of the United States Attorneys Office for the District of Columbia ("USAO") of issuing witness vouchers to non-testifying cooperators outside the authority provided by law was not put in writing, but it had gone on for "quite a number of years." *Id*. pp. 30-31. In support of the above finding, the Hearing Committee cited, *inter alia*, the testimony of James Bradley, a District of Columbia police detective with 27 years of service in the Metropolitan Police Department ("MPD"). *See id*. p. 29; Tr. at 582-83. During the last decade of his service, he worked with Assistant United States Attorneys ("AUSA"), including Respondent, on a task force known as "Redrum" (from sometime in the 1980s through 1991) and in the MPD Homicide Division (from 1991 until his retirement in 1995). Tr. at 582-83. "Redrum," Bradley explained, was "[m]urder spelled backwards." *Id*. at 583. The task force

---

[2] The citation "BX" refers to Bar Counsel's exhibits, and "RX" to Respondent's exhibits. The citation "Tr." refers to the transcript of the hearing held on May 7-11, 2007. The citation "HC Rep." refers to the Report and Recommendation of Hearing Committee Number One dated August 19, 2009. The citation "HC Rep. p., FF ¶" refers to the numbered paragraphs in the Findings of Fact on pages 4 through 20 of the Hearing Committee Report.

[3] The statutory authority is as follows:

> [A] witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

28 U.S.C. § 1821(a)(1) (Emphasis added). The Justice Department regulations expanded the class of those entitled to federal witness vouchers to include "fact witnesses . . . attending at any judicial proceeding." 28 C.F.R. § 21.4. "Judicial proceeding" was defined to include a "conference between the Government Attorney and a witness to discuss the witness's testimony," but the "conference must take place after a trial, hearing, or grand jury proceeding has been scheduled but prior to the witness' actual appearance at the proceeding." *Id*. at § 21.1.

was so designated because it dealt with the large number of "drug-related homicides in the District of Columbia" at that time. *Id.* He testified that during the five years he worked with Redrum, when trying to "get someone to cooperate every prosecutor that [he] worked with . . . gave the witness or a potential witness a voucher when they came down. So it was the standard operating procedure for the U.S. Attorney's Office at the time." *Id*. at 614.

The Hearing Committee Chair asked Bradley to "suppose that somebody came down and they were giving you information about the case, or maybe about threats to other witnesses . . . [b]ut there was no expectation that they were going to . . . be a witness at trial -- they weren't a trial or a potential witness at trial," and he asked the officer if the "standard practice would have allowed that person to get a voucher for coming down just to provide information to you in an investigative way only." *Id.* at 618. Bradley replied, "[t]hat's how it worked." *Id*.

The Hearing Committee Chair probed further about the practice of paying "non-witnesses," meaning "people who were not going to be trial witnesses." *Id*. at 621. The following colloquy ensued:

> THE WITNESS: And are you saying that . . . they had evidentiary value to the investigation; they just weren't --
>
> HEARING CHAIR GLASSMAN: Yes -- No. you had a legitimate law enforcement . . . purpose in talking to them.
>
> THE WITNESS: Happen[s] every day . . . [e]very day. In every case.

Id. at 621.

The Hearing Committee found that "[a]lthough this standard practice may not have complied with applicable law and/or regulations, it appears that AUSAs [in the District of Columbia office] who were Respondent's contemporaries believed that the standard practice was entirely appropriate." HC Rep. p. 7, FF ¶ 11. Alan B. Strasser, a veteran AUSA, who, as chief

of the Felony Trial Section, was Respondent's supervisor at the time the Newton Street investigation got underway (Tr. at 793, 795), agreed that "it was a common investigative technique for the assistants to ask the detectives to see if citizens in the community might come down and just voluntarily appear and provide information" and "[each one] would receive a witness voucher." *Id*. at 800-01. As Strasser put it, "if they came down and talked to the prosecutor, I think it would be entirely routine for them to get a witness voucher." *Id.* at 801.

Jeffrey Ragsdale worked with Respondent in the Newton Street Crew trial and was chief of the Federal Major Crimes Section in the USAO when Bar Counsel called on him to testify. *Id*. at 206, 201. He was asked if he would give a voucher to (a) a cooperating witness who "just wanted to give [him] some information about what was happening around Newton Street" or (b) a person who, on his own volition, watched the trial and then said that he is hearing "rumors on the street about threats." *Id*. at 262, 263. Ragsdale answered that, in the first case, the cooperating witness "could be entitled to" a voucher and that, in the second case he "might" give the person a voucher "if he came down at my request, clearly, yes at that point of time." *Id*. at 262, 263-64. In Ragsdale's view, for a voucher to be given, the information had "to be relevant to something you're inquiring about," but he noted that defining what is relevant is not easy. *Id*. at 265. As he explained, "arguably you could have a witness that has information about unrelated matters that still would justify their receiving a voucher because they're providing information about a crime that's been committed or something that's in our factual investigation." *Id*. at 265-66.

The testimony of Bar Counsel's first witness, Robert R. Chapman, a veteran prosecutor who was an AUSA in the District of Columbia for close to 35 years (from 1971 through 2005), and who had served for many years in the Major Crimes Section of the office, was consistent

with that of Bradley, Ragsdale and Strasser. Like them, when the Newton Street Crew cases were being investigated and tried, he was not familiar with the statutory or regulatory limitations on their authority to issue witness fee vouchers. *Id*. at 103-05. Prior to his getting involved in the investigation of Respondent's voucher issues in 1996 by the Department of Justice's Office of Professional Responsibility ("OPR"), he "would be inclined to issue a voucher" to somebody who came down to his office before a grand jury had been opened, and he volunteered that "probably other assistants would be likewise willing to issue a witness voucher under the circumstances." *Id*. at 109-110. Now, "after reading the statute and the Code of Federal Regulations, [he] understand[s] that it's not authorized." *Id*. at 110.

Lawyers in the USAO at the time Respondent worked there generally regarded "[p]reparing witness fee vouchers . . . as a trivial or *pro forma* task." HC Rep. p. 7, FF ¶ 10. They "received no formal training regarding the statute and regulations authorizing the payment of witness fees, and were, in fact, not even "required *or expected* to be aware of the content of the statute and regulations authorizing witness fees." HC Rep. pp. 6-7, FF ¶ 10 (emphasis added).[4]

What is more, the record contains no evidence that voucher issuing practices of the prosecutors were monitored or audited for compliance with any standard. Instead, a kind of office culture prevailed that was informally spread by word-of-mouth from prosecutor to prosecutor, "in what can fairly be described as 'on the job' training." *Id.* That culture permitted prosecutors to sign the "Attendance Attestation" on the federal voucher application form for any person who came to the prosecutor's office with information relevant to a matter under

[4] The Hearing Committee Report quotes the following testimony of former AUSA David Schertler:

> [T]o try to put [the preparation of witness vouchers] in some context for you, this was a very routine aspect of the job, almost a, you know, a minor aspect of the job. It wasn't anything that was ever at the forefront of any kind of office policy or office training.

HC Rep. p. 7, FF ¶ 10 (quoting Tr. at 650).

investigation or in trial, even though the person was not "entitled to the statutory allowance" under the terms of the statute. *See* BX 106; Tr. at 618. And prosecutors, at least prosecutors involved in drug-related homicide cases, were given considerable latitude in determining the relevance of information they were given. Any properly filled-out form with that attestation signed by a prosecutor could be taken by the person named in the form's "witness" box and presented to the U.S. Marshal for disbursement, and payment would be made.[5] *Id*. at 70-71.

B. RESPONDENT'S DEPARTURES FROM OFFICE VOUCHER PRACTICES

The Hearing Committee made two general findings with respect to Respondent's issuance of vouchers. It found first that "Respondent improperly provided *federal* vouchers to government witnesses, to their friends and relatives, and to an incarcerated government witness . . . in the *Card/Moore* case, a *Superior Court case*." HC Rep. p. 8, FF ¶ 13 (emphasis added).[6] Second, it found that "[b]efore, during and after the prosecution of the *Newton Street Crew* case, Respondent signed federal vouchers for individuals who were not entitled to such federal vouchers or who were not entitled to a federal voucher for 'the matter indicated.'" *Id*. p. 11, FF ¶ 24.

[5] The federal voucher application form used by the District of Columbia office merely required the prosecutor to sign an attestation that said, "I attest that the witness named above *attended in the case or matter indicated* and is entitled to the statutory allowance for attendance and travel." BX 106 (emphasis added). AUSAs in the District of Columbia office thus did not "falsely certif[y] that the recipient [of a voucher] had attended *a judicial proceeding as a witness*," as Ms. Jeffrey asserts. *See* Jeffrey Report p. 5 (emphasis added). What is more, since the attorneys in that office had come to believe that any person who came to their office with relevant information was "entitled to the statutory allowance," they believed their certification was truthful, even though the statute did not so provide. *See* Tr. at 109-10.

[6] The two lengthy trials involved in this matter are referred to herein as the "*Card/Moore* case," which was tried in the District of Columbia Superior Court during seven months from September 1993 through April 1994, and the "*Newton Street Crew* case," which was tried in the United States District Court for the District of Columbia during six months from April through October 1994. The *Newton Street Crew* case is sometimes referred to in the Hearing Committee Report as the "*Hoyle*" case. Mark Hoyle, a leader of the gang known as the "Newton Street Crew," was the lead defendant in that case. HC Rep. p. 5, FF ¶ 5.

The Hearing Committee regarded the "evidence concerning witness vouchers to government witnesses and their relatives [as] potentially lend[ing] itself to three interpretations," which it stated as follows:

> (1) Each of the payments was for a visit to the USAO or courthouse during which the voucher recipient provided case-related information (although the visit may have also served other purposes, such as providing moral support to a government witness).
>
> (2) Some of the payments were made to induce relatives to visit incarcerated witnesses to maintain their morale, but the relatives did not provide real or substantial case information.
>
> (3) Payments were, in sum and substance, unlawful financial inducements to the witnesses directly or through their relatives and close associates.

Id. p. 33.

The Hearing Committee "believed that most of the payments fall into the first category, *i.e*. payments for case-related information, but that at least some . . . fall into the second category, *i.e*. payments for visits to provide moral support where no real information was provided." *Id*. As the Hearing Committee explained, it believed that the office practice of paying non-testifying witnesses "was not in accord with the statute and regulations," but it "recognized that the practice . . . was within the norm for this office and had a colorable legal justification." *Id*. p. 29. Respondent therefore was not held to have violated any disciplinary rule when his conduct stayed within the office practice, which is described in the first category above. The Hearing Committee thus exonerated Respondent with regard to "most of the payments."[7] *Id*. p. 33.

[7] An unspecified number of payments in the first category were made using federal vouchers with the *Newton Street Crew* caption in the Superior Court *Card/Moore* case. HC Rep. p. 41. Respondent admitted that these vouchers should have been paid on Superior Court voucher forms with the *Card/Moore* case caption. *Id*. Respondent stipulated that he knew that persons who provided information in a Superior Court case were "not entitled to be paid by federal vouchers." BX 1 pp. 5, 6, ¶ 17.

(footnote continued on next page)

None of the payments were shown by clear and convincing evidence as being in the third category — "unlawful financial inducements to the witnesses either directly or through their relatives and close associates." *Id*.; *see also id*. pp. 37-39.

With respect to the Hearing Committee's second category above — payments made to induce relatives to visit incarcerated witnesses to maintain their morale, but the relatives did not provide real or substantial case information — the Hearing Committee found "the evidence . . . compelling that *at least some* received vouchers *on certain occasions* for bolstering witnesses' resolve, not for providing information." *Id*. p. 34 (emphasis added). Respondent thus stepped outside the office voucher-issuing practices with respect to "at least some" unspecified number of vouchers. *Id*.

The Hearing Committee also found that Respondent was not acting within the office standard practice with respect to substantial payments to Ronald Fluck and David Belisle, two retired MPD detectives who had worked with him in the Newton Street Crew investigations. *See* BX 1 pp. 7, 9, ¶¶ 18, 23. According to the Report of the Office of Professional Responsibility, Department of Justice, dated February 9, 1998 ("OPR Report" or "OPR Rep."):

> Belisle, an officer with the [MPD], worked virtually all of his career from 1970 until 1992 in the 10th Precinct, later designated the 4th District . . . . This area

---

(footnoted continued from previous page)

The Hearing Committee wrote as follows with respect to these payments wrongfully made on federal vouchers:

> The Committee does not believe that the record establishes a premeditated scheme to thwart discovery efforts, and we credit Respondent's explanation that the use of federal vouchers in the *Card/Moore* matter began as a time and effort short cut, albeit an improper one. At some point, however, the Committee believes that Respondent became aware that the issuance of witness vouchers out of the wrong court and under the wrong case caption was frustrating defense discovery efforts and chose to continue to conceal the issue, further frustrating those efforts.

HC Rep. p. 40. The Hearing Committee thus regarded the principal problem with the wrongly-captioned *Card/Moore* case vouchers to be the fact that they impeded the *Card/Moore* case defendants' ability to discover them. *See id*. Accordingly, they are best dealt with in the discussion of Respondent's decision not to disclose to the defendants or the Court vouchers he had issued to the incarcerated witnesses families and friends. *See infra*, at 13-17.

> included . . . parts of Newton Street. Through his long association with this area, Belisle was very familiar with its residents, and he watched some of them grow from young children to become killers and drug dealers.

BX 3 (OPR Rep.) pp. 2-3.

Similarly, Fluck had "spent his entire career in 7-D," a police district in Southeast where a "seller [of drugs] for Marky Hoyle's crew" had lived. Tr. at 1011. Respondent "worked many cases" with Fluck, and he brought Fluck into the investigations that led to the Superior Court indictment against six individuals in the Javier Card conspiracy, including MPD officer Fonda Moore. *Id*. at 1024. Fluck "knew Fonda Moore very well and ha[d] supervised her" as a police officer. *Id.* As Respondent explained, "one day Ron Fluck and David Belisle were instrumental as police officers working [his] cases and the next day they're retired." *Id*. at 1030-31. They nonetheless continued to work with him "because they had been [an] institutional foundation for these cases and they continued clearly out of loyalty to [Respondent]." *Id*. at 1031.

The Hearing Committee harshly condemned the vouchers Respondent signed for Fluck and Belisle as "reflect[ing] a serious abuse of the witness voucher system and a flagrant disregard for the proper disposition of the public funds accessed through the witness voucher system." HC Rep. p. 46. It saw "no credible basis for an AUSA, in effect, to hire a small staff of part-time 'case agents' for his own professional convenience through the use of United States District Court witness vouchers." *Id*.

Finally, the Hearing Committee found that Respondent improperly issued vouchers to the following:

> (1) Kevin Bears, a witness in the *Card/Moore* case, totaling $504, including $160 for days on which he was incarcerated (*id*. p. 47):
>
> (2) Lazaro Santa Cruz, Robert Smith, William Woodfork and Frank Lynch, all witnesses in the *Newton Street Crew* trial, each received $160 in whole or in part for "appearance dates" on days they were incarcerated (*id*.);

(3) Marjorie Jones and her three grandchildren for 53 days of attendance, totaling $9,843.20, although Respondent knew that two of the grandchildren were not attending as fact witnesses (five days of attendance shown on these vouchers were on days after Respondent had left the USAO) (*see id*. p. 49); and

(4) Jack Szymczak, totaling $293 for three days of attendance and meals and/or lodging, when Szymczak had testified on only one day in the *Card/Moore* trial. *See id*.[8]

C. DID RESPONDENT SERIOUSLY DEPART FROM OFFICE VOUCHER PRACTICES?

The question at this point in this proceeding is not whether Respondent violated disciplinary rules with regard to some of his voucher issuances and other conduct. The Hearing Committee concluded, based largely on Respondent's own admissions, that, in certain respects, he did. And the findings of fact that underlie the specific violations the Hearing Committee found are supported by the substantial evidence in the record as a whole. The Board thus is bound by those findings. But to recommend a sanction, it is necessary to fairly assess the gravity of Respondent's violations, considering not only the Hearing Committee's findings, as opposed to its opinions of the gravity of Respondent's violations (which the Board is not bound to accept), but also some issues of fact that the Hearing Committee's findings do not resolve.

The Hearing Committee, for example, considers Respondent's departures from the office voucher practices a "core type[ ] of misconduct," comparable to intentional or reckless misappropriation, and brands them "more egregious" than deliberately filing a false voucher solely for personal financial gain. HC Rep. pp. 67, 68-73. In my view, those characterizations

[8] One of the Hearing Committee members asked Respondent if he knew "at the time that [he] signed the [Szymczak] voucher that it was not true. Respondent's answer was as follows:

> I remember the day he was here. I don't have any recollection of signing it. It could have been either someone signed it [or] I signed it. Somebody handed it to me and I signed it. I signed a lot of things on the fly -- you know, somebody put it on my knee and I signed it. I just don't remember signing this one.

Tr. at 1307.

are overblown and cannot reasonably be sustained by the record.

Respondent violated the disciplinary rules by signing federal vouchers attesting that they were authorized by the federal law, when in fact they were not. Under the standard witness voucher practice that prevailed in the USAO, prosecutors did the same thing virtually on a daily basis. The prosecutors were not authorized by law to issue vouchers to every person who came to their offices and gave them relevant information, but the practice was that they routinely did so "[e]very day . . . [i]n every case." Tr. at 621 (Bradley). Presumably that practice was followed because, even though not lawful, it served a legitimate law enforcement purpose to have persons who might have relevant information come to the prosecutors' offices, and as Detective Bradley testified, "when [he] first got to Homicide . . . he was told people won't come in unless they have a witness voucher." *Id*. at 620.

Respondent's departures from the office practices regarding issuance of vouchers also served legitimate law enforcement purposes. Vouchers issued to retired MPD detectives Fluck and Belisle, to the grandmother and her grandchildren in the *Jones* child molestation investigation, and to the incarcerated witnesses' friends and family for morale, were not authorized by law, but like many vouchers signed under the standard office practice, they served legitimate law enforcement purposes.

The Hearing Committee derides Respondent's use of federal vouchers to Fluck and Belisle as hiring a "small staff of part-time 'case agents' for his own professional convenience", HC Rep. p. 46, but the issuance of vouchers that were in accord with the prevailing standard office practices could be criticized on the same ground. It certainly is more "convenient" to have potential witnesses come to the prosecutor's office than for the prosecutor to go to the potential witnesses' homes.

Fluck and Belisle, detectives who had worked in the critical District of Columbia neighborhoods for many years, had encyclopedic knowledge of the people and their relationships and had worked with Respondent from early on to provide invaluable information and assistance to him during the *Card/Moore* and *Hoyle* trials. *See* Tr. at 1030-31. Having one of them working with him in each of the two extensive trials thus provided Respondent immeasurable, perhaps indispensable, help in bringing those challenging trials to a successful conclusion.

The lack of attention paid by the USAO to the preparation and issuance of witness vouchers itself undermines the idea that Respondent's departures from the standard office practices should be treated as serious disciplinary offenses. Not only was there no formal training on witness vouchers in that office, but preparation of vouchers was considered a "trivial or *pro forma* task" and a "very routine aspect of the job", *see* HC Rep. p 7, FF ¶ 10, and the record is devoid of evidence that payment of witness vouchers was subject to any system of monitoring or auditing. That *laissez-faire*, hands-off approach to the entire subject of witness fee vouchers is wholly inconsistent with the level of importance that the Hearing Committee and some of my colleagues would attach to Respondent's departures from the office practices.

With the possible exception of those vouchers issued for days on which the recipient witnesses were incarcerated, the vouchers Respondent issued helped Respondent to investigate and try the *Card/Moore* and *Hoyle* cases and aided his efforts to interview a young child who appeared to have been the victim of sexual abuse by a family member. The Hearing Committee quotes Respondent's explanation of his issuing vouchers to incarcerated witnesses as follows:

> I had protected them all along. I had invested hours and hours trying to get them ready to go back so that they wouldn't revert and they wouldn't get . . . killed and I made a choice. There was no federal money there. They showed up in my office where there should have been Safe Streets Money. It wasn't available and there they stood. That's what I did.

Id. p. 48 (quoting Tr. at 1283); *see also* Tr. at 1283 ("I just know that I knew incarcerated witnesses shouldn't receive witness vouchers and I made a conscious choice in that situation for just moral reasons.").

The total amount involved in those particular vouchers was $800. HC Rep. p. 47. Despite its acknowledgement of Respondent's "laudatory motives," the Hearing Committee nonetheless found that his conduct violated seven disciplinary rules, including Rule 8.4(b) (criminal act reflecting on lawyer's honesty). *Id*. p. 3.

All in all, I find it unrealistic to regard Respondent's use of vouchers in this matter, taking into account the context in which he acted, as a serious disciplinary violation. The USAO for many years not only failed to "monitor or supervise" the use of witness vouchers, *see* Jeffrey Report p. 28, but also made no formal effort whatsoever to inform its prosecutors about any limits on their authority to issue those vouchers or any obligation to adhere to any defined limit to that authority. In that atmosphere, Respondent's use of governmental funds in ways that enabled him to get all the work that needed to be done in the high-pressure, high-stakes criminal investigations and prosecutions assigned to him did not constitute a serious departure from any norms prevailing in the governmental office in which he worked and thus, in my view, should not be regarded a serious violation of the lawyer disciplinary rules.

D. Respondent's Decision Not to Risk Defendants' Learning of Vouchers that He Had Issued to Families and Friends of Incarcerated Witnesses

Respondent stipulated that, in violation of Rule 3.8(e), he "intentionally failed to disclose to the defense . . . evidence or information that he knew or should have known tended to negate the guilt of the accused." BX 1 p. 15, ¶ 32(c). During the hearing, however, he explained that his decision was grounded in his deep concern that revealing the identity of the Newton Street residents who were cooperating with his investigation and prosecution of the Newton Street

Crew murderers would entail a grave risk of harm and could well lead to death for one or more of the persons identified. *See* HC Rep. pp. 53-55 (quoting Tr. at 1260-63).

Respondent was not alone in being concerned about the safety of his cooperators in the homicide cases he investigated and tried. The testimony of other prosecutors who spoke to that issue was unanimous regarding the utmost importance of that concern. For example, Chapman testified that "probably one of the highest duties that a prosecutor has is to make sure one of his witnesses doesn't get killed." Tr. at 138; *see also id*. at 660 (Shertler testified that "there's a moral duty and a moral concern for the safety of a cooperative."). Moreover, Respondent could not simply dismiss as unimportant what he knew from his prior experience with the Newton Street crowd. In 1991, he had tried and convicted two members of the gang for "killing a grand jury witness on the Giant parking lot." *Id*. at 1015-16. More recently, a young police officer named Phillip Tony Garrett, who Respondent had "helped develop and helped put in the field to make [drug] buys," was killed gangland-style while working on the street undercover for Respondent.[9] *Id*. at 1036-37. The car of Detective Bradley was "shot up" while it was parked in front of his house, an incident that "caused [his] entire family to be relocated." *Id*. at 588-89 (Bradley). Detective Wagner summed up his view of the Newton Street Group as "the most

[9] Respondent told the Hearing Committee about that killing and the effect it had on him:

> I helped develop and helped put in the field to make buys from Andre Perry and other folks in the Newton Street umbrella . . . a kid who went to Catholic school in the District of Columbia, very well spoken . . . but had the ability to get into organizations and talk the talk. He got very close to . . . Andre Perry, called him Arnie. His name was Phillip Tony Garrett. He was found with a bullet in his head and we have good, reliable information that he was executed because he was working with us.
>
> When you lose an informant, somebody you have worked with, talked with, wired up and one morning he's dead and protecting my cooperating witness, particularly in this case where they're all family members, was something I never lost sight of.

Tr. at 1036-37

violent group [he's] ever known of in this country." *Id*. at 866. He testified that he knew of 31 murders they committed and a "whole lot of other violent acts." *Id.* at 866-67.

The ever present potential for harm to the persons who had cooperated in the investigation and trial of the Newton Street gang leaders was the subject of the following testimony of Respondent, which the Hearing Committee quoted in its report:

> HEARING CHAIR GLASSMAN: [T]he weighing analysis that you've just describe[d], potentially exculpatory material, potential impeachment evidence, the need to disclose it on the one hand, the need to protect witnesses or cooperators on the other, seems quintessentially to be a balancing test that a court does, not counsel. Correct?
>
> THE WITNESS: Yes, sir.
>
> HEARING CHAIR GLASSMAN: Okay. Normally, in practice, even at that time, it would have been perfectly natural to make that type of submission to the Court. Correct?
>
> THE WITNESS: At that time . . . I weighed it in my own mind. I can only tell you that having lost one informant and almost a second, I was terribly mindful of protecting them, and I made the wrong choice at the time.
>
> HEARING CHAIR GLASSMAN: You were worried that if the Court made the decision that you need to disclose that material, then those witnesses['] names would be out.
>
> THE WITNESS: Yes.
>
> *HEARING CHAIR GLASSMAN: So you made a conscious decision to take the locus of that decision-making away from the Court?*
>
> *THE WITNESS: I made a conscious decision at that time.*

HC Rep. pp. 54-55 (italics in report) (quoting Tr. at 1263).

Based largely on that testimony, the Hearing Committee found that Respondent's failure to reveal the vouchers he had issued to the family and friends of the incarcerated witnesses in the *Card/Moore* and *Hoyle* cases was intentional, but the Hearing Committee also accepted Respondent's testimony that his decision resulted from his "having performed a mental

'calculus' in which he unilaterally balanced the rights of the criminal defendants to *Brady* and/or *Giglio* information against his own assessment of the likelihood that harm might come to his cooperators if their identities were divulged to the defendants." *Id*. p. 74. The clear and convincing evidence in this matter confirms Respondent's testimony that he decided against disclosing the vouchers to the judge for the reason he explained in the above-quoted testimony. Basing a sanction on an assumption that Respondent acted for some other reason that some other person theoretically might have acted upon in Respondent's circumstances would be to base his sanction on sheer speculation.

Respondent also stipulated that he "repeatedly and falsely assured the court and defense counsel, that he had provided all *Brady* and *Giglio* information to the defense" in the *Card/Moore* case. BX 1 p. 5, ¶ 16. The Hearing Committee, based largely on what it termed "Respondent['s] evasiveness in responding to [defense counsel's] questions" during that trial, concluded that Respondent "deliberately concealed" witness payments totaling $320 made to Theresa Bryant/Greene, a government witness in that case, "in order to thwart defendants' legitimate discovery efforts." HC Rep. pp. 42-44. Observing that Respondent "has explained" that he had not provided witness vouchers to the court in *Hoyle* "in an effort to protect nonwitnesses' identities", *id*. at 44, the Hearing Committee went on to identify what it thought were some potential effects of turning Bryant/Greene's witness vouchers over to the defense:

> [T]urning over her witness vouchers would have created significant complications for Respondent, by potentially revealing (i) the systematic miscaptioning of witness vouchers used in connection with the *Card/Moore* matter, (ii) other undisclosed payments to *Card/Moore* witnesses out of the federal court, and possibly (iii) improper payment under the *Hoyle (Newton Street Crew)* caption, because defense counsel could be expected to try to subpoena all vouchers under that caption once the pattern of improper voucher issuance was revealed.

Id.

Immediately following that passage, the Hearing Committee writes that "Respondent's evasiveness in responding to Ms. Holt's [Bryant/Greene's lawyer] questions clearly suggests to the Hearing Committee, in any event, that [Respondent's] intention was to mislead and distract an inquiry that was venturing close to a problematic subject." *Id*.

The only problem mentioned in the Hearing Committee Report that a "subpoena [of] all vouchers [issued] under" the *Newton Street Crew* caption would have posed for Respondent is the problem that Respondent himself associated with disclosure of those vouchers — the lethal danger such a disclosure would have entailed for the family and friends of the incarcerated witnesses who had cooperated with the investigation of the defendants' crimes of violence. In my view, therefore, the most reasonable meaning that can be ascribed to the Hearing Committee's unexplained term "problematic subject" is to regard that term as a reference to the risk of harm that disclosure of the vouchers would have brought about.

Had the Hearing Committee concluded that, during his 1993-94 trials, Respondent's motives were "at best mixed and not entirely altruistic" as Ms. Jeffrey supposes, Jeffrey Report p. 14, it certainly would have stated that conclusion in clear and unambiguous words as justification for the severe sanction that it recommends. It did not do so. Neither the Hearing Committee's findings nor clear and convincing evidence supports what can only be regarded as the Jeffrey Report's conjecture that Respondent had motives other than the motive he testified he had at the time of the 1993-94 trials.

Respondent readily admitted that he resisted disclosure of the vouchers to the defendants in order to keep the identity of his cooperators from them, and the Hearing Committee accepted the mental calculus by which he concluded that the cooperators' safety made that objective more important than any rights the defendants may have had. *See supra* at pp. 14-15. Moreover, even if speculation that another motivation might have played a significant part in his decisions were

accepted, it would mean nothing more than that avoiding a serious risk to the cooperators' well being may not have been his sole motive. Protecting the cooperators, however, would still stand as his predominant motive, the consideration that drove his fateful decision.

E. THE APPROPRIATE SANCTION

With the District of Columbia experiencing "an explosion in violence, and in particular an explosion in the homicide rate", Tr. at 646 (Shertler),[10] Respondent stepped forward, and for the better part of seven years, he devoted his unquestionable legal ability and seemingly unbounded supply of energy to restore the rule of law in the Newton Street neighborhood, an epicenter of the District's frightening wave of violent crime. From 1988 through late 1994, Respondent directed the investigation and personally prosecuted members of a violent "Newton Street Crew." BX 3 pp. 3-7. From September 1993 through October 1994, he tried two cases. In the Superior Court, he "was the sole prosecutor" against six sets of defense counsel in the *Card/Moore* case, a "complex, seven-month, multi-defendant trial, involving more than 30 government witnesses." HC Rep. pp. 3-4, FF ¶ 3. Then, in a trial that started the "day after the conclusion of the *Card/Moore* trial," he was lead prosecutor in a six-month trial in the United States District Court of federal charges that included "criminal enterprise, RICO conspiracy, drug conspiracy, murder and murder conspiracy." *Id*. p. 5, FF ¶ 5. The defendants in the second case were "Mark Hoyle and co-defendants who were the leadership of the . . . Newton Street Crew." *Id*.

[10] Schertler quantifies this "explosion in the homicide rate" with an alarming statistic. "[A]s chief [of the Homicide section of the USAO] I was monitoring this, but in the early 1980s . . . the homicide[s] in one year might be 150 to 200. By the time we reached 1991 we were in 400 to 500 homicides a year." *Id*. at 646.

In the midst of those trials, Respondent was forced to decide whether he should identify — and thereby expose to the risk of grave harm or even death — those men and women who had come forward, at great personal risk, to help him and his colleagues find the evidence needed to break the Newton Street Crew and rid their District of Columbia neighborhood of the violence that gang used to carry on its criminal enterprises. He chose to observe what Bar Counsel's first witness identified as "probably one of the highest duties that a prosecutor has," that is, "to make sure one of his witnesses doesn't get killed." Tr. at 138 (Chapman). Respondent did what was necessary to avert disclosure of the vouchers.

No one can say with any degree of certainty which, if any, of the defendants may have been convicted had Respondent chosen a different course. From our vantage point some 17 years after the event, the illusion might safely be indulged that the trial judge, if only Respondent had let him, would have been able to "address legitimate safety concerns by means of protective orders, redactions, gag orders or similar measures." Jeffrey Report p. 13. But again nothing in the record supports that supposition. But what is more, my four colleagues who would recommend disbarment in this matter do not — and in my view, cannot — explain how the trial judge could have provided the defendants with the information they would have needed in order to consider using the vouchers for impeachment without revealing to them the identify of those who received the vouchers.[11] Indeed, the supposition that the judge would have done so is at odds with the thesis that "the United States was forced to agree to substantial sentence

[11] The Jeffrey Report refers to *Tinsley v. United States*, 868 A.2d 867 (D.C. 2005) (per curiam) in connection with the suggestion that "legitimate safety concerns" could have been addressed in the *Card/Moore* and *Newton Street Crew* trials by means of "protective orders, redactions, gag orders or similar measures." *See* Jeffrey Report p. 13. In that case, however, the court dealt with an intimidated prosecution witness by banishing from the courtroom the persons whose presence had been the cause of the witness' intimidation. That court action does not suggest any measure by which the court could have resolved the dilemma in the *Card/Moore* and *Newton Street Crew* cases, in which giving the defendants the information needed for them to consider using the vouchers to impeach the incarcerated witness necessarily would carry the grave risk of harm to the recipients of the vouchers that Respondent sought to avoid.

reductions" because it recognized that the court probably would grant the defendants' motions for new trial. *Id*. p. 2. For if the judge would have kept the identity of the cooperators from the defendants even if Respondent had disclosed the vouchers to him, then Respondent's decision to keep that information to himself was nothing but harmless error and therefore hardly a reason for the government to agree to substantial sentence reductions.

The simple fact is that defense demands for information that would reveal the cooperation of the persons who were compensated by means of witness vouchers, which first came in the middle of the *Card/Moore* trial, put Respondent in a cruel dilemma from which he had no escape. Achieving the objective he had been tirelessly working toward for the past six years — putting a stop to a series of brutal killings by the Newport Street Crew — required him to perform an act that might well facilitate more killing. Allowing the defendants to get the information they demanded would, in Respondent's colorful words uttered in a related context, "put [a] bull's eye" on innocent people who would be targeted by persons associated with the violent criminals he was bringing to justice. Tr. at 922.

With regard to Respondent's improper use of the witness vouchers, as the Bolze Report demonstrates, that conduct cannot reasonably be seen as akin to intentional misappropriation or flagrant dishonesty. As discussed above, *supra* at pp. 6-7, most of the vouchers Respondent signed were used in circumstances no different from the circumstances in which vouchers, for many years, had been issued by all the AUSAs in the District of Columbia office. As for the few vouchers issued to those who were not providing information — and therefore were not "witnesses" by any meaning of that word — a suspension for that misconduct should be measured in months, not years. A lengthy suspension cannot in my view be reconciled with the longstanding practices of the District of Columbia's USAO that: (1) provided prosecutors with

no guidance concerning the extent of their authority to use witness vouchers; (2) paid no attention to the prosecutors' use of vouchers; and (3) gave the prosecutors application forms that merely required them to "attest" only that "the witness named above attended in the case or matter indicated and is entitled to the statutory allowance." *See supra* at p. 5 n. 4. With few exceptions, the vouchers signed by Respondent were given to persons who arguably met a loose construction of that standard as meaning persons with knowledge of information that the prosecutor found useful who came to the courthouse or the prosecutor's office to help with the case by giving the prosecutor the benefit of their knowledge.

Respondent is a 60-year old lawyer. He is well-regarded and has been well-regarded over the course of his career, as is proven not only by the two judges who offered character testimony in the hearing, but also the number and content of the many Special Achievement Awards, Performance Evaluations and Character Reference Letters that Respondent has introduced in evidence. *See* RX 1(a-j), 2(a-j), 10(a-cc); Tr. at 936-67 (Judge James Irving), 968-990 (Judge Thomas B. Jackson). No one has suggested that the funds expended through the vouchers Respondent signed were not prudently and efficiently directed toward achievement of the highly important public goals that Respondent was pursuing during the *Card/Moore* and *Newton Street Crew* cases. Under these circumstances, the disciplinary mission to protect the public, the courts and the legal profession does not, in my view, require that Respondent be dealt a career-ending sanction because those funds were drawn from the United States Treasury by the unauthorized use of a voucher system that the USAO for the District of Columbia had been misusing for many years.

As for the actions Respondent took to keep the identity of the recipients of those vouchers from the defendants in his trials, his conduct is not analogous to the conduct before the Court in *In re Stuart*, 942 A.2d 1118 (D.C. 2008), a case in which the respondent withheld exculpatory evidence for no purpose other than, as the Jeffrey Report would phrase it, "convicting bad people." Jeffrey Report p. 29. Respondent in this matter acted for a different purpose. In keeping the vouchers to himself, Respondent was following what an experienced federal prosecutor, who for 35 years was an AUSA in the District of Columbia office, sees as "probably one of the highest duties that a prosecutor has." Tr. at 138 (Chapman); *see supra* at p. 13. Respondent was "mak[ing] sure one of his witnesses doesn't get killed." Tr. at 138 (Chapman).

As the Court often has written, determining the proper sanction is more art than science. *See*, *e.g.*, *In re Guberman*, 978 A.2d 200, 210 (D.C. 2009) ("[W]e recognize . . . that 'the imposition of sanction in bar discipline cases is not an exact science . . . ."); *In re Cater*, 88 A.2d 1, 17 (D.C. 2005) (noting same and expressing the broad considerations involved in determining sanctions); *In re Goffe*, 641 A.2d 458, 463 (D.C. 1994) (per curiam) ("The imposition of sanctions . . . is not an exact science but may depend on the facts and circumstances of each particular proceeding."). The unusual misconduct in this matter and the unique circumstances in which it occurred defy easy comparison with previously decided cases. Five members of the Board have concluded that Respondent's misconduct in this matter does not warrant disbarment. In my view, the sanction in this matter ought to be no greater than the one-year suspensions ordered in *In re McBride*, 642 A.2d 1270 (D.C. 1994 (en banc) and *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (en banc) — both of which involve deliberately false statements made under

oath in formal filings, with the INS (*McBride*) and the SEC (*Hutchinson*), but with "significant factors in mitigation." *Hutchinson*, 534 A.2d at 924.

By: /JPM/
James P. Mercurio

Dated: July 27, 2010

Ms. Cintron joins in this separate statement.