

THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE**



FILED

Jun 18 2020 5:04pm

Board on Professional Responsibility

In the Matter of:

MARY CHRIS DOBBIE,

Respondent.

**A Member of the Bar of the
District of Columbia Court of Appeals :
(Bar Registration No. 975939) :**

REAGAN TAYLOR,

Respondent.

**An Attorney Licensed to Practice Law :
in the State of Tennessee :**

**Board Docket No. 19-BD-018
Disciplinary Docket No. 2014-D208**

Disciplinary Docket No. 2014-D209

**REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE**

I. INTRODUCTION

While the District of Columbia Rules of Professional Conduct (the “Rules”) govern all lawyers who are admitted to the District of Columbia Bar, there is a set of those that apply specially and only to prosecutors. Rule 3.8 contains seven ethical

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

obligations applicable to prosecutors in criminal cases. At issue in this case is Rule 3.8(e).¹ That Rule provides:

The prosecutor in a criminal case *shall not*:² . . . (e) [i]ntentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense . . . known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

(Emphasis added).

The events precipitating these charges – Respondents’ treatment of a report (the “Collins Report”) from the Department of Corrections (“DOC”) about a witness that the Government wanted to (and ultimately did) sponsor in a criminal case (the “*Vaughn* case”³) involving a melee in the DC jail – occurred in 2009 and 2010. A question they faced was whether the contents of the Collins Report were something that they were obligated to provide to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and Rule 3.8(e). With

¹ The Rule 3.8(e) violation is one of six Rules violations set out in Disciplinary Counsel’s Specification of Charges. While the Committee treats all six charges in this Report and Recommendation, Rule 3.8(e) best sets the backdrop for a description of both the events in this case and the other Rules implicated by Respondents’ conduct.

² We have highlighted the phrase “shall not” because Paragraph 1 of the Scope Section of the Rules provides as follows: “Some of the Rules are imperatives, cast in the terms ‘shall’ or ‘shall not.’ These define proper conduct for purposes of professional discipline.”

³ We refer to that underlying criminal case as the *Vaughn* case. That is also the shortened name we use to identify the subsequent decision by the District of Columbia Court of Appeals reversing the convictions of various of the multiple defendants in that case. It will be apparent from context when we are referring to the proceedings in the Superior Court and when we are referring to the Court of Appeals decision.

the benefit of perfect hindsight and changing law and practices by prosecutors since the 2009 case, the answer to the question is “yes.” We know that because in 2014 the District of Columbia Court of Appeals reversed the convictions of various defendants in the *Vaughn* case on the ground that the Collins Report contained *Brady* and *Giglio* material that the government should have produced to the defense in a timely and useful manner but did not. *See Vaughn v. United States*, 93 A.3d 1237 (D.C. 2014). And in 2015, the Court decided *In re Kline*, 113 A.3d 202 (D.C. 2015), holding that prosecutors violated Rule 3.8(e) even if the non-disclosed information, while “exculpatory,” was not “material” to the outcome of the criminal case.

But the Court’s decisions in *Vaughn* and *Kline* are not the end of the inquiry; rather, they are the beginning. Paragraph 3 of the Rules’ Scope Section provides:

The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

As we set out more fully in this Report and Recommendation, from the moment Respondents – who were relatively new to the practice of law and to the United States Attorney’s Office when these events arose – first learned about the Collins Report until the Court of Appeals issued the *Vaughn* decision, they, their immediate supervisors in the United States Attorney’s Office, the head of the United States Attorney’s Superior Court Criminal Division who chaired the Office’s committee with the responsibility for making these determinations, the United States Attorney’s Appellate Division and Superior Court Judge (now Chief Judge) Morin

grappled with the related questions of whether the Collins Report was *Brady* or *Giglio* material, what – if anything – should be disclosed or provided to defense counsel, how it should be disclosed or provided and how it could be used at trial. Until the Court of Appeals decision, no one (other than defense counsel) faulted Respondents’ approach to disclosure. Shortly after the Court of Appeals decision, Disciplinary Counsel opened an investigation into Respondents’ conduct and in early 2019 filed the Petition and Specification of Charges that called into question Respondents’ role in the failure to have produced the Collins Report. It is that role that forms the basis for the allegations in the Charges and that the Ad Hoc Hearing Committee (the “Hearing Committee” or “Committee”) explored over four days in late July 2019 and discusses in this Report and Recommendation. And, for the reasons set out in the body of this Report and Recommendation, the Hearing Committee, with the exception of the Public Member (who disagrees with the majority with respect to the Rule 8.4(c) allegation), concludes that Disciplinary Counsel has established by clear and convincing evidence that Respondents violated Rules 3.8(e), 3.4(d), 8.4(c) and 8.4(d) and recommends that they be suspended for 30 days.⁴

⁴ The Committee’s Conclusions regarding the specific charges refer throughout to “Respondents” collectively, notwithstanding that at some of the Superior Court hearings only one of the Respondents was present. Both signed the pleadings at issue in this case and participated in the pretrial motion hearings and at trial. Neither Disciplinary Counsel nor Respondents have suggested that one or the other of Respondents is more or less culpable than the other with respect to any of the Rules violations alleged in the Specification of Charges or that they should be sanctioned differently if the Board and Court ultimately agree with the Committee’s findings and conclusions, and the Committee is of the same mind.

II. PROCEDURAL HISTORY

Although the events that formed the basis for the charges occurred in 2009, the Office of Disciplinary Counsel (“ODC”) initiated this proceeding on February 21, 2019 by filing a twelve-page Petition and Specification of Charges (the “Petition”) (DX B)⁵. The Petition contains forty numbered paragraphs, several with bulleted sub-paragraphs, and culminates with a Specification of Charges asserting that Respondents violated six Rules of Professional Conduct – **Rule 3.3(a)(1)** (Knowingly mak[ing] a false statement of fact to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6); **Rule 3.3(a)(4)** (Offer[ing] evidence that the lawyers knew to be false, except as provided in paragraph (b)); **Rule 3.4(d)** (Fail[ing] to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party in pretrial procedure); **Rule 3.8(e)** (Set out in text above); **Rule 8.4(c)** (Engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation); **Rule 8.4(d)** (Engag[ing] in conduct that seriously interferes with the administration of justice). Respondents filed their Joint Answer on April 9, 2019 (DX D).

⁵ DX refers to ODC’s Exhibits, numbered DX A through D and thereafter 1 through 36. RX refers to Respondents’ Exhibits, numbered RX 1 through 41. The Hearing Committee also inserted into the record three exhibits during the hearing. Many of Respondents’ Exhibits are the same as ODC’s Exhibits. For ease of reference, we use DX numbers for those Exhibits offered by both ODC and Respondents. All Exhibits have been admitted into evidence, albeit that several ODC Exhibits were admitted subject to certain objections as to use. Those objections became moot once witnesses testified.

After substantial pre-hearing proceedings described in the Separate Statement of the Chair attached to this Report and Recommendation, the hearing commenced on July 22, 2019. Following opening statements, Disciplinary Counsel called four witnesses: Mr. Benjamin Collins (the DOC investigator who wrote the Collins Report), Respondents Taylor and Dobbie⁶ and Justin Okezie (one of the defense attorneys in the underlying *Vaughn* case). Respondents called five witnesses: the Respondents (in the manner previously described), Chrisellen Kolb (a deputy chief in the United States Attorney's Appellate Division responsible for the appellate brief in *Vaughn*), Jeffrey Ragsdale (one of Respondents' supervising Assistant United States Attorneys at the time and currently a lawyer in the Professional Responsibility Division of the United States Department of Justice) and Chief Judge Morin of the District of Columbia Superior Court (the trial judge in the underlying *Vaughn* case). Virtually all of the parties' exhibits were admitted without objection for all purposes.⁷

Witness testimony concluded on July 25.⁸ At the close of the evidentiary portion of the hearing, the Committee requested that the parties present closing arguments, which were held over a four-hour period on Friday, July 26. The closing

⁶ By agreement, when Taylor and Dobbie were called as witnesses in ODC's case, they were also treated as witnesses in their affirmative cases and their counsel examined them without regard to the scope of their direct examination.

⁷ The exceptions were DX 4, 5, 21, 22, 23, 25, 27, 28, 31, 32, 33, 34 and 36. As to those exhibits, Dobbie objected only as to certain uses; *e.g.*, she objected to hearsay statements contained in certain exhibits being used for the truth of the contents of those exhibits. As to these exhibits, this Report treats them as reflecting what was said in them, not for the truth of any of those statements.

⁸ No hearing was held on July 24, 2019.

arguments were interactive; the Committee Members posed questions to the Parties in an effort to understand fully each Party's view of the relationship between the facts (again, most of which were undisputed) and the applicable law.

The Committee met immediately following closing arguments and, after meeting, advised the parties that it was unable to make a preliminary, non-binding determination that Respondents either did or did not violate at least one Disciplinary Rule⁹ but invited the parties to offer any evidence on aggravation or mitigation they wanted to offer. ODC advised that it had nothing to offer on these subjects. While Respondents had listed witnesses on their witness lists that their counsel represented would either testify as character witnesses on behalf of Respondents or would offer evidence in mitigation,¹⁰ Respondents advised the Committee that they had decided that they would not call those witnesses but would submit mitigation evidence in writing along with their Post-Hearing Briefs. Hr'g Tr. 1216-18.

⁹ The Chair explained the Committee's view as follows:

For all the time that was put into producing a record, our general sense is that the underlying facts. . . are not in dispute, and that what's at stake, ultimately, is the intent of the Respondents as that term may be defined differently for various different rules, and on that, we really do want to parse the record, parse the arguments, and think about it for quite a bit, before we reach any conclusions, so I don't want the Respondents to take any comfort from -- and I don't want the Disciplinary Counsel to take any adverse inferences from the fact that we're not making that finding at the moment.

Hearing Transcript ("Hr'g Tr.") 1216-17.

¹⁰ In the Pre-Hearing Proceedings, the Chair had granted Dobbie's unopposed motion to present remote testimony from a witness whom she proffered would testify to, among other things, Respondent's good character. *See* Order, July 11, 2019, at 2, ¶1. She ultimately decided not to call the witness.

The Parties filed their Post-Hearing Briefs and their respective Proposed Findings of Fact over the period August 23 to September 30. Respondent Dobbie also submitted, as evidence in support of mitigation, letters from persons who know her well attesting to her good character and evidence on the effect this proceeding has had on her since the events under scrutiny. Respondent Taylor submitted a letter, filed under seal, containing confidential medical information.¹¹

III. FINDINGS OF FACT¹²

A. Introductory Facts.

1. This matter stems from a prosecution by the United States Attorney's Office for the District of Columbia ("USAO") following a December 27, 2007 melee at the D.C. Jail that caused injuries to several inmates and a guard (the "*Vaughn* case"). In the fall of 2008, the United States Attorney for the District of Columbia indicted 11 inmates of the D.C. Jail on assault charges arising from a melee that

¹¹ Each of the letters submitted in mitigation are hereby admitted into evidence and accepted for what they are worth. *See* Board Rule 11.3 ("Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies.").

¹² As is evident from the fact that Respondents admitted to most of the factual allegations in the Specification of Charges, most of the material facts are not in dispute; documents (emails and pleadings) reflect what the authors wrote and transcripts reflect what Respondents said in court. In the main, the disputes between ODC and Respondents are over what inferences can be drawn from these undisputed facts about what was in Respondents' heads, *i.e.*, their intent, when they took the positions they took and said or wrote the statements they made. In assessing the evidence on these questions, we are mindful that it is ODC's burden to prove by clear and convincing evidence that Respondents violated the disciplinary rules. *See* Board Rule 11.6. While this burden applies to the case as a whole, it informs us on how to weigh the evidence on those facts that are not subject to proof by objective means. Additionally, because most of the material facts are not in dispute, the Hearing Committee is not faced with an expansive set of credibility determinations to reach its conclusions. To the extent that witness credibility may be a determinate of any material fact, we explain whom we credit and why we credit them.

occurred at the jail in December 27, 2007. Carl S. Morton and Alonzo R. Vaughn were among the defendants charged in the indictment. DX 1 at 1; DX 2 at 1; *see also Vaughn, supra*, 93 A.3d at 1246; DX B, ¶ 3; DX D, ¶ 3. Assistant United States Attorney Michael Humphreys was assigned to the case and brought the indictment. DX B, ¶ 3; DX D, ¶ 3. Several defendants pleaded guilty before trial. The remainder of the indictments were either prosecuted or dismissed. Morton and Vaughn were among those defendants who were convicted. Nearly five years after trial, the D.C. Court of Appeals held that the USAO had “not fulfill[ed] its due process disclosure obligations” under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). *Vaughn, supra*, 93 A.3d at 1244.

2. Respondent Mary Chris Dobbie (Dobbie) is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on August 6, 2007 and assigned Bar number 975939. At all relevant times she was an Assistant United States Attorney for the District of Columbia. DX A; DX B, ¶ 1; DX D, ¶ 1.

3. Respondent Reagan Taylor (Taylor) is an attorney admitted by the Supreme Court of Tennessee in 2005 to practice law in the State of Tennessee. At all relevant times, she was an Assistant United States Attorney for the District of Columbia and practiced in the local courts of the District of Columbia pursuant to D.C.C.A. Rule 49(c)(1).¹³ DX B, ¶ 2; DX D, ¶ 2.

¹³ Taylor is subject to the jurisdiction of the Board and Court pursuant to D.C. Bar Rule XI Section 1(a), which provides as follows:

All members of the District of Columbia Bar, all persons appearing or participating pro hac vice in any proceeding in accordance with Rule 49(c)(1) of the General Rules of this Court, all persons licensed by this Court Special Legal Consultants

4. Taylor was assigned to assist Assistant United States Attorney Michael Humphreys in prosecuting the case in February 2009. She became the lead prosecutor when Humphreys left the USAO. DX B, ¶ 4; DX D, ¶ 4.

5. On May 26, 2009, shortly after returning from maternity leave, Dobbie was assigned to assist Taylor on the case. She also took over Humphreys' other cases in addition to retaining her own caseload. Hr'g Tr. 538-39 (Dobbie).

6. A key issue in the *Vaughn* case was the assailants' identities. The December 27, 2007 melee was captured on videos, but all the videos were not of high quality. To identify the defendants, the prosecution intended to rely on the identification testimony of corrections officers who were familiar with the inmates and could identify them from the videos. The lead identification witness was Angelo Childs. DX B, ¶ 5; DX D, ¶ 5; DX 8; Hr'g Tr. 43-45, 138 (Collins); Hr'g Tr. 432 (Dobbie). Not all of the corrections officers who were present during the melee could identify the participants, so the Department of Corrections (DOC) Office of Internal Affairs ("OIA") Investigator Benjamin Collins ("Collins") set out to find corrections officers who were not witnesses to the melee but who could identify the inmates in the video footage. One such officer was Angelo Childs ("Childs"). Hr'g Tr. 43-45 (Collins); *Vaughn, supra*, 93 A.3d at 1245-46. Childs reviewed the video the day after the incident. RX 21 at 00184.

under Rule 46(c)(4), all new and visiting clinical professors providing services pursuant to Rule 48(c)(4), and all persons who have been suspended or disbarred by this Court are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility (hereinafter referred to as "the Board").

B. Department of Corrections Officer Childs' April 7, 2009 Use-of-Force Incident.¹⁴

7. Approximately six months before trial, on April 7, 2009, corrections officers at the D.C. jail conducted a search for contraband in housing units at the jail. Part of the search involved the use of a dog trained to detect the presence of certain drugs. Officer Childs was one of the officers conducting this search. DX 4 at 2; Hr'g Tr. 46-47 (Collins). During the search, one inmate – Ernest Heath (“Heath”) – attempted to avoid a drug-sniffing dog when the dog and his handler approached him. Childs sprayed the inmate with mace or some other chemical agent. At the time Childs sprayed him, Heath's wrists were restrained behind his back. DX 4 at 3-4.

8. Three other officers witnessed Childs' use of a chemical agent: Sergeant Thomas, Lieutenant McKnight and Childs' supervisor, Major Talley. Childs and the three officers each completed Incident Reports describing what happened. Childs also prepared a Disciplinary Report charging Heath with Assault Without Serious Injury and Lack of Cooperation. DX 4 at 5-7.

¹⁴ The Hearing Committee's Findings of Fact regarding this April 7, 2009 incident are based entirely on the Collins Report prepared by Officer Collins – by coincidence the same officer who investigated the Vaughn incident (Hr'g Tr. 140-41) – after the event (DX 4). While Collins testified at the disciplinary hearing that he had reviewed the videotape of the incident and that the description of the April 7 incident in his Report was based on his review of the videotape of the incident (Hr'g Tr. 46-49), neither ODC nor Respondents called any witnesses at the disciplinary hearing who were witnesses to the April 7 incident as it occurred nor did they offer the videotape of the incident as an exhibit. Thus, the Hearing Committee's Findings of Fact with regard to the incident are not findings regarding the incident itself but are only findings of what the Collins Report said had happened. The Hearing Committee has no view on whether the Collins Report is, in fact, an accurate report of what happened on April 7. To the extent the Committee's findings summarize or characterize the Collins Report, they are not to be understood to be findings regarding the incident itself nor are they intended to be a substitute for the actual text of the Collins Report. Given the centrality of the Collins Report to this proceeding, we have appended it (but without its appendices) to this Report.

9. The textual portion of Childs' Incident Report consisted of four paragraphs. DX 4 at 14. The first paragraph contained the following sentence: "[The inmate] started kicking at the dog. Because [the inmate's] actions interfered with the normal operations of the facility, I sprayed one burst of chemical agent. I then instructed [the inmate] to seize [*sic*] his disruptive behavior." The next paragraph began: "[The inmate] was placed in restraints, escorted to Male Receiving and Discharge, given a shower, change of underwear and bed linen." DX 4 at 14-16. The natural reading of those sentences is that Heath was unrestrained when he was sprayed.

10. Like Childs, Thomas described the inmate as "kicking at the dog." DX 4 at 24. Talley also stated the inmate was "kicking towards the Dog." She further noted that the inmate "began to fight and tried to snatch away from Lieutenant Childs," and after some dialogue, "continue[d] to fight against Lieutenant [Childs]." DX 4 at 19.

11. Contrary to Childs' Report, Talley's and McKnight's incident reports made clear that the inmate was restrained at the time Childs maced him. DX 4 at 19, 22.

12. On April 9, 2009, Talley issued Childs a "Letter of Direction," charging him with neglect of duty and incompetence for violating the DOC's policy regarding "Use of Force and Application of Restraints." The Letter explained that, because the inmate was restrained at the time, he was not a threat and there was no reason to spray him. The letter made no mention of the Incident Report or the Disciplinary

Report that Officer Childs had made. DX 4 at 8, 38-40. This letter was a “reprimand.” DX 4 at 38-39.

C. Department of Corrections Investigator Collins’ Investigation of The April 9, 2009 Incident and His Report.

13. On April 11, 2009, in response to “an allegation of the use of excessive force” by Childs, the DOC OIA opened an investigation into the incident. DX 36 ¶ 4. Collins was the assigned investigator. He issued his final report on June 27, 2009. DX 4 at 1.

14. The Collins Report is ten pages long and references the Incident Reports from Childs and the other officers, the Disciplinary Report Childs filed against Inmate Heath, the Letter of Direction from Talley, a standard DOC notification, and copies of DOC policies. DX 4.

15. The substantive sections of the Report are titled “Background,” “Investigation,” and “Findings.” DX 4 at 2-9. Collins testified that the Investigation section “represents the methods by which our office took to investigate the incident itself,” whereas the “Findings” section contains “the findings of the investigation . . . the findings that the office presented to the HR.” Hr’g Tr. 51-52 (Collins). He further testified that “[m]y report stands on the findings.” Hr’g Tr. 102 (Collins).

16. The Background section describes the general procedure for the search. DX 4 at 2. It also provides a summary of the events that occurred between the inmate and the officers. DX 4 at 2-3. The Investigation section contains a more detailed description of the events; excerpts or copies of the officers’ incident reports; statements from the officers’ interviews with OIA; and Collins’ assessment of the

video footage. DX 4 at 3-8. It also mentions that Talley did not charge Childs with “submitting a false and or misleading Incident Report” in her “Letter of Direction.” DX 4 at 8.

As to Childs, the Investigation section notes:

- Upon review of the facts and circumstances of this incident, it is evident that [the inmate] was in restraints and not a threat to ‘normal operations’ when he was sprayed with chemical agent by Lieutenant Childs.
- During his interview with OIA Investigators, Lieutenant Childs stated that the Incident Report he prepared regarding this matter was incorrect and written in error.
- Video footage of the incident does not support the allegation that [the inmate] assaulted any Correctional Officer or canine.

DX 4 at 6.

17. The Collins Report lists four total findings, two regarding Childs and two regarding other officers involved in the incident. The findings about Childs are: (1) his “use of chemical agent on a restrained inmate who posed no immediate danger to himself or others was a direct violation of the use of force continuum”; and (2) he “submitted a false and or misleading Incident Report of the facts in stating that the inmate was placed in restraints after being sprayed with chemical agent.” DX 4 at 9. The Collins Report also recited that Officer Childs had filed a false Disciplinary Report against Heath. Specifically, the Collins Report said: “Lieutenant Childs also composed and submitted a Disciplinary Report charging inmate Heath with Assault without Serious Injury and Lack of Cooperation. Video footage of the

incident does not support the allegation that inmate Heath assaulted any Correctional Officer or canine.” DX 4 at 6. That recitation was contained in the Investigation section of the Collins Report but not in the Findings section.

18. The findings about the other officers are: (1) Sergeant Thomas “submitted a false and or misleading Incident Report of the facts in stating that [the inmate] attempted to kick his canine”; and (2) Major Talley “submitted a false and or misleading Incident Report of the facts in stating that [the inmate] began to ‘fight’ Lieutenant Childs.” DX 4 at 9.

19. The Collins Report does not impose or recommend discipline. Under DOC procedure, OIA presented the results of its investigations to the Office of the Director, which decided whether to impose discipline. DX 36, ¶¶ 5-6; Hr’g Tr. 48 (Collins).

20. Collins believed that his report could result in the Government not calling Officer Childs as a witness in the trial involving the December 27, 2007 incident. He informed the corrections officer who had been injured in the December 27, 2007 assault that the United States might be unable to prosecute the case. Hr’g Tr. 62-65 (Collins).

21. Although Collins wrote the final report on the April 7 incident, he was not the decision-maker with respect to any discipline that might be imposed on Officer Childs for his misconduct. DX 36, ¶ 6; Hr’g Tr. 47-48 (Collins). Several months after he submitted his final report, Collins learned that Officer Childs had

been demoted from the rank of lieutenant to sergeant. DX 36, ¶¶ 9-10; Hr’g Tr. 67, 72 (Collins).

D. The United States Attorney’s Office’s Process Regarding Childs’ Credibility Issue.

22. In August 2009, Collins informed Taylor that “there was an issue” with Childs. Hr’g Tr. 180-81 (Taylor). Taylor requested more information from Collins several times. Hr’g Tr. 181 (Taylor).

23. On September 15, Collins emailed his Report, without the appendices or the videotape, to Taylor, who forwarded it to Dobbie. DX 5; DX 6; Hr’g Tr. 181-82 (Taylor). OIA’s practice was to provide appendices only upon request. Prosecutors rarely requested the appendices to OIA reports. Hr’g Tr. 65, 110-11 (Collins). He also informed her on that date that Officer Childs had been demoted. Hr’g Tr. 67 (Collins); DX 36, ¶ 10. The trial was scheduled to begin on November 2, 2009. Hr’g Tr. 194 (Taylor).

24. Taylor read the Collins Report when she received it. Hr’g Tr. 184-86 (Taylor). And Dobbie did so as soon as another trial she was working on finished. Hr’g Tr. 544-45 (Dobbie). Recognizing that the Collins Report “raised a question” about Childs’ credibility and whether the USAO could call him as a witness, on or about September 29, 2009, Dobbie alerted her supervisors, Alan Boyd and Jeffrey Ragsdale, Chief of the Felony Major Crimes Section, by email that their “lead identification witness” was involved in macing an inmate while in restraints, that the statement was “[c]ontrary to the video footage of the incident,” and that the witness had “submitted a false and/or misleading Incident Report of the facts.” The email

did not mention that the Collins Report also recited that Officer Childs had also filed a Disciplinary Report falsely accusing the inmate of assault and lack of cooperation, a fact recited in the Investigation section of the Report but not included in the Findings section of the Report. DX 8; Hr’g Tr. 186-88 (Taylor); *see also* DX 4. The four AUSAs (Dobbie, Taylor, Boyd and Ragsdale) met to discuss how to proceed. Hr’g Tr. 313 (Taylor), 545 (Dobbie).

25. The United States Attorney’s Office has a committee of senior prosecutors, called the *Lewis* committee, that determines whether the Office can sponsor the testimony of law enforcement officers with credibility issues and, if the officer could be sponsored, whether and how to disclose the underlying information related to credibility. Hr’g Tr. 759-60 (Kolb), 852 (Ragsdale). If an officer was not sponsored, disclosure of this information was unnecessary. Hr’g Tr. 499 (Dobbie); *see also* Hr’g Tr. 186 (Taylor), 759-60 (Kolb).

26. Childs presented “a little bit of an outlier in that traditionally the Lewis [C]ommittee did not deal with Department of Correction employees.” Hr’g Tr. 853 (Ragsdale). Nevertheless, Ragsdale decided to refer the information about Childs to the Chair of the *Lewis* Committee, headed by John Roth,¹⁵ the Executive Assistant United States Attorney, for a determination. Hr’g Tr. 545, 551 (Dobbie), 853-54 (Ragsdale). Ragsdale asked Dobbie to email him a “quick synopsis” of the issue that he could forward to Roth. Hr’g Tr. 545 (Dobbie), 854 (Ragsdale).

¹⁵ Roth did not testify at trial.

27. By email dated September 29, 2009, Ragsdale referred Officer Childs' "veracity issue" to Roth. Roth asked for a copy of the Collins Report. Dobbie forwarded it to him without attachments or the videos that it referred to, which she had not obtained. DX 9; DX 10; Hr'g Tr. 433-34 (Dobbie). Her email said: "This is all that I have from DOC on the topic. Let me know if you need anything else." Roth replied: "This is great. Thanks." DX 10. He did not request the appendices or any additional information. DX 10.

28. On September 30, 2009, Taylor, following an office procedure, asked Officer Childs about his awareness of potential impeachment information, the so-called "Oral Request for *Giglio* Information." The interview asks three questions to gauge an officer's knowledge of any impeachment issues he might have. DX 11. The questions were: are there any findings of misconduct that reflects upon the truthfulness or possible bias of the officer, including a finding of lack of candor during an administrative inquiry; are there any past or pending criminal charges brought against the officer or any pending investigations by the USAO; and are there any credible allegations of misconduct that reflect upon the truthfulness or possible bias of the officer that are the subject of a pending investigation? Officer Childs responded, "No" to all three questions. DX 11; Hr'g Tr. 195-97 (Taylor). His answers were recorded on a form that both he and Taylor signed. DX 11. Although the September 30, 2009 *Giglio* interview occurred one day after the initial September 29 query to the *Lewis* Committee, the interview predated a follow up request to the *Lewis* Committee two weeks later (on October 14.) DX 12; *see* Finding of Fact

(“FF”) 30, *infra*. But there is no evidence on whether the form, or Childs’ responses, were provided to the *Lewis* Committee.

29. Childs also told Taylor that “he took a voluntary demotion because of his excessive force and because he made errors in cutting and pasting in a report.” Hr’g Tr. 210 (Taylor); *see also* Hr’g Tr. 58-59 (Collins) (testifying that Childs told him he made a “cut and paste mistake”), 557 (Dobbie). Taylor informed Dobbie of the demotion. Hr’g Tr. 511 (Dobbie). Taylor did not raise a question about, or challenge, Childs’ responses in the *Giglio* interview concerning his potential misconduct reflecting truthfulness, possible bias or lack of candor. DX 11. Taylor testified that she perceived that Childs believed his answer to be correct since he [Childs] was unaware of the Collins report, which found that he [Childs] had filed false reports. Hr’g Tr. 199-201, 203 (Taylor). Taylor further testified, “we also weren’t supposed to inform the witness that there is a credibility issue or what that was, if we knew about it, if we knew that there was some pending investigation.” Hr’g Tr. 201-03 (Taylor).

30. Respondents told Ragsdale about the demotion and repeatedly “bugged” him for a decision from the *Lewis* Committee. Hr’g Tr. 553-54, 556-57 (Dobbie), 859 (Ragsdale). By email dated October 14, 2009, with the trial a little more than two weeks away, Dobbie, at Ragsdale’s request, followed up with Roth. The *Lewis* committee had not yet dealt with the issue of Officer Childs’ testimony. Ragsdale himself then wrote to Roth that the DOC “concluded that he [Childs] had lied and demoted him. . . . The *Lewis* Committee question is whether we will sponsor

his testimony or whether we disclose and litigate . . . the appropriate questions on cross examination.” DX 13.

E. The Decision to Sponsor Officer Childs and the Form of Disclosure of the Contents of Investigator Collins’ Report.

31. On October 21, Roth responded via email saying:

Based on an informal poll of some members of the Lewis committee, we think we can sponsor this witness and simply disclose the report and litigate its admissibility.

My personal opinion is that the officer’s written report is simply unclear, and the officer attempted to clear it up in his interview. Not sure that the DOC conclusion that he lied is supported by the record, but I will leave it to you folks to hash that out. Good luck with it.

Sorry for the delay in getting back to you.

DX 13.

32. Roth did not, however, recommend disclosing only to the judge under seal. Hr’g Tr. 891 (Ragsdale) (“He did not make that statement. He did not, no.”).

33. Roth did not have the “record” that he suggested did not support Collins’ conclusion; he only had Collins’ ten-page report. DX 10. He had not reviewed the actual reports Officer Childs had submitted. Even though Collins had attached them to his report, he had not forwarded them, and neither Roth, Dobbie nor Taylor asked for a copy. Nor did they ask for copies of the videos referred to in the report. Hr’g Tr. 182-83 (Taylor), 886-90 (Ragsdale). Nor did anyone express any doubts to Collins about the accuracy of his report or ask him any questions about it. Hr’g Tr. 70-72, 84-86 (Collins).

34. After Respondents received Roth’s email, they consulted with their supervisors. Hr’g Tr. 559-61 (Dobbie).

35. Ragsdale recommended that Respondents file the Collins Report under seal and summarize the impeaching information to the defense in a Motion *in Limine*. Hr’g Tr. 227-28, 318-19 (Taylor), 561-62 (Dobbie).¹⁶ This “disclose and litigate” approach—disclosing the source material to the court *ex parte* and summarizing it to the defense—was an acceptable practice used in various circumstances by lawyers in the USAO at that time. Hr’g Tr. 569-70 (Dobbie), 760, 763-64 (Kolb), 860-61, 891-92 (Ragsdale). The USAO often provided the court with the source documents to determine whether a summary was sufficient or additional information should be disclosed. Hr’g Tr. 234 (Taylor), 561-62, 571-73 (Dobbie), 763-65 (Kolb), 964-65 (Morin).

36. Ragsdale provided Dobbie a sample motion *in Limine* from another case in which the prosecution had disclosed a credibility issue concerning a law enforcement witness and had litigated the scope of the cross-examination of that witness, as Roth had instructed them to do in this case. That sample motion argued that the findings about the subject officer’s credibility were unclear, stating that “[t]he government is not conceding that [the judge] made an adverse credibility finding with respect to [the officer].” RX 13 at 00126 (emphasis in original). Dobbie

¹⁶ As explained in the Conclusions of Law, *infra* at pages 43-52, two Members of the Committee credit Mr. Ragsdale’s testimony on this point while one does not. But as further explained, this difference between the Members does not affect their respective views of the overarching conclusions based on the record as a whole and on the operative legal principles.

understood that Ragsdale gave her this motion because the arguments in the sample motion were similar to those about Childs as raised by the *Lewis* Committee (Roth). Hr’g Tr. 479-81 (Dobbie). The disclosure in the sample motion had been made to defense counsel; it was not an *ex parte* disclosure to the trial judge. RX 13. Dobbie and Taylor made an *ex parte* disclosure of the Collins Report only to the presiding judge, Judge Morin. In her prior *Lewis* Committee cases, none of which were as complex as this one, Dobbie had produced whatever materials her supervisor told her to produce or did not call the witness. Dobbie had never before employed this procedure – filing under seal – after a *Lewis* committee determination that she disclose *Brady* material and litigate its admissibility. Hr’g Tr. 623-24 (Dobbie). By disclosing the Collins report *ex parte*, the *Brady* disclosure to defense counsel would be contained in the summary of the report in the Motion *in Limine*. Hr’g Tr. 247-48 (Taylor), 458-59 (Dobbie), 935 (Ragsdale).

37. After a more “detailed reading” of the Collins Report in anticipation of disclosure, Dobbie concluded that Roth’s view that Childs’ incident report was “simply unclear” was “reasonable.” DX 13; Hr’g Tr. 475 (Dobbie). She then drafted a Motion *in Limine* following the sample motion Ragsdale gave her, reading the cited cases, doing her own research, and applying the arguments to the Collins Report and Childs. She “start[ed] with the findings” that were set out in the Findings section of the Collins Report and worked through the rest of the Report to find “the facts that pertain[ed] to [those] particular findings.” While Dobbie read the entire Collins Report before drafting her Motion, it is apparent from her testimony that her

focus was on the Report's "Finding" that Officer Childs had "submitted a false and or misleading Incident Report of the facts in stating that the inmate was placed in restraints after being sprayed with chemical agent." That was the Finding that was the subject of the email from Roth in which he opined that Childs' recitation was "simply unclear," an opinion Dobbie concluded was "reasonable." Hr'g Tr. 460-63, 473, 481, 559-60, 562-65 (Dobbie). She also drafted an *ex parte* Motion to seal the Collins Report. Hr'g Tr. 450 (Dobbie).

38. Dobbie and Taylor "intentionally made the determination to proceed that way [producing a summary of the report] instead of giving [the defense] the report." Hr'g Tr. 357 (Taylor); *see also* Hr'g Tr. 454 (Dobbie). They did so having been instructed to do so by their supervisor, Jeffrey Ragsdale.¹⁷ *See* FF 35, *supra*.

39. The Motion *in Limine* disclosed the two findings against Childs, as well as "abbreviated facts" from the Collins Report that Respondents stated in their Motion to File Attachment Under Seal were "essential" to those findings. DX 17 at 2; DX 18 at 1. According to Dobbie, this was a more fulsome summary than the typical one-sentence disclosure. Hr'g Tr. 563-64 (Dobbie). Among other things, Dobbie disclosed the following facts: OIA reviewed the officers' paperwork and "videotape footage of the incident," the inmate attempted to walk away from Childs during the canine search, the inmate "stomped his foot in the direction of the canine,"

¹⁷ As noted previously in n.16, the question whether Respondents were instructed to proceed in that manner by their supervisor is a question on which the Members of the Hearing Committee are not in agreement. Our respective views on this matter are addressed *infra* at pages 43-52.

and the inmate's "wrists were restrained" before Childs maced him. DX 17 at 2-3.

The Motion also stated:

The investigation resulted in two findings related to Officer Childs: (1) Officer Childs' use of force violated DOC policy and (2) Officer Childs submitted a false and or misleading statement in reciting the facts. With respect to the first finding, DOC Internal Affairs noted that the inmate was restrained and therefore posed no immediate danger to himself or others. As to the second finding, DOC Internal Affairs found that Officer Childs' statement that [the inmate] was placed in handcuffs after being sprayed with chemical agent was false or misleading.

DX 17 at 3-4.

40. The Motion then quoted the portion of Childs' incident report at issue and noted that the Collins Report stated that Childs' "narrative 'suggests' that . . . [the inmate] was not restrained." DX 17 at 4.

41. While Ragsdale provided Respondents with a sample Motion *in Limine*, no supervisor assisted in drafting or reviewed the content of the Motion *in Limine* or the *ex parte* Motion to File Under Seal that Dobbie wrote and filed on behalf of herself and Taylor. Hr'g Tr. 251 (Taylor), 450 (Dobbie), 875-76 (Ragsdale). As referenced previously, the *ex parte* Motion filed with the Court asserted that, "The essential facts are related in the Background section of the Government's Motion *in Limine*. DX 18, ¶ 2; Hr'g Tr. 229 (Taylor), 452-53 (Dobbie). The Motion to File under Seal and the Motion *in Limine* were filed on October 27, 2009,¹⁸ five days before the trial was scheduled to begin, November 2, 2009. DX 2 at 5; DX 17;

¹⁸ While the Docket Sheet (DX 2 at 5) reflects that the Motion *in Limine* was filed on October 27 and a "Sealed Document" was filed on October 29, the cover sheet in the fax of the *Ex Parte* Motion (DX 19) reflects that it was faxed to Judge Morin's chambers on October 27.

DX 18; DX 19. The disclosure concerning Officer Childs' demotion was not included and was not made until the first day of trial. Respondents did not disclose the Collins Report while the *Lewis* Committee was deliberating because they were waiting for the Committee's decision and advice on whether the Government would sponsor Officer Childs and, if so, what to disclose. Hr'g Tr. 355-57 (Taylor).

42. Respondents did not review the videotape of the incident involving Officer Childs, which they were aware of from, but which was not included with, the Collins Report when Collins transmitted it to them. While the Hearing Committee likewise has not viewed the videotape, Officer Collins testified that it depicted a scene quite different than the one Officer Childs described in his Incident Report and his Disciplinary Report. According to Officer Collins, had they viewed the videotape, they would have seen that it was not correct – as Officer Childs' report recited – that the inmate who was maced had been acting up, and they would have seen that the inmate was in fact restrained when Childs maced him. Nevertheless, Respondents recited in their Motion that “the government is not conceding that Officer Childs in fact made a false and/or misleading statement.” DX 17 at 2. They further wrote: “The conclusion that Officer Childs made a false or misleading statement is at odds with the body of the report and does not appear evident from the text of Officer Childs' [report].” DX 17 at 8. While the record is not as fulsome on this point as it might have been, it appears that Respondents were driven to that conclusion, at least in part, by the sentiments Roth expressed when he conveyed the *Lewis* Committee's determination that the Government could sponsor Officer

Childs. DX 13 (“My [Roth’s] personal opinion is that the officer’s written report is simply unclear, and the officer attempted to clear it up in his interview. Not sure that the DOC conclusion that he lied is supported by the record.”). Respondents made those statements without asking Officer Collins about the basis for his finding. Had they done so, he would have explained the basis for his statements, which would have led Respondents directly to the videotape, and which, at least based upon Officer Collins’ testimony (which was not refuted on this point) would have shown the Respondents that Officer Childs’ characterization was not true, that Officer Collins’ finding was supported by the video evidence, and that there was no such ambiguity.

43. While the Respondents did cite the Collins Report conclusion about Office Childs’ false Incident Report set out in his Report’s Findings, they did not go beyond Collins’ Findings to include any reference to Collins’ statement in the Investigation section of his Report that Childs had filed a false Disciplinary Report alleging that Heath had engaged in an assault on a correctional officer and had not cooperated. DX 34 at 8; Hr’g Tr. 56-58 (Collins), 252-54 (Taylor), 482-84 (Dobbie), 720-22 (Okezie).

44. Respondents’ Motion did not recite that Officer Childs had been demoted, a fact that was not in the Collins Report but that had been communicated to them verbally by Collins after they had received his report. DX 34 at 8; Hr’g Tr. 67 (Collins), 277 (Taylor), 491-92 (Dobbie) (“And you will agree with me that that was an essential fact that needed to be disclosed to the defense? A. Absolutely.”).

As set out above in FF 41, and below in FF 49 and 55, that fact was not disclosed to the defense until the day of trial in response to a question by the Court.

45. Respondents did not mention that two other corrections officers had also filed false reports in what Collins concluded was a coordinated effort to falsely corroborate Officer Childs' false allegation of inmate assault. *Compare* DX 4 at 6-8, *and* Hr'g Tr. 154-55 (Collins), *with* DX 17 at 4, *and* Hr'g Tr. 486-89 (Dobbie).

46. Respondent's Motion *in Limine* recites that the reason for filing the Collins Report *ex parte* was that it referenced "sensitive employment information and also refer[red] to inmates and other DOC employees not relevant to this case." DX 17 at 2, n.2. During the disciplinary hearing, Respondents testified that the need to file the report *ex parte* was for "security concerns." When asked to reconcile these two different articulations, Dobbie stated, "[sensitive employment information is] probably not the best phrase I could have used. I acknowledged that fact. I could have been more descriptive in the way to articulate the concerns that we had." Hr'g Tr. 446-50 (Dobbie). Dobbie testified at the disciplinary hearing that if the Report was disclosed and subsequently circulated in the jail, the identification of various correctional officers who had been "charged" with making false statements could create security concerns at the jail. Inmates might seek to use this information for their own interests. Dobbie further testified that the concern was that inmates would use the document as leverage over guards who had already been in trouble and could potentially be in trouble again and targets of the inmates. She further explained that an inmate might say to an officer: "I will accuse you of,' you know, 'assaulting me.'

You know, I know you've been in trouble once, kind of thing.” Hr’g Tr. 447-48 (Dobbie). In her testimony, Taylor acknowledged that a protective order could have reduced those concerns. Hr’g Tr. 224 (Taylor).

47. Respondents signed and filed both Motions with the Court on October 27; they also served the Motion *in Limine* on defense counsel. DX 17; DX 18. When Dobbie faxed the Motions to Judge Morin’s chambers, which was common practice at the time, she inadvertently transmitted only the first five pages of the Collins Report. DX 19; DX 33 at 6; Hr’g Tr. 576-78 (Dobbie). This omission was not discovered until after trial. DX 29; Hr’g Tr. 605 (Dobbie).

F. Officer Childs’ Testimony and the Legal Rulings at Trial.

48. The trial was scheduled to begin on November 2. Three days prior to the trial (October 29), one of the defense counsel had made a request to Respondents for a copy of the Collins Report and renewed that request in court on November 2. DX 20; DX 21 at 12-23. That prompted a discussion about Respondents’ Motion *in Limine*. Defense counsel advised the Court that the Collins Report still had not been provided to him and that he wanted the Report and wanted to delay the trial to give him time to investigate the facts after receiving the Report. The Court then explored with the parties the timing regarding the Government’s knowledge about the DOC OIA investigation, its receipt of the Collins Report and its notice to the defense about the Report.

49. After defense counsel made his arguments about why he needed the full Report, the discussion turned to the question about how the information in the

Report—or the Report itself—could be used at trial. During that discussion, in connection with an assessment about whether anything about the investigation could be used to show bias on the part of Officer Childs, the Court asked Respondents whether Officer Childs was “put on any probationary status” as a result of the events described in the Collins Report. DX 21 at 18. In response, Dobbie disclosed for the first time, Hr’g Tr. 494, 626 (Dobbie) (“You never disclosed that until the court directly asked about it, right? A. Yes”), that, “[h]e was demoted. . . . I expect him to say that he was demoted related to this incident, but not as to the particulars”—noting that Childs had not seen the Collins Report and was not aware of its contents. DX 21 at 18-19. The Court then asked why the government had reservations about “turning [the Report] over with a restrictive [*sic*] order.” DX 21 at 18, 22. Dobbie answered, saying that “the government doesn’t believe that there is anything in the report that wasn’t disclosed in the [M]otion [*in Limine*] that would be necessary for the defense counselors for the purposes that the Court has allowed the questioning.” DX 21 at 23. She continued saying that the Government did not believe that even production with redaction would be sufficient because there were “employment issues here.” DX 21 at 23 (Dobbie: “[T]he government also—even—I don’t believe redaction is sufficient in this particular case, because there are employment issues here, Your Honor, and the government is not—doesn’t believe that putting these other DOC employees . . .”¹⁹).

¹⁹ It appears from context that the Court cut off Dobbie before she could conclude with the words “at risk.”

50. Dobbie reiterated her request that the Court review whether “there’s anything in the final report that should additionally be disclosed to defense counsel, if there’s anything that I didn’t include that would be useful.” DX 21 at 22.

51. Judge Morin ultimately ruled that the defense could “question the witness about the alleged [] filing of a misleading report.” He “reserve[d] on the question of extrinsic evidence” (*i.e.*, whether counsel could use the undisclosed Collins Report to impeach Officer Childs) but ruled that the Collins Report did not go to bias. DX 21 at 17-18, 20-22.

52. Defense counsel also asked for “additional time” and requested that the government be sanctioned for the late disclosure. Judge Morin denied both requests saying: “Well, we do have plenty of time before this witness is called.” DX 21 at 14.

53. Childs testified two days later. DX 22. On cross-examination, defense counsel began an effort to impeach him through questioning about the April 2009 incident. Childs denied “that in April 2009 [he] submitted a false report to the Department of Corrections while [he was] working at the D.C. Jail.” DX 22 at 6. Dobbie objected to a follow-up question about events that occurred that day. DX 22 at 6; Hr’g Tr. 510 (Dobbie).

54. At the bench conference regarding the objection, defense counsel renewed the request for the Collins Report. Taylor opposed, and proffered that the witness would continue to deny that he had given a false report, although she knew (or should have known) that, even accepting that there was legitimate doubt about the Collins Report Finding regarding the Incident Report, the Report stated that

Childs had made at least one false report about events that day (the Disciplinary Report) as to which no one had raised any ambiguities. DX 22 at 7-8; Hr'g Tr. 261-63 (Taylor). Judge Morin allowed one follow-up question, and before the jury Officer Childs denied that he had been "disciplined by the Department of Corrections for filing a false report." DX 22 at 10-11. Judge Morin directed defense counsel to move on to another subject. DX 22 at 11. Respondents did not seek to "correct" his testimony about Childs demotion because they believed that Childs believed that his testimony was correct and because Respondents did not know the actual reason for the demotion. Hr'g Tr. 264-67, 270-72 (Taylor).

55. Later that day, following Childs' testimony to the jury, Judge Morin examined Officer Childs outside the presence of the jury on whether he had been disciplined as a result of the April 2009 incident. DX 22 at 13-14. Officer Childs said he had not formally been charged but that he had accepted a "voluntary demotion," even though he did not want to. DX 22 at 13-14. Judge Morin asked if he "underst[oo]d it to be the results of any disciplinary action." Childs replied: "No. No one has told me the reason for the demotion." Judge Morin asked whether it was "in response to an investigation about whether or not [he] filed a false report." Childs replied: "I took it as if they . . . felt that I [maced] the inmate while he was in handcuffs." Judge Morin asked whether he discussed the "accuracy of any report" with DOC. Childs replied: "Yes, sir. They asked me about it, and I said that that was an error. I do a lot of cutting and pasting." DX 22 at 13-14. Judge Morin concluded that there had not been any discipline imposed but there had been an "administrative"

or “informal” resolution. Hr’g Tr. 457 (Dobbie), 958-59 (Morin); DX 22 at 16, 19. Neither Dobbie nor Taylor explained to the Court whether Officer Childs’ demotion was the product of an “administrative” or “informal” resolution or whether it was the product of a formal disciplinary proceeding, and there is no evidence in this record on whether they knew the answer to that question at the time of the hearing. Judge Morin allowed no further questioning on this issue. DX 22 at 16-19.

56. During the discussion on November 4, 2009, Judge Morin asked if he had been given the entire report, noting that his copy stopped at page five. DX 22 at 15. The report “seemed a little unusual to [Judge Morin], because it sort of, there was no conclusion to the report.” Hr’g Tr. 958 (Morin). As Dobbie returned to the prosecution’s table, she affirmed that “[t]here is no discipline listed in the report itself.” DX 22 at 15. Dobbie consulted her copy of the pleading she had filed with Judge Morin and confirmed that the report was only five pages. DX 22 at 15-16. Dobbie did not notice the absence of a conclusion that made Judge Morin suspicious, including the fact that the portion of the report entitled “FINDINGS” was missing. Taylor had her entire report in the courtroom but did not consult it. Hr’g Tr. 278-80 (Taylor). According to Taylor, she “didn’t catch that he [Judge Morin] was saying he only had five pages.” Hr’g Tr. 280 (Taylor).

57. On November 10, the jury acquitted one defendant, and convicted Morton, Vaughn and Johnson on various charges arising from the melee. DX 34 at 7-9; Hr’g Tr. 614 (Dobbie), 665 (Okezie).

G. Post-Trial Proceedings.

58. Morton and Vaughn challenged the verdict in post-trial motions filed prior to their sentencing. DX 23 at 12-17; DX 34 at 15. At a February 3, 2010 hearing, Judge Morin suggested disclosing the full Collins Report to the defense. Dobbie contended that the report should remain under seal. Hr'g Tr. 527-28 (Dobbie). Judge Morin ordered that the report be released with a protective order that the contents not be disclosed to any third party without leave of court. DX 25 at 5-7. Dobbie emailed the Collins Report to defense counsel later that day. DX 26.

59. Upon receipt of the ten-page report, on April 22, 2010, Morton filed a supplemental motion seeking a judgment of acquittal or a new trial. DX 27. The motion recited that the government still had not provided the complete Collins Report (and at the hearing on the motion on April 23 clarified that what she meant was that she had not received the Report's appendices, DX 28 at 2-3). DX 27 at 3, n.2. The Motion also pointed out that the summary of the report in the Motion *in Limine* did not disclose what counsel characterized as the apparent collusion of three correctional officers, including Officer Childs, to cover up the April 7, 2009 incident and that in addition to filing a false incident report, Officer Childs had also filed a false Disciplinary Report charging the inmate with assault and lack of cooperation. DX 27 at 8, n.6.

60. At the April 23 hearing on the Motion, Taylor advised the Court that at the time of the request she had provided all that she had. She further advised the Court that it was only earlier in the week of the hearing that defense counsel told her she was requesting the Report's appendices and had she known earlier that counsel

was seeking those appendices, “we probably could have done some more investigation to see what more was available.” DX 28 at 2-3. Also, at that hearing, Judge Morin learned that the report was lengthier than the report he remembered reviewing at trial. DX 28 at 3-4, 7.

61. Taylor told the Court that to determine whether the government had filed the full report, she asked Dobbie to check the original filing. DX 28 at 5-6. Taylor said that during a recess, she “ran into Ms. Dobbie actually in the hallway” and informed her of the issue. DX 28 at 7. Dobbie “ran back . . . to the U.S. Attorney[']s Office . . . [and] started digging through the files.” Hr’g Tr. 605-06 (Dobbie). When she found her copy of the Collins Report that had been faxed to Judge Morin when she had filed the Motion *in Limine* and noted that it only had five pages, Dobbie “understood the significance . . . of the mistake that [she] had made.” She re-read the Motion to “make sure . . . we had covered, you know, the back end [the last five pages] of the report.” Hr’g Tr. 605-06 (Dobbie). She immediately sent Taylor an email confirming that her unstamped copy only attached five pages and noted that “the substance of my motion outlines the entire report, including the findings made against Childs.” DX 29.

62. Following this revelation, on June 21, 2010, Taylor wrote a “Supplement to Government’s Opposition to Defendant’s Motion for Judgment of Acquittal and Motion for a New Trial,” which she signed for herself and Dobbie. DX 30; Hr’g Tr. 230 (Taylor). Focusing on the Finding regarding the Incident Report, she continued to assert that the Motion *in Limine* adequately disclosed and

summarized the Collins report and that it was not clear that Officer Childs had filed a false report because the actual text “was found to be misleading [and] was ambiguous at best.” DX 30 at 6-7.

63. Judge Morin held hearings on June 25, 2010, October 22, 2010, and January 14, 2011. DX 31; DX 32; DX 33; Hr’g Tr. 620-21 (Dobbie). Through these post-trial hearings, the defense received the full Collins Report and its attachments, subpoenaed Childs’ personnel file and any information specific to Childs’ demotion, and interviewed Collins. Judge Morin reviewed all of this, as well as a post-trial affidavit from Collins and made detailed findings about the timeline of events. DX 31 at 14-15, 19; DX 32 at 4-5; DX 33 at 4-11; DX 36.

64. Ultimately, Judge Morin denied the defense’s post-trial motions, determining that his prior rulings remained correct: Because Childs “was not under investigation and [was not] subject to any personnel action,” defense counsel had not been entitled to present extrinsic evidence; and because the April 2009 incident “was far [a]field of what was being litigated” and therefore likely to confuse the jury, cross-examination had been appropriately limited. DX 33 at 10-11.

65. On February 16, 2011, Judge Morin sentenced Vaughn to 40 months for Aggravated Assault and 24 months for Assault on a Police Officer. DX 2 at 11. On March 18, 2011, Judge Morin sentenced Morton to 62 months in prison for Aggravated Assault and 48 months for Assault on a Police Officer, the sentences to run concurrently. DX 1 at 10. Morton and Vaughn noticed appeals, and the Appellate section of the USAO chose to defend Respondents’ disclosure. Hr’g Tr. 750 (Kolb).

The government’s brief argued, *inter alia*, that the Motion *in Limine* summarized the complete Collins Report, fully disclosing its relevant findings. It also agreed with Judge Morin’s legal rulings, noting that the defense’s lack of the Report itself was immaterial, both because, as inadmissible extrinsic evidence of a collateral matter, the Report could not be used to confront Childs, and because having the report would not have altered the defense’s trial strategy. RX 30 at 00403-10; Hr’g Tr. 755 (Kolb) (“[W]e thought that Judge Morin made [a] reasonable assessment of materiality, and we defended it on appeal.”), 757-58 (Kolb) (“[T]he stuff that was not disclosed at the time of trial, the five pages and I guess the appendices, wasn’t material and so there wasn’t a Brady violation.”).

66. On July 3, 2014, the D.C. Court of Appeals reversed Morton’s convictions on *Brady* grounds.

67. The case was remanded to Judge Morin, who dismissed the charges against Morton on the Government’s Motion. DX 1 at 13; DX 35.²⁰

IV. CONCLUSIONS OF LAW

A. Respondents Violated Rule 3.8(e) and 3.4(d).

1. The Relationship Between Obligations Under Rule 3.8(e) and *Brady v. Maryland* and *Giglio v. U.S.*

²⁰ Vaughn had submitted a post-trial affidavit admitting that Childs’ identification of him was accurate, thereby “negat[ing] [the Court of Appeals’] materiality determination,” and his conviction for assault on a law enforcement officer was affirmed. *Vaughn, supra*, 93 A.3d at 1266. Vaughn’s conviction for aggravated assault was reversed on other, non-*Brady* grounds. *Id.* at 1244.

We turn first to the allegation that Respondents violated Rule 3.8(e). Unlike virtually all other Rules of Professional Conduct that are applicable to all members of the Bar, the Rule applies only to prosecutors. It provides, in pertinent part, that:

The prosecutor in a criminal case shall not: . . . (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 3.8(e).

While, on its face, the Rule does not specifically cite to obligations under *Brady* or *Giglio*, but rather more generally to “evidence . . . that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense,” the Comments make clear that the obligations under these cases are within the Rule’s coverage. Comment [1] to the Rule provides that: “[t]he rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.” Rule 3.8, cmt. [1].

While we understand that it is the text of the Rule and not its Comments that is controlling,²¹ there can be no serious doubt that the disclosure obligations in Rule

²¹ See D.C. R. Prof’l Cond., Scope (6) (2014) (“The Comments are intended as guides to interpretation, but the text of each Rule is controlling.”), *quoted in In re Kline*, 113 A.3d 202, 209 (D.C. 2015).

3.8(e) are at least as broad as the disclosure obligations under the Due Process Clause, from which both *Brady* and *Giglio* are “derived.”²²

Since the Court of Appeals decision in *Vaughn* makes clear that the Government did not meet its obligations under *Brady* and *Giglio* as regards the disclosure of the Collins Report, it would be simple enough to say that Respondents had to have violated Rule 3.8(e). After careful consideration, the Committee does not believe that such an *a fortiori* approach to the Rule’s application is appropriate. If it were, every *Brady/Giglio* violation would result in disciplinary charges and sanctions; yet we know anecdotally, from experience and from authorities called to our attention in ODC’s Post-Hearing Brief²³, that there has been no such automatic application of the Rule to *Brady* cases.²⁴ Moreover, Rule 3.8(e) contains a requirement that to constitute a violation, a failure to produce *Brady/Giglio* materials must be intentional.²⁵ No such intentionality is required in the case of a *Brady*

²² For that reason, we reject Respondents’ suggestion that, for purposes of the application of Rule 3.8(e) to the facts of this case, there is a distinction to be made between exculpatory *Brady* material and impeaching *Giglio* material. *See also Moore v. United States*, 846 A.2d 302, 305 (D.C. 2004). Obligations as to both types of materials spring directly from the Constitution’s Due Process clause and thus fit squarely within Rule 3.8(e)’s ambit.

²³ *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 146 (2005) (“Unfortunately, *Brady* violations are one of the most common forms—if not *the* most common form—of prosecutorial misconduct, yet discipline is rarely imposed.”); ODC Br. at 48-49.

²⁴ *See Kline, supra*, 113 A.3d at 206 (“It is unquestionable, however, that constitutional protections in the criminal context serve a fundamentally different purpose than disciplinary proceedings in the ethical context.”) (citing *United States v. Agurs*, 427 U.S. 97, 110 (1976)).

²⁵ “The prosecutor in a criminal case shall not: (e) *Intentionally* fail to disclose” (emphasis added).

violation; if the Government has *Brady* materials but fails to disclose them for any reason, a defendant is entitled to a new trial (providing, of course, that the undisclosed evidence is determined, in a post-conviction proceeding, to have been “material”).²⁶ See *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In short, *Brady/Giglio* focus entirely on the rights of a defendant and not at all on the prosecutor, while Rule 3.8(e) focuses entirely on the prosecutor.

Throughout the hearing and in its Opening Brief, ODC argued that disclosure of *Brady* material to the Court under seal together with a Motion *in Limine* with the request that the Court determine whether and to what extent such material should be provided to the defense was not “disclos[ure] to the defense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal” as provided for in Rule 3.8(e). See ODC Pre-Hr’g Br. at 5. It took that position despite uncontroverted evidence from the USAO, endorsed by Chief Judge Morin, that at the time of the operative events, proceeding in that manner was not unusual. Respondents contended the opposite; that disclosure in this manner satisfied the Rule’s requirements. They also argued that they were directed to proceed in this manner by their supervisor, Jeffrey Ragsdale, thereby implicating Rule 5.2 which,

²⁶ See *Kline, supra*, for a discussion of the relationship between the materiality requirement in *Brady* as it relates to post-conviction review, on the one hand, and to Rule 3.8(e), on the other. For present purposes, it is enough to say that, at least in this jurisdiction, the ethical duty to disclose is more expansive than the Constitutional right of a defendant to have his conviction reversed as a result of the government’s failure to disclose. See *Kline, supra*, 113 A.3d at 213; see also *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”).

broadly described, “allocates” responsibility for violations of the Rules of Professional Conduct between supervisor and subordinate lawyers.²⁷

In its Reply Brief, ODC retreated from that view, arguing instead that its case was all about the substance of the disclosure, not the method.²⁸ The Committee endorses ODC’s current (and Respondents’ consistent) view of Rule 3.8(e)’s scope. In other words, Rule 3.8(e) cannot trump an accepted judicial mechanism for resolving *Brady* disclosure issues. If the Court is willing to undertake the task of deciding those issues without the Government first providing the challenged material to the defense, we are unwilling to interpret the Rules to prohibit that approach.²⁹

2. Did Respondents’ Supervisors Direct Them to Proceed by Filing the Collins Report *Ex Parte* Accompanied by a Motion *in Limine*?

²⁷ Rule 5.2(b) defines when an action by a supervised lawyer that violates an ethical obligation may be excused (at least as to that supervised lawyer) because a supervising lawyer directed it. It provides that “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”

²⁸ “The issue, then, is not how disclosures were made, but the adequacy of the disclosures that were made. It is not form, but content. It is not process, but substance.” ODC Reply Br. at 7. Thus, Respondents’ defense under Rule 5.2(b) – that they were instructed by their superiors to file the Collins Report with the Court under seal together with a Motion *in Limine* summarizing the impeaching information – is no longer relevant to alleged misconduct before the Hearing Committee.

²⁹ Because we do not believe that Respondents’ failure to have produced the Collins Report itself to the defense was a violation of Rule 3.8(e), we do not believe it is necessary to the outcome to decide whether their explanation at the disciplinary hearing for their decision (*i.e.*, that it contained information which, if disclosed, could undermine safety and security at the jail) was inconsistent with the explanation they previously gave in their Motion *in Limine* and was an after the fact – and therefore false – explanation or whether it was merely a more expansive and accurate description of what they had actually written (*i.e.*, that it contained sensitive employment information). Nevertheless, we address that issue at pages 76-77, *infra*, so the Board and Court have our views on the facts surrounding that point.

ODC argues that Respondents made the decision to proceed by filing and serving their Motion *in Limine* “describing” the Collins Report and filing the Collins Report *ex parte* on their own. Respondents urge us to find the opposite; that they proceeded as they did because they were instructed to by their supervisor, Jeffrey Ragsdale. Because the Hearing Committee has concluded that the procedural mechanism they employed did not, in and of itself, constitute a violation of Rule 3.8(e), we believe it is unnecessary to decide whether they were instructed to proceed in that manner by Ragsdale and, if they were, whether Rules 5.1 and 5.2 protect them from a finding that they violated Rule 3.8(e). Nevertheless, because considerable hearing time was spent on the issue, because the Board or Court of Appeals may have a different view on its relevance to the violation question and because it may bear on any sanction that should be imposed, we address the hearing record on this factual dispute.³⁰

(i) The only evidence ODC offered on this question in its *affirmative case* was Respondent Dobbie’s testimony that Ragsdale did instruct her to proceed in that manner.³¹ If that were all there was to it, we would have no basis to make any other finding. But evidentiary hearings are not that simple, and the *totality of the record evidence* on this issue is less than crystal clear. On the one hand, in addition to

³⁰ To be clear, the factual dispute is whether Mr. Ragsdale instructed Respondents to file the Collins Report *ex parte*, not whether he instructed them to file the Motion *in Limine* describing the Collins Report in the terms they used. No one testified that Ragsdale, or any supervisor, reviewed the *substance* of the filing they made. And it is the *substance* of that filing that ran afoul of *Brady*, *Giglio* and, as the Committee has found, Rules 3.8(e) and 3.4(d).

³¹ Taylor testified in ODC’s case that she had no conversations with Ragsdale on the subject. That is not inconsistent with Dobbie’s testimony.

Dobbie’s testimony, a) it is undisputed that proceeding in this way at the time of the events was not unusual; and b) Mr. Ragsdale likewise testified that he instructed Dobbie to proceed in that manner. On the other hand, a) the sample motion Ragsdale gave Taylor did not include an *ex parte* submission component; b) Ragsdale’s testimony that he instructed them to proceed *ex parte* was based largely – but not exclusively – on the nature of his supervisor/subordinate relationship to Respondents and his related belief that they would not have proceeded in that manner unless he had instructed them to do so and not on his clear memory of the events; c) his testimony was impeached by his prior inconsistent statements on this point made to the Office of Professional Responsibility (OPR) of the Department of Justice (the office in which Ragsdale now works) in 2015; and d) he has never “corrected” those statements to the OPR. Finally, arguably cutting in both directions, Dobbie had never proceeded in this manner previously.

If one were to look solely at the *testimony developed at the hearing* on this point, we would be compelled to find that Ragsdale did instruct Respondents to proceed as they did. The key players – Dobbie, who was lead counsel in the case, and Ragsdale – confirmed that he had and that that practice was not inconsistent with the USAO’s practice at the time. But we cannot ignore the fact that Ragsdale was impeached with his contradictory DOJ interview, nor can we ignore ODC’s argument, based on that impeachment (Hr’g Tr. 892) and on the inferences one might draw from the other bits of evidence described above, that Ragsdale (and, by necessary implication, Dobbie) should not be credited on this point.

In reaching our respective conclusions on this question, we turn first to ODC’s impeachment of Ragsdale. In answers to a series of questions by ODC, Ragsdale acknowledged that he had made certain statements to the OPR in 2015. We know very little more about those statements. They appear to have been made in an interview, not in testimony under oath, although we do not know that with any certainty. We do not know the statutory or regulatory basis for the “proceeding” (if it was a “proceeding”) in which they were made. We do not know what ultimate findings, if any, were made in that proceeding or what actions the DOJ took based on those proceedings. And we do not have the statements themselves, although they appear to exist, as ODC read portions of them in questions to Ragsdale during the Hearing.

There are also “technical” evidentiary rules at play. Under the Federal Rules of Evidence, Ragsdale’s prior statements would likely be hearsay, and therefore not admissible for their truth. Fed. R. Evid. 801(c) defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” That is precisely the case here. And, while there are exceptions to the Rule, there are no exceptions that would cover this statement.³² If those Rules were to be applied here, while it is possible that fact-finders could discredit Ragsdale’s testimony that he instructed Respondents to proceed *ex parte*, they would not be

³² Ragsdale’s statements were not, so far as we know, “given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition” (Fed. R. Evid. 801(d)(1)(A)), nor do they meet the very precise requirements necessary to be considered a “public record” under Fed. R. Evid. 803(8).

compelled to and, in any event, there would still not be any *affirmative* evidence in the record that he did not so instruct them.³³ On that point, the only evidence would be Dobbie's testimony that he did.

That said, neither the District of Columbia City Council nor the Courts have adopted wholesale the Federal Rules of Evidence, although the District of Columbia Courts typically apply them. Even if they had, the Board's Rules of Procedure would not compel us to apply Fed R. Evid. 802 or the Courts' application of the principles regarding hearsay. Indeed, the Board Rules could be understood to permit the Committee to rely on technical hearsay for the truth of the contents of the statement.³⁴ If we were to do so, the record *would* include affirmative substantive evidence that Ragsdale did not instruct them to proceed as they did.

³³ When ODC questioned Ragsdale about these statements, ODC made it clear that it was impeaching Ragsdale and not trying to create affirmative evidence by refreshing his recollection:

“COMMITTEE CHAIR FREUND: I meant to ask you this earlier. What are we doing here? Are we impeaching or are we refreshing –

MR. FOX: Impeaching.

COMMITTEE CHAIR FREUND: Impeaching. So, you're -- you're asking these questions in order to undercut the credibility of the witness who is testifying.

MR. FOX: Right.”

Hr'g Tr. 892.

³⁴ Board Rule 11.3 provides:

Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies. The Hearing Committee may be guided by, but shall not be bound by the provisions or rules of court practice, procedure, pleading, or evidence, except as outlined in these rules or the Rules Governing the Bar.

The remaining evidence on the ultimate question does not help cut through the foregoing analysis of Ragsdale’s testimony. The fact that Dobbie had never proceeded in this manner before supports the inference that she would not have done so here without guidance from someone. The fact that the sample motion Ragsdale gave her did not include an *ex parte* submission supports the opposite inference. At the end of the day, we are left largely with the testimony on its face, and that posture would require that we reach a conclusion on whether Ragsdale testified truthfully. The paragraphs that follow address the Committee Members’ conclusions regarding Ragsdale’s credibility.

(ii) Two Committee Members credit Ragsdale for the following reasons. The Committee had the benefit of his actual appearance at the hearing. He testified for just short of two hours. He was subjected to a thorough and adversarial examination by ODC, a more “friendly” examination by Respondents’ counsel and follow-up questions by all three Committee Members. He gave an internally coherent explanation for why he believes Respondents were acting pursuant to his direction. He acknowledged making contrary statements in 2015 without nit-picking over details and without asserting any self-serving reasons for his different testimony now. He did not appear to be glib, evasive or argumentative. And while he did testify that his memory on the question was affected by the nature of his relationship as Respondents’ supervisor, *i.e.*, that it was “logical” that he would have instructed them to proceed in that manner, he did not say that his recollection was based

exclusively on that logic.³⁵ In short, his demeanor was entirely consistent with truthfulness. And, beyond ODC's analogy to what is often referred to a "blue wall" within police departments (*see* ODC Br. at 49)³⁶, ODC has not offered any reason why Ragsdale would perjure himself³⁷ or, at a minimum, expose himself to

³⁵ Ragsdale testified as follows:

MS. RICHARDSON: Mr. Fox said that you changed your testimony. Would you agree with that characterization?

A. I mean, I have carefully reviewed this for preparation today, I spent a fair amount of time reviewing it in 2015, undeniably, I've probably spent three times more looking at it again, playing it through my mind, and I'm confident as we sit here today, again, that that decision had to be made by me. . . .

COMMITTEE CHAIR FREUND: Are you confident of that because you remember that to be the case or are you confident of that because of the nature of your relationship in the office with your subordinates generally, and Dobbie and Taylor more specifically, such that as a logical matter, it would have had to have been made by you?

RAGSDALE: Certainly the latter. There's no question about it, I think filtered on top of that is the decision to provide Judge Morin with the IAD report would have been something that I would have -- I would have condoned under the circumstances because I -- he's an experienced trial judge, very experienced trial attorney, and in my mind, he would have been in a position to evaluate the -- the nature of the problem with Childs, but more importantly, what -- which additional disclosures should be made and what potential extrinsic evidence could be introduced."

Hr'g Tr. 911-12 (Ragsdale).

³⁶ ODC characterized the testimony of the four Assistant United States Attorneys in this case as akin to a popularly held (but likely inaccurate) belief that police officers will always testify in support of one another.

³⁷ We do not know whether his statements in 2015 were at a proceeding and taken under oath, as his hearing testimony was. *See* pages 43-44 nn.32-33, *supra*. *But see* page 44 n.34, *supra*.

disciplinary consequences within the Bar or the Department of Justice³⁸ for testifying falsely at the hearing.

(iii) One Committee Member does not credit the substance of Ragsdale's testimony for the following reasons. While questioning Ragsdale, ODC worked from a document not admitted under the proceedings, the relevance and origin of which was not disclosed to the Committee beyond the point that the "record" was created in 2015. *See* pages 43-45 & n.32, *supra*. To clarify, the Committee Chair interrupted ODC's examination of Ragsdale to determine that ODC was in fact impeaching and not refreshing the Ragsdale's recollection. Hr'g Tr. 892 (Ragsdale); *see also* pages 43-44 nn.33-34, *supra*. *But see* page 45 n.34, *supra*. The fact that ODC expressly intended to *impeach* Ragsdale from an undisclosed *record* reasonably suggests that ODC was working from some attestation. In fact, ODC asked Ragsdale: "Q: Now, you were interviewed *on the record* . . . in July of 2015; correct? A: I was." Hr'g Tr. 897 (Ragsdale) (emphasis added); *contra* page 46 n.36, *supra*.

However, in an apparent contradiction, ODC also characterized Ragsdale's words not as testimony, but rather as an *interview*. Hr'g Tr. 900 (Ragsdale). Incidentally, Ragsdale never corrected ODC from describing his 2015 statements as testimony (or for that matter as an interview) during the hearing.

Because the Committee lacks dispositive proof that Ragsdale's interview was, or was not, made from a record while under oath, it is unable to conclusively

³⁸ Indeed, Ragsdale's current position at the Department of Justice is a factor the Committee has taken into account in assessing the credibility of his testimony.

understand the evidentiary origin and nature of ODC’s impeaching document. As such, despite ODC’s expressed intention to impeach Ragsdale, the Committee lacks the foundation to know the weight of ODC’s impeachment. This point aside, Ragsdale’s “statements” from 2015, juxtaposed with his 2019 testimony, are substantively sufficient to reasonably find his testimony should not be credited.

When asked by ODC what he did after receiving Roth’s response email, Ragsdale testified that “we gave a green light, or I gave a green light to . . . proceed to file an appropriate pleading [*sic*], make disclosures to the court” Hr’g Tr. 859-60 (Ragsdale). “[W]e [] filed a motion *in limine* that provided [] a general summary of the issue in the case as we perceived it.” Hr’g Tr. 860 (Ragsdale). Considering the collective inexperience of Respondents, the degree of reliance placed upon senior supervising attorneys by Respondents, and the number of senior supervising attorneys giving “direction” to Respondents, remarkably, in responding to ODC’s question “[y]ou had no input on the decision to summarize rather than give the actual report to the defense,” Mr. Ragsdale’s answer was simply “[t]hat’s what I testified to, yes.” Hr’g Tr. 906 (Ragsdale). In fact, he never read the Motion *in Limine* prior to it being filed. Hr’g Tr. 875-76 (Ragsdale). “I had full faith that her [Dobbie’s] filing would be in compliance with an accurate statement of the law and presumably an accurate statement of the facts.” Hr’g Tr. 876 (Ragsdale); *see also* Hr’g Tr. 875-76 (Ragsdale) (“Q: [Y]ou did not approve the contents of the motion *in limine*. A: Well, I – I didn’t approve it, by virtue of having read it; that’s correct.”),

879 (Ragsdale) (“[O]f course you’re hoping that they [junior prosecutors] come to you.”).

Ragsdale then testified that “it was [his] recommendation [to file *ex parte*] because it was an internal affairs report, there [were] people mentioned [in] it, etc. . . .” Hr’g Tr. 861 (Ragsdale). Finally, Ragsdale testified that it was his idea to file the Collins Report under seal. Hr’g Tr. 896-97 (Ragsdale).

However, in 2015, Ragsdale had dramatically different comments on these topics. In 2019, Ragsdale stated he had no input on the decision to summarize the Collins Report in the Motion *in Limine*. When asked if he would have summarized the Collins Report into a Motion *in Limine*, he said “when I read her pleading [*sic*] I’m like this isn’t the way I would have [done it]. . . . I would have walked down to our office and go [*sic*], no, we can’t be doing it this way.” Hr’g Tr. 904-05 (Ragsdale). Conversely, in 2015, he had agreed that his “preferred course of action would have been [to] disclose the [Collins] report to defense counsel and litigate it.” Hr’g Tr. 902-03 (Ragsdale); *see also* Hr’g Tr. 903-04 (Ragsdale) (“I wouldn’t have done the two-part pleading; you know, the *ex parte* submission.”); Hr’g Tr. 879-80 (Ragsdale) (“[Y]ou can’t assume anything, and, you know, the remedy is always to err on the side of disclosure.”); Hr’g Tr. 879 (Ragsdale) (“[I]t’s got to be extraordinary circumstances where you go *ex parte* as opposed to actually giving defense counsel a copy.”).

Finally, Respondents initially recognized Childs’ veracity problem reasonably prompting them to seek assistance from their bosses and ultimately the

Lewis committee. The genesis of the problems leading to these charges stem almost exclusively from the idea, expressed in Roth's email, that "the officer's written report is simply unclear, and the officer attempted to clear it up in his interview" DX 13. This is "the idea" that led to the decision to sponsor Childs at trial.

The Committee Members have attributed the idea that the officer's report is simply unclear and the officer attempted to clear it up to Roth. However, during the hearing Ragsdale testified:

Q: And then there's the suggestion in there from [] Roth about the possibility that the officer had simply written something that was unclear; correct?

A: That's correct.

Q: Is that the first time anybody ever raised that possibility, as far as you know?

A: No. I recall *when I was originally briefed on this the first time* that either [] Taylor or [] Dobbie mentioned that her understanding was that Childs had somehow felt that his -- his writing was *misunderstood or misinterpreted*. That he had made a mistake in the report.

Hr'g Tr. 891-92 (Ragsdale) (emphasis added).

Ragsdale testified that he was made aware of a reason to sponsor Childs *before* ever making Roth and the *Lewis* Committee aware of the issue. If the majority of the Committee Members credit Ragsdale's testimony, they necessarily credit the possibility that, according to Ragsdale, Respondents themselves, and not Roth, conceived of the basis by which the decision was made to sponsor Childs. Because this does not seem probable, Ragsdale's testimony should not be credited.

* * *

While the Committee Members thus have different views on Ragsdale’s credibility, we all agree that the question is a close one. And, because it is a close one, we are unanimous on one point: While we do not believe that the *ex parte* filing in and of itself is a violation of Rule 3.8(e),³⁹ if any of the violations alleged in the Petition require, as an essential element of that violation, a finding that Respondents’ decision to proceed *ex parte* was *not* a product of Ragsdale’s direction, we are unable to conclude that ODC has made that showing by clear and convincing evidence as required by Board Rule 11.6.

3. Did Respondents’ Disclosures in Their Motion *in Limine* Meet Their Brady and Giglio Obligations?

This conclusion, however, does not end the Rule 3.8(e) inquiry. As ODC correctly asserts, “[i]f prosecutors elect to make *in camera* production and disclose

³⁹ Because the Committee has concluded that the *ex parte* filing was not, in and of itself, a violation of the Rules of Professional Conduct, we do not believe it is necessary to reach the question whether Rule 5.2 insulated Respondents’ conduct. Nevertheless, for completeness, this note summarizes the Committee’s view on the issue. Rule 5.2(b) defines when an action by a supervised lawyer that violates an ethical obligation may be excused (at least as to that supervised lawyer) because a supervising lawyer directed it. It provides that “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty. Assuming, *arguendo*, that filing the Collins Report *ex parte* would have raised an “arguable question of professional duty” *even if it had been accompanied by a Motion in Limine that fully and accurately described all of the potentially exculpatory components of the Report*, the entire Committee – including the Member who does not credit Mr. Ragsdale’s testimony – has found that ODC did not prove by clear and convincing evidence that Respondents did *not* act in accordance with Ragsdale’s direction on that point, the burden ODC would have been required to meet once Respondents raised the Rule 5.2(b) defense. *Cf. In re Szymkowicz*, 195 A.3d 785, 789 (D.C. 2018) (per curiam) (“If Disciplinary Counsel presents evidence of a conflict of interest pursuant to Rule 1.7(b), a respondent may present evidence in support of the contention that the respondent obtained informed consent pursuant to Rule 1.7(c). *If a respondent offers such evidence, then Disciplinary Counsel must prove by clear and convincing evidence that the respondent did not in fact obtain informed consent.*” (emphasis added)).

to the defense only by summary, they must completely and accurately disclose all the relevant exculpatory evidence.” ODC Reply Br. at 8. While it is obvious that if the Government provides the precise document that is or contains the potential *Brady* material to the Court and asks the Court to decide whether it should be produced to the defense, the Government has – definitionally – “completely and accurately” disclosed the *Brady* material to the Court. But that is only half of the obligation. What we understand ODC really to be saying, and what we conclude, is that in these circumstances, the Government must “completely and accurately” *describe* the withheld evidence to the defense so the defense is equipped to make an intelligent argument to the Court as to why the actual evidence should be disclosed and, once disclosed, whether and how it can be used at trial as an evidentiary matter. The question in this case, then, is whether Respondents “completely and accurately” described the *Brady* material to the defense and, if they did not, whether their failure to have done so was with the intent requisite to establish a Rule 3.8(e) violation.

The answer to the first question is not really subject to dispute. Putting to one side whether Respondents actually believed that Childs had not made a “false and/or misleading” report (*i.e.*, their statement in the Motion *in Limine* that “the Government is not conceding that Officer Childs in fact made a false and/or misleading statement”),⁴⁰ their description of it in their Motion *in Limine* was

⁴⁰ The Committee is of mixed minds on the question of whether Respondents believed that Childs had not made a “false and/or misleading” report. On the one hand, Respondents began the *Lewis* Committee process seeming to believe that Childs had made a “false and or misleading Incident Report” – or at least that Collins had concluded that Childs did. DX 8 (“Contrary to the video footage of the incident, Childs wrote in his report that the inmate was placed in restraints after he was maced. The internal DOC report issued in June of 2009 found that Lt. Childs’ use of mace

inadequate. They did not disclose that, in addition to Childs' Incident Report that Collins found was "false and or misleading," the Collins Report recited that Childs had also filed a Disciplinary Report against Heath falsely charging him with assault without serious injury and lack of cooperation. Nor did they disclose that Childs had been demoted as a result of the Heath incident.⁴¹ They also did not disclose that other correctional officers had filed reports that were inconsistent with videotape of the Heath incident and that Childs' supervisor had written him a "Letter of Direction" for neglect of duty and incompetence in connection with the incident and not for filing false reports.⁴² There is no serious question that a complete and accurate description of the *Brady* material should have included these facts.

was in direct violation of DOC's use of force policies and also that Childs submitted a false and/or misleading incident Report of the facts."). On the other hand, Collins had reported to Respondents that Childs' explanation for the narrative in his incident report was that it was a "cutting and pasting" error, and Respondents' supervisor, having reviewed the Collins Report, was not so certain that the Incident Report was false. DX 13 ("My personal opinion is that the officer's written report is simply unclear, and the officer attempted to clear it up in his interview. Not sure that the DOC conclusion that he lied is supported by the record, but I will leave it to you folks to hash that out."). We revisit this point in Part V of this Report and Recommendation in our discussion about sanctions.

⁴¹ Dobbie testified at the disciplinary hearing that she simply "forgot" about the demotion when they wrote the Motion *in Limine*. Hr'g Tr. 504; 564-65. At the hearing on the Motion, when asked by Judge Morin whether Childs had "been put on any probationary status," Respondent Dobbie said that he had been demoted "related to" the Heath incident but did not disclose whether he had been disciplined because of his use of mace or because he had filed a false incident report and a false disciplinary report. *See* FF 49, *supra*. She was no more precise on that question because Respondents relied exclusively on Childs' explanation to them that he had taken a "voluntary demotion" in connection with the incident and did no independent investigation of the reasons for, and circumstances of, his demotion or, for that matter, anything else in connection with the Heath incident, a subject we discuss further below. *See* pages 59-61, *infra*.

⁴² On this point, Collins at the hearing and ODC in its pre-hearing brief spun out a conspiracy theory that these other officers, by their reports, had engaged in a cover-up of the incident and that Childs' supervisors' Letter of Direction was actually an effort to *protect* Childs from more serious discipline by giving him a slap on the wrist that could be the basis for a "double jeopardy" claim

4. Was Respondents’ Failure to Completely and Adequately Disclose the *Brady* and *Giglio* Material “Intentional” Within the Meaning of Rule 3.8(e)?

(i) That leaves the question whether Respondents’ failure to have accurately described the *Brady* material was intentional within the meaning of Rule 3.8(e). The Court of Appeals has set out a framework for assessing the intentionality requirement in Rule 3.8(e). In *In re Kline*, 113 A.3d 202 (D.C. 2015), the Court said the following with regard to that Rule’s use of the word “intentionally”:

We believe that the intentionality requirement under Rule 3.8(e) best fits the definition employed in the context of intentional failures to act—namely, that “*intentional*” requires an element of purposefulness or deliberateness or, at a minimum, of aggravated neglect. See *In re Lenoir*, 585 A.2d at 778 (citation omitted). In assessing intent, the “entire mosaic” of conduct should be considered. *In re Ukwu*, 926 A.2d at 1117. (emphasis added).

Kline, *supra*, 113 A.3d at 213. While both ODC and the Respondents⁴³ recognize that “an element of purposefulness or deliberateness or, at a minimum, of aggravated neglect” is the standard the Court articulated in *Kline*, they understand its meaning and application to these facts differently.

In its Opening Brief, ODC argues that Respondents’ conduct was deliberate – that they “made a deliberate decision not to disclose the entire Collins Report to the

by Childs should someone in higher rank at the Department of Corrections believe more discipline was appropriate. While this entire line of argument appeared to the Committee to be wholly speculative and determination of the truth or falsity of that theory unnecessary for our resolution of this matter, it is surely a theory that the defense lawyers would want to explore and likely would have had they known the facts.

⁴³ Respondent Taylor’s Post-Hearing Brief does not grapple with the case law that discusses Rule 3.8(e) and, thus, necessarily does not attempt to square the facts here with any particular standard. But she also joins in Respondent Dobbie’s Brief, and we address those arguments as applicable to both Respondents in text.

defense. They chose instead to file it with the court *ex parte*.” ODC Br. at 29. If not “deliberate,” it was at least reckless, and recklessness, it argues, is sufficient to satisfy the intent requirement in Rule 3.8(e). ODC Br. at 30 (“A prosecutor who recklessly fails to disclose to the defense information that tends to negate the defense of the accused must be treated the same as a prosecutor who intentionally does so.”). ODC also asks the Committee to discredit Respondent Dobbie’s testimony that she simply forgot about Childs’ demotion when she drafted the Motion *in Limine*. But even if that testimony were to be credited, it argues, her conduct was still reckless, and her recklessness should not excuse her failure to comply with Rule 3.8(e). ODC Br. at 29-31.

Respondents first take on the “deliberateness” prong of *Kline*. Summarizing their argument, they say that deliberateness requires proof that the charged prosecutor consciously decided that she need not disclose the information and that here the evidence shows the opposite – Respondents consciously decided to disclose it through the Motion *in Limine*. As regards the “aggravated neglect” prong, they observe – correctly as we discuss more fully below – that “[t]he Court of Appeals has not expounded on the meaning of ‘aggravated neglect’ in the Rule 3.8(e) context” but argue that in cases cited in *Kline* in connection with that standard, the Court has “held that an attorney can only intentionally violate that rule through neglect if she was ‘demonstrably aware of [that] neglect or if [the] neglect was so pervasive that [she] must have been aware of it.’” Resp. Dobbie Br. at 20 (citation

omitted). ODC, they argue, has not made out facts supporting that conclusion by clear and convincing evidence.

In its Reply Brief, ODC deals with the “aggravated neglect” prong in *Kline* and Respondents’ argument on that point with this passing reference only: “[W]hat is recklessness if not aggravated neglect?” ODC Reply Br. at 16.

(ii) The Committee is of the view that neither ODC nor Respondents have grappled adequately with the convergence of the facts we have found here and the “purposefulness or deliberateness or, at a minimum . . . aggravated neglect” standard in *Kline*. Our analysis follows below.

In *Kline*, the *Brady/Giglio* evidence the government failed to produce was a statement by the victim of the crime made at the hospital shortly after being shot that he did not know who had shot him. Before the trial began, he had changed his tune and at trial identified the defendant as the shooter. The “entire mosaic” of conduct in *Kline* that led the Board and the Court to conclude that Kline’s failure to produce the hospital statement was intentional included:

- Kline not only spoke to the officer who took the victim’s statement, he wrote the substance of it down in his notes.
- Kline consistently maintained that he did not think the statement was exculpatory.
- Kline maintained that position with the Assistant United States Attorney who took over the case after Kline left the office.
- Kline was repeatedly reminded by the trial judge about his *Brady* disclosure obligations, repeatedly told the Court he was mindful of those obligations and was nevertheless reprimanded by the Court regarding other disclosure failures.
- Kline testified that he believed that the victim’s statement was ambiguous, and he did not recognize it as exculpatory.

- Kline also testified that he thought that other police reports he did disclose provided “97.7%” of the information.

Kline, supra, 113 A.3d at 205-06, 213-14.

That “mosaic of facts” led the Court to conclude that the Hearing Committee’s and Board’s determination that Kline acted with the intent necessary for a Rule 3.8(e) finding was supported by the hearing record. On that point, the Court said the following:

After reviewing the entire record, we see no reason to disturb the findings of the Hearing Committee and the Board that Kline *consciously decided that the Boyd Hospital Statement did not have to be produced and thus acted with “deliberateness.”* See *In re Lenoir*, 585 A.2d at 778. Therefore, we agree that the evidence is such that it produces in the mind of the trier of fact a “firm belief” that Kline *intentionally withheld the statement because he did not think it was exculpatory.* See *In re Dortch*, 860 A.2d at 358.

Id. at 214 (emphasis added).

The “mosaic of facts” here is quite different. First, from the moment Respondents learned about the Collins Report, they recognized that it created “issues” they would have to deal with. Summarizing Taylor’s testimony, when she talked to Officer Collins and read his Report, she understood that his Report raised a question about whether the Government could sponsor Childs and that, if the decision was made that it could sponsor him, the Government would have to deal with disclosure of the Collins Report. Second, they immediately sought guidance on how to proceed from their supervisors, who had considerably more experience on these issues: her direct supervisor (Alan Boyd) and the chief of the Superior Court Felony Major Crimes Division (Jeffrey Ragsdale). Third, after discussing it among

themselves, they decided to send it to the *Lewis* Committee for further review.⁴⁴ Fourth, when guidance was not forthcoming, they pestered the Committee for a response. Fifth, the guidance they received authorized them to sponsor Childs and to “disclose the report and litigate its admissibility.” More importantly, it expressed Roth’s skepticism that the Collins Report correctly characterized Childs’ report as false. Sixth, upon receiving clearance to sponsor Childs and to “disclose and litigate” the use of the Collins Report, Dobbie discussed with Ragsdale how to proceed,⁴⁵ reviewed a Motion *in Limine* he gave her as a sample of a way to proceed, and drafted the Motion that is central to this case. All of these facts point to prosecutors who were mindful of their *Brady* and *Giglio* obligations, who understood that the Collins Report raised *Brady* and *Giglio* issues they had to deal with and who took a variety of steps to tee-up the issues for resolution. They do not paint a picture of prosecutors who set out to violate *Brady/Giglio* or the Rules with “deliberateness.”

But there are other facts in the “mosaic” that cut in the other direction. Those all relate to what Respondents did not do. While Roth sowed the seeds of doubt about whether “the DOC conclusion that he [Childs] lied is supported by the record,” he also advised “but I will leave it to you folks to hash that out,” which invited

⁴⁴ The *Lewis* Committee consists of senior-level Assistant United States Attorneys who review questions of whether the government can sponsor the testimony of law enforcement witnesses who may have credibility issues. At the time, John Roth, the Executive Assistant United States Attorney, headed the Committee. At Mr. Roth’s request, they sent him a copy of the Collins Report.

⁴⁵ Our respective conclusions regarding the credibility issues surrounding this point are discussed *supra* at pages 40-51.

Respondents to take additional steps that would either affirm or negate the doubts that Roth introduced. DX 13.⁴⁶ Yet, prior to filing the Motion *in Limine*, they never asked Collins for the appendices to his report or the videotape of the incident in questions (and therefore did not read or view the source materials, including the Incident Report, the Inmate Disciplinary Report and the reports of the other officers present). They did nothing to parse Childs' "cut and paste" explanation for the words in his Incident Report. They did nothing to "hash out" whether Roth's theory was valid, as Roth had, in effect, asked them to do. Furthermore, when Childs answered as he did at the *Giglio* interview, they did not press him on his answers⁴⁷ or circle back to Collins to test Childs' answers with him. They did not follow up with the Department of Corrections to determine the facts surrounding Childs' suspension, *i.e.*, was his demotion really voluntary or was it a "plea bargain" to avoid termination; was the action taken because he violated DOC policies regarding macing or because he filed a false report or two false reports; did the DOC conclude that the other officers were involved in a cover-up designed to protect Childs? In short, they effectively took Childs' word casting doubt on the Collins Report without

⁴⁶ While there is no evidence in the record on what a reasonable prosecutor would have understood "hash it out" to mean, we think none is required. It is evident from the context in which Roth used the phrase that he was leaving it to the line attorneys and their immediate supervisors to figure out what Childs actually said and did and what would follow from their determination on that question.

⁴⁷ Respondents testified that they were instructed that they should not tell law enforcement witnesses about the existence of investigative reports undercutting their statements made in *Giglio* interviews. Hr'g Tr. 201-03. While the Committee has no reason to doubt that testimony, it misses the point. Nothing would have prevented them from asking Childs hard questions about his conduct and reports and confronting him with the reports themselves.

taking readily available steps to corroborate the Collins Report findings when they had ample time to do so. Respondents received the Collins Report on September 15, 2009. DX 6. And while Respondents began the *Lewis* Committee process promptly, nearly six weeks passed between the time they asked for advice and the time they received direction to proceed, during which time they did nothing to flesh out the issues. Nor did Respondents take steps when the *Lewis* Committee's succinct guidance asked them to "hash [] out" the vitally important question of whether the Collins report conclusion that "he [Childs] lied is supported by the record."⁴⁸ DX 13.

There are other steps Respondents did not take once the matter was before Judge Morin. In no particular order, they did not conduct a careful check on Judge Morin's question as to whether he had received the complete report, particularly in light of his observation that it appeared incomplete, and they did nothing to undo his confusion between the Letter of Direction Major Talley gave Childs and the demotion he eventually received, including not correcting Childs' testimony regarding his demotion (something they could not do since they hadn't gotten to the bottom of that themselves).

The Committee cannot conclude on this "mosaic" that Respondents acted with "deliberateness" in the way in which Kline acted. There would have been a substantial parallel to the *Kline* facts if Respondents, after receiving the Collins

⁴⁸ ODC argues that Respondents could have made their disclosures – directly or through a Motion *in Limine* – even before the *Lewis* Committee decided whether the Government would sponsor Childs. While true, we do not draw any inferences from that fact; it is the essence of 20/20 hindsight. Nor do we believe that there is any adverse conclusion to be drawn from the fact that they received *Lewis* Committee's direction on October 21 and did not file their Motion *in Limine* until October 27, the Tuesday following the Wednesday they received the direction to proceed.

Report, did nothing more with it. As described above, however, that is not at all what they did. The question for the Committee (and eventually for the Board and the Court) is whether this “mosaic” – comprised of the many steps Respondents took to have the question of disclosure properly resolved by the Court, offset by the many steps they did not take which, had they taken them, would likely have produced a different result – paints a picture of Respondents as having merely been careless on a matter of substantial importance or whether their carelessness was of such a magnitude as to constitute “aggravated neglect” that supplies the intent requirement in Rule 3.8(e).

There is very little guidance on what the *Kline* Court meant when it said that a finding of aggravated neglect could provide the element of intent necessary to support a Rule 3.8(e) violation. The facts in *Kline*, according to the Court, demonstrated deliberateness (“After reviewing the entire record, we see no reason to disturb the findings of the Hearing Committee and the Board that Kline consciously decided that the Boyd Hospital Statement did not have to be produced and thus acted with “deliberateness.” *Kline, supra*, 113 A.3d at 214), so it had no occasion to explain what it meant by aggravated neglect. It is only by context that we can understand that whatever the Court meant by that phrase, it envisioned a lower level of intentionality than deliberateness (“deliberateness *or, at a minimum, of aggravated neglect.*” *Kline, supra*, 113 A.3d at 213 (emphasis added)). The case the Court cited in support of an aggravated neglect standard – *In re Lenoir*, 585 A.2d 771, 778 (D.C. 1991) (per curiam) (appended Board Report) – and the case the

Lenoir court cited – *In re Reback*, 487 A.2d 235 (D.C. 1985), *aff'd in relevant part*, 513 A.2d 226 (D.C. 1986) (*en banc*) – were not Rule 3.8(e) cases. And a parsing of the facts in those cases is not particularly helpful. In *Reback*, neither the Panel nor the *en banc* Court used the term “aggravated neglect” and, in any event, held that Reback’s conduct did not establish intent under any standard:

[F]requent reminders [to Respondent from his client’s brother to pursue the matter] make Reback’s negligence more egregious, but, even when combined with the other relevant evidence, they cannot be found to have provided clear and convincing evidence of intent.

Reback, supra, 487 A.2d at 241. And in *Lenoir* – the case that actually uses the term “aggravated neglect” – the Court adopted the Board’s determination that evidence showing that Respondent was:

heavily engaged in another matter at the time of the [Client’s] representation . . . as evidence that he intentionally abandoned the [Client’s] matter in favor of another . . . does not constitute clear and convincing evidence of the necessary degree of intent [either purposefulness or aggravated neglect] to violate [the two Disciplinary Rules involved].

Lenoir, supra, 585 A.2d at 778-79. Thus, neither case provides the Committee with guidance on what conduct the Court would consider to be “aggravated neglect” sufficient to meet an intent requirement under any Rule, let alone under Rule 3.8(e).⁴⁹

⁴⁹ If the Court meant to use the “reckless” standard in these cases, it easily could have. But it did not, and the Committee does not believe it should hold for the first time that a standard the Court has used repeatedly is identical to another standard it also uses repeatedly.

Left to our own understanding of what “aggravated neglect” under Rule 3.8(e) would look like, we find that, on balance, Respondents’ conduct rises to that level. Although as in *Kline*, Respondents “did not think [the Collins Report] was exculpatory,”⁵⁰ unlike Kline they did not, as a result of their belief, simply decide to do nothing more with it. *See Kline, supra*, 113 A.3d at 205. But while they did more than Kline did, there were just too many additional steps Respondents could have taken which, had they taken them, would have – in the Committee’s view – led them to a different conclusion. Had they asked to see the videotapes, or tried to reconcile Collins’ statement in the body of his report that Childs had filed a false Disciplinary Report against Heath (or even just disclosed that fact in their Motion *in Limine*) with Childs’ “cut and paste” explanation (an explanation that could not be reconciled with the false Disciplinary Report), or had they circled back with Collins after the Childs *Giglio* interview to get a better understanding of Childs’ demotion, we suspect that, at a minimum, they would have treated the issue differently and, very likely, that Judge Morin would have as well. But they did none of those things. And, while we fault their supervisors for their “unhelpful” advice and guidance (*see* pages 78-81, 84, *infra*), it is the case that Roth was at best equivocal on Childs’ credibility and told Respondents to “hash that out,” which they simply did not do. When a prosecutor is trying to obtain a conviction that could (and in this case did) imprison a defendant and is faced with a serious question about the credibility of a key

⁵⁰ *See Kline, supra*, 113 A.3d at 214 (“[W]e agree that the evidence is such that it produces in the mind of the trier of fact a “firm belief” that Kline *intentionally withheld the statement because he did not think it was exculpatory.*” (emphasis added)).

witness, it is incumbent on the prosecutor to run the credibility issue to the ground. Respondents' failure to do that here, in the face of the many warning bells that were sounded, in the Committee's view converts what might in other circumstances be characterized as simple negligence into aggravated neglect that supports the Committee's finding that Respondents had the intent necessary to support a finding of a Rule 3.8(e) violation.

5. On these Facts, the Committee's Conclusion that Respondents Violated Rule 3.8(e) Necessarily Includes a Conclusion that Respondents Violated Rule 3.4(d).

While *Brady* and *Giglio* obligations are rooted in the Constitution and not the Superior Court discovery rules, they are nevertheless part of the discovery process. And here, in any event, defense counsel made timely and repeated discovery requests that included specifically requests for *Brady* and *Giglio* information. DX 3; DX 20; Hr'g Tr. 191-93 (Taylor), 435-36 (Dobbie). While it is literally correct that Respondents responded to those discovery requests, and while we do not fault them regarding the timing of their response,⁵¹ we have found that the substance and

⁵¹ See n.48, *supra*. Additionally, we recognize that the Court of Appeals concluded that the "Government" failed to meet its *Brady* obligations in a timely manner, noting that the Government's investigation into Childs' statements and actions in connection with the jail melee began in April 2009 and concluded in June 2009 and that Respondents did not file the Motion *in Limine* until October. *Vaughn, supra*, 93 A.3d at 1258. Rejecting the Government's argument that it did not know about the Collins investigation and report until "late summer," the Court observed that "[f]or such an important witness so closely tied to the investigation, the government should have had the systems in place to ensure that it was alerted immediately about impeaching information." *Id.* Obviously, the Committee respects the Court's holding in this regard as to the Government writ large. But at issue in this case is the conduct of these Respondents, and it was not until the *Lewis* Committee decided that the Government could sponsor Childs as a witness that the facts Collins had uncovered – which were not facts about the jail disturbance to be tried in the *Vaughn* trial – became relevant. That was on Wednesday, October 21, 2009, and Respondents filed their Motion 6 days later on the following Tuesday. Again, whatever might be said about the

adequacy of their response was woefully inadequate – so inadequate as to rise to “aggravated neglect” sufficient to supply the intent requirement of Rule 3.8(e). Those same facts make out the Rule 3.4(d) violation. A party – particularly a prosecutor in a criminal case – cannot satisfy her discovery obligations without doing a diligent search of the reasonably available materials. Here, as we have detailed in Part IV.A.4, Respondents’ failures of investigation and disclosure fell well short of the diligence required by a discovery request.

B. Respondents Violated Rule 8.4(d).

Rule 8.4(d) prohibits a lawyer from “[e]ngag[ing] in conduct that seriously interferes with the administration of justice.” To establish a violation of Rule 8.4(d), Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) Respondent’s conduct was improper, *i.e.*, that Respondent either acted or failed to act when he should have; (ii) Respondent’s conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) Respondent’s conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have at least potentially had an impact upon the process to a serious and adverse degree. *See In re White*, 11 A.3d 1226, 1230 (D.C. 2011); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Rule 8.4(d) is violated if the attorney’s conduct causes the unnecessary expenditure of time and resources in a judicial proceeding. *See In re Cole*, 967 A.2d 1264, 1266-67 (D.C. 2009).

Government more broadly, as regards these Respondents the Committee does not believe that the timing issues rise to a Rule violation.

On this charge, ODC's theory is a fairly simple one: Because Respondents violated Rule 3.8(e) by intentionally failing to disclose *Brady/Giglio* information, Respondents *a fortiori* violated Rule 8.4(d). Respondents argue that there is no violation because "Childs'[] credibility would likely have been an appellate issue regardless of any conduct by Dobbie" and that "even if defense counsel had the full Collins report, there is no evidence that Judge Morin would have allowed them to use it at trial." Resp. Dobbie Br. at 39-40. Moreover, they argue that "[i]t is also implausible that Dobbie's descriptions of the Collins Report could have had more than a *de minimis* effect on the judicial process because the Court had access to the report itself and actually read it. There was no risk of Dobbie's description having any negative effect on the Court's decision-making, much less affecting it to a 'serious and adverse degree' as required to violate Rule 8.4(d)." *Id.* at 40 (citations omitted).

The Hearing Committee concludes that Respondents did violate Rule 8.4(d) by their treatment of the *Brady/Giglio* information, but we have reached that conclusion based on the facts of this case and not on ODC's *a fortiori* argument. Our conclusion centers on the words "seriously interferes" in the Rule. We can imagine a circumstance where a prosecutor's failure to produce potentially exculpatory material in a timely manner is quickly and efficiently cured without having placed an undue burden on the criminal justice system. While that might nevertheless be a Rule 3.8(e) violation, its impact on the system as a whole might not be "serious" enough to constitute a Rule 8.4(d) violation.

That was not the case here. Respondents' failures required the expenditure of significant judicial resources beyond the proceedings in the Court of Appeals on which Respondents focus their attention. In addition to the pre-hearing conference treating the disclosure issue and the trial time spent renewing and reviewing the Court's initial determination, there were five post-conviction hearings in the Superior Court spanning 14 months after the return of the jury verdicts. DX 25, 28, 31, 32, 33. While much of the material that hadn't previously been disclosed was disclosed during this period (*i.e.*, eventually the complete Collins Report with appendices was disclosed), it appears that the issue of Officer Childs' demotion was never fully clarified.⁵² And, of course, some of the *Vaughn* defendants were sentenced to prison terms, one of whom (Morton) had his conviction reversed by the Court of Appeals over four years later and was not retried.⁵³ We do not know where the line between serious and not serious is, but we are convinced that – wherever that line is – the facts here are on the serious side of that line.

⁵² Respondents argue that because Judge Morin eventually reaffirmed his ruling limiting the scope of cross-examination of Officer Childs after the full Collins Report was disclosed based on the prevailing law on the scope of cross-examination on “collateral” matters and bias in 2009, the convictions would have been appealed even had there been full and timely disclosure. We think that argument misses the point for at least three reasons. First, it does not account for the five post-trial hearings required as a result of the non-disclosure. Second, it does not address the fact that even after five hearings, the circumstances of Officer Childs' demotion were not fully fleshed out. And, third, we are simply not persuaded that Judge Morin would necessarily have ruled as he did in advance of the trial if defense counsel had been able to make their arguments in a timely hearing.

⁵³ Vaughn's conviction for assault on a police officer was not reversed and his sentence was not set aside because, in an affidavit in a post-trial motion, he acknowledged that he was the person identified by Officer Childs. Since the *Brady/Giglio* material went to Officer Childs' credibility, the Government's failure to disclose it was not a failure to disclose material evidence.

C. Respondents Did Not Violate Rule 3.3(a)(1) or Rule 3.3(a)(4).

The Committee's conclusions regarding Respondents' state of mind as regards the Rule 3.8(e) violations inform us as well regarding the Rule 3.3(a)(1) and 3.3(a)(4) violations charged in the Petition. Both these Rules, by their express terms, require proof that the lawyer "knowingly" engaged in the prohibited conduct.⁵⁴

The Rule's "knowing" requirement is narrowly construed; a lawyer must possess actual knowledge to violate Rule 3.3(a)(1) and 3.3(a)(4). The "known or should have known" standard, as well as any other form of constructive knowledge, is insufficient to make out a violation under the Rule. This means that a lawyer must actually speak (or fail to speak) or offer evidence while in possession of actual objective knowledge that her statement or evidence is false.

At trial, in response to Judge Morin's *voir dire*, Childs testified to the reason he was demoted. Judge Morin examined Childs on two key points: whether Childs understood his demotion resulted from disciplinary action and whether the demotion resulted from a violation of DOC's use of force policy or from submission of false and/or misleading reports. DX 22 at 13-14. Even if Childs was untruthful while testifying, Respondents were never in possession of the requisite actual knowledge of the reason for Childs' demotion – because Respondents simply did not do the work necessary to know that the statements they made, or the testimony Childs gave, were false.

⁵⁴ Rule 3.3(a) begins with the following overarching premise: "A lawyer shall not knowingly"

Moreover, the Committee does not know even today what the facts are concerning Childs' demotion. Collins testified that the Office of Internal Affairs does not make disciplinary recommendations or affect disciplinary actions against DOC employees. Hr'g Tr. 48 (Collins). Rather, those actions are administered by the DOC Human Resources department. Hr'g Tr. 48 (Collins). Collins asserted that he was informed of Childs' "formal demotion" on January 3, 2011. DX 36. The record does not contain documentation from DOC Human Resources, nor was dispositive testimony offered at the hearing describing his demotion or the reasons for it. Indeed, Collins' Affidavit submitted in the post-conviction Vaughn proceedings states that "the Office of Internal Affairs [did not] receive any written documents of discipline or proposed disciplinary action related to . . . Childs." DX 36.

The hearing record did not have to be so sparse as it is on this point. Discipline of DOC employees is governed by the Comprehensive Merit Personnel Act, D.C. Code §§ 1-616.51-54 (2012 Repl.). Implementing regulations quoted in *Vaughn*, *supra*, 93 A.3d at 1249 n.12, require the agency to give such notice and the employee to acknowledge receiving it. Covered employees may not be subject to discipline, including "reduc[tions] in grade," 6-B DCMR § 1601.1 (2008), unless the employee is "given *a notice of final decision* in writing . . . informing him . . . of the reasons" for corrective or adverse action. 6-B DCMR § 1614.1 (2004) (emphasis added). The regulations require that notice be delivered to employee "*on or before the time the action is effective*," *id.* § 1614.4 (emphasis added), and the employee "*shall be asked*

to acknowledge its receipt.” Id. § 1614.5 (emphasis added). If ODC thought it was important for the Committee to know the reasons for Childs’ demotion, we assume it could have subpoenaed these records. Be that as it may, the Committee has not seen them and has no basis for finding that Childs was demoted for excessive use of force or for making false reports and we cannot ascertain whether his testimony was false, let alone whether Respondents had any basis for correcting it if it was.

ODC asserts that under Rule 1.0(f), “knowingly” may be “inferred from the circumstances.” ODC Br. at 33. But because Respondents never had determinative evidence describing Childs’ demotion and because Collins attested that he never came into possession of documents pertaining to Childs’ demotion from DOC’s Human Resources Department, no reasonable inference of knowledge can be made.

On these facts, the Committee cannot conclude that ODC has proven by clear and convincing evidence that Respondents possessed the necessary objective knowledge. Respondents did not *knowingly* “make a false statement of fact . . . to a tribunal or [knowingly] fail to correct a false statement of material fact” or knowingly “offer evidence that the lawyer knows to be false.” Therefore, we find ODC has not met its burden to show by clear and convincing evidence that Respondents violated Rules 3.3(a)(1) or 3.3(a)(4).

D. Respondents Violated Rule 8.4(c).⁵⁵

The facts that the Committee has found that support its conclusion with regard to the Rule 3.8(e) allegation are the same facts it considered in connection with the Rule 8.4(c) dishonesty allegation. And, as described in Part IV.A. above, the Committee has found that these facts amount to “aggravated neglect” and thus a violation of Rule 3.8(e).

But “aggravated neglect” is not a standard of conduct the Board or Court have yet articulated as a basis for finding a Rule 8.4(c) violation. Under that Rule, it is professional misconduct for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” While the four components of the Rule – dishonesty, fraud, deceit and misrepresentation – all have the ring of

⁵⁵ The Public Member does not join in the Committee’s conclusions regarding Rule 8.4(c) and has filed a dissent premised on two distinct points. First, while he acknowledges the facts we have *unanimously* found regarding Respondents’ conduct and has joined in the Committee’s conclusion that Respondents’ conduct amounted to aggravated neglect central to the other Rule violations we have found, he believes that with respect to the dishonesty allegation, those same facts establish only that Respondents “made a mistake in judgment” in “advancing the Roth theory” about Childs’ reports and testimony without “hashing it out,” but do not establish that Respondents’ actions constituted a reckless disregard of the truth about those reports and testimony. Second, he is troubled that Rule 8.4(c)’s broad definition of “dishonesty” does not comport with the public’s understanding of that term and thus threatens to paint Respondents unfairly in the eyes of the lay community. We respectfully take issue with the Public Member’s first point. As we spell out in detail in text, the “truth” of Childs’ reports and testimony was easily ascertainable and Respondents’ multiple failures to do anything at all to get to the truth when they clearly had doubts about Childs’ credibility and were told to “hash it out” cannot be brushed aside so easily by characterizing their actions as nothing more than “mistakes in judgment” in “advancing a theory.” As to the Public Member’s second concern, while the majority of the Committee may share it, we are guided in this proceeding by the Rule as it is written and as the Court has interpreted it and not by the lay definition or public perception of the word “dishonest.”

“deliberateness” to them,⁵⁶ the Court of Appeals has “given a broad interpretation to [the] Rule” and has held that while “the latter three terms [fraud, deceit and misrepresentation] . . . describe ‘degrees or kinds of active deception or positive falsehood,’” dishonesty “is [] the most general term in Rule 8.4(c),” and applies “to conduct not covered by [those three] terms.” *In re Hager*, 812 A.2d 904, 916 (D.C. 2002) (citation omitted). Moreover, quoting *Hager*, the Court has held that reckless conduct that results in an attorney acting in a “dishonest” way will support a Rule 8.4(c) violation. *In re Boykins*, 999 A.2d 166, 172 (D.C. 2010) (“sufficiently reckless conduct is enough to sustain a violation of the rule” (citation omitted)); *see also In re Ukwu*, 926 A.2d 1106, 1113-14 (D.C. 2007) (“Thus, even if Respondent’s conduct was in reckless disregard of the truth rather than specifically intended to deceive . . . he would have violated Rule 8.4(c).”); *In re Jones-Terrell*, 712 A.2d 496, 499 (D.C. 1998); *In re Weiss*, Board Docket No. 14-BD-089, at 11-12 (BPR July 26, 2018), *recommendation adopted with exceptions withdrawn*, 218 A.3d 227 (D.C. 2019) (per curiam); *In re Thomas Edwards*, Board Docket No. 15-BD-30, at 11-14 (BPR, July 25, 2019), *pending before DCCA*. In contrast, facts establishing only simple negligence will not support a finding of dishonesty under the Rule. *In re Romansky*, 825 A.2d 311, 317 (D.C. 2003).

⁵⁶ *See, e.g., In re Shorter*, 570 A.2d 760, 767 n.12 (D.C. 1990) (per curiam) (“Fraud is a generic term . . . embrac[ing] all the multifarious means . . . to gain an advantage over another by false suggestions or by suppression of the truth. [Deceit is t]he suppression of a fact by one who is bound to disclose it, or who gives information . . . likely to mislead . . . and is thus a subcategory of fraud. [Misrepresentation is] the statement made by a party that a thing is in fact a particular way, when it is not so; untrue representation; false or incorrect statements or account.”).

Romansky and *Weiss* are particularly instructive. In *Romansky*, the Court reviewed a Board determination that the respondent's act of "premium billing" his client without authorization in his retainer agreement was dishonest within the meaning of Rule 8.4(c). In its analysis of the issue, the Court reviewed the four components of the Rule and several of its decisions discussing, and distinguishing between, intentionally dishonest, reckless and negligent conduct. In discussing the recklessness standard, the Court looked to its cases involving misappropriation, where the sanction depends on whether the misappropriation was reckless or negligent. Borrowing from those cases, the Court defined recklessly dishonest conduct as an attorney's action "that reveals . . . a *conscious indifference to the consequences of his behavior* for the security of the funds." *Romansky, supra*, 825 A.2d at 316 (emphasis added) (citing *In re Anderson*, 778 A.2d 330, 339 (D.C. 2001)).⁵⁷ In *Weiss*, the Board found that the respondent engaged in dishonest conduct that violated Rule 8.4(c) when he told his client that his case was moving forward even though, in fact, it was not. That statement was recklessly dishonest, the Board held, because it was false and because Respondent made the assurance "while his [Client's] file was languishing in Respondent's filing cabinet *These false statements were made recklessly because Respondent did not know of or check on the status of Mr. Morgan's case before reassuring him that Respondent was*

⁵⁷ Because the Court could not ascertain from the Board's decision its rationale for having found the conduct to have been dishonest, the Court remanded the case for specific findings of fact regarding *Romansky's* state of mind.

advancing his interests.” *Weiss, supra*, Board Docket No. 14-BD-089, at 12 (emphasis added).

ODC asserts that Respondents acted with at least reckless disregard – and were therefore dishonest within the meaning of Rule 8.4(c) – when they: (i) “attempted to muddy” Mr. Collins’ clear finding that Officer Childs had lied about his involvement in an unrelated excessive use of force case; (ii) did not concede that “Childs had made a false and/or misleading statement”; (iii) falsely claimed that the Collins Report contained “sensitive employment information”; and (iv) omitted key details of the facts surrounding the Collins Report to “portray the motion to be a complete and fulsome summary.” ODC Br. at 34-36. It also asserts that Respondents acted dishonestly by recklessly misleading Judge Morin regarding the length of the Collins Report. *Id.* at 39-41.

The Committee has found that, despite being told by Roth to “hash out” the facts around Collins Report and Childs’ explanations and despite there being a variety of things they could have done to get to the bottom of what happened in the melee that was the subject of the Collins Report and Childs’ employment circumstances as a result, Respondents did none of them. Their failure to have done so before writing, filing and arguing their Motion *in Limine* was “aggravated neglect” in the context of their Rule 3.8(e) violation, and we conclude, on these facts, that it was reckless in the same way as Weiss’ failure to actually consult his client’s file before assuring him that it was “being taken care of” when it was not. Accordingly, a majority of the Committee – not including the Public Member –

concludes that as to ODC's assertions numbered (i), (ii) and (iv), Respondents' conduct was dishonest in the context of Rule 8.4(c).

We do not reach the same conclusion with regard to ODC's assertions that Respondents' statement that the Collins Report contained "sensitive employment information" or that their responses to Judge Morin when he inquired about the length of the Collins Report and whether he had a complete copy were dishonest. As to the first of these, it seems clear enough to us that what they were trying to convey – inartfully, as they acknowledged at the disciplinary hearing – was that there were security concerns regarding the correctional officers named in the Report. *See* FF 46, *supra*. It is not difficult to imagine a more precise way of conveying that thought, but we cannot conclude that ODC has established by clear and convincing evidence that Respondents were acting with conscious indifference to the truth when they used that phrase. As to the second, all parties agree that the original faxing of the truncated document was inadvertent. When asked by the Court if it had the entire Report, Respondent Dobbie checked her file, saw that her copy was the same length as the Court's and confirmed (incorrectly, it turned out) that the Court had the full Report. Had she not checked her file before answering, her uniformed answer would have evidenced a conscious indifference to the truth of her statement and would have been recklessly dishonest. But those are not the facts and, indeed, later in the proceedings when the subject arose for a second time, Respondents did a deeper dive, discovered their error and immediately informed the Court and defense counsel. All facts taken together, we do not believe Respondents' conduct on this subject was reckless.

V. SANCTION

ODC urges the Hearing Committee to recommend at least a 60-day suspension. Respondents argue that if the Hearing Committee finds a violation (a finding they say the Committee should not make), we should recommend either no discipline or at most a reprimand. While the Committee is not bound by the recommendations of the parties regarding either the upper or lower end of the sanction range it will consider, it is certainly informed by their respective positions.

In this case, our recommendation is further informed by two separate sets of considerations. The first is the guidance given by the Court of Appeals and by D.C. Bar Rule XI itself. The Court of Appeals has instructed that, in determining the appropriate sanction for a disciplinary infraction, the factors to be considered include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) aggravating or mitigating circumstances, (6) whether counterpart provisions of the Rules of Professional Conduct were violated (*i.e.*, the total number of Rule violations), and (7) prejudice to the client. *See, e.g., In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). The Court of Appeals has further instructed that the discipline imposed in a matter, although not intended to punish a lawyer, should serve to maintain the integrity of the legal profession, protect the public and the courts, and deter future or similar misconduct by the respondent-lawyer and other lawyers. *Hutchinson, supra*, 534 A.2d at 924; *In re Reback*, 513 A.2d 226, 231 (D.C. 1986)

(en banc). Additionally, Rule XI provides that a sanction imposed must not “foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted.” D.C. Bar Rule XI, § 9(h)(1); *see also In re Cleaver-Bascombe*, 986 A.2d 1191, 1194 (D.C. 2010) (per curiam). We take this guidance to heart in our recommendation below.

But there is a second consideration that we believe is unique to this case. That consideration could easily be lumped into the category of “mitigation,” but because it is not what typically arises under that label, our view is that it is worthy of a separate discussion before parsing the other recited standards. That consideration is the role of Respondents’ supervisors and superiors in the USAO at critical points in the prosecution of the *Vaughn* case. In short, we believe that the USAO let these Respondents down. While ultimately these Respondents are responsible for their own conduct, we cannot blink away the role their superiors had in this unfortunate chain of events.

We begin with the fact that Respondents were relatively inexperienced prosecutors. Dobbie had been an Assistant for three to four years and Taylor for a little over a year, and neither had substantial criminal experience. Without intending to excuse their conduct based on their relative inexperience, it is a fact that they were hardly seasoned prosecutors. But even with their inexperience, it is apparent to the Committee that when they first received the Collins Report on September 15, 2009, they recognized that it raised a thorny problem and were skeptical about their ability to rely on Childs as a witness in what would become the *Vaughn* trial. On September

29, Dobbie wrote her supervisor, Ragsdale, an email in which she summarized the Collins Report, saying:

Contrary to the video footage of the incident, Childs wrote in his report that the inmate was placed in restraints after he was maced. The internal DOC report issued in June of 2009 found that Lt. Childs' use of mace was in direct violation of DOC's use of force policies and also that Childs submitted a false and/or misleading incident Report of the facts.

DX 8.

After meeting with Respondents, Ragsdale likewise recognized that there was a credibility problem with Childs and told his superior – John Roth, who was the Executive Assistant US Attorney for Operations and the head of the *Lewis* Committee – in an email that same day that: “This is a DC Dept of Corrections officer. Not sure how we fit him on our list since he is not MPD or USPP. However, this is a witness we intend to call at trial who now has a veracity issue.” DX 9.

At Mr. Roth's request, Dobbie forwarded him the Collins Report. When time passed and neither Respondents nor Ragsdale had heard from Roth, Dobbie again emailed Roth the Report, at Ragsdale's request. DX 12. That same day, Ragsdale sent a not-so-gentle reminder that there was an issue that had to be resolved, reiterating that the witness had “lied about his involvement in an unrelated . . . case” and that “DOC concluded that he [had] lied and demoted him.” DX 13. In other words, Respondents and Ragsdale correctly concluded that Childs was a problem witness.

To this point, all was well. But the wheels soon fell of the wagon. In response to Ragsdale's plea for guidance, Roth cavalierly responded:

All: Based on an informal poll of some members of the Lewis committee, we think we can sponsor this witness and simply disclose the report and litigate its admissibility. *My personal opinion is that the officer's written report is simply unclear, and the officer attempted to clear it up in his interview. Not sure that the DOC conclusion that he lied is supported by the record, but I will leave it to you folks to hash that out. Good luck with it. Sorry for the delay in getting back to you.*

DX 13 (emphasis added).

He gave that advice without reviewing anything other than the Collins Report and without advising Respondents how they should “hash that out.” Ragsdale’s efforts were to give them a sample Motion *in Limine* that recited, as to the facts in that case that bore no resemblance at all to the facts of the *Vaughn* case, that “the Government is not conceding” the correctness of a particular credibility finding and, apparently, to instruct them to proceed *ex parte* despite the fact that the sample motion he gave them did no such thing.⁵⁸ Like Roth, he didn’t review anything beyond the Collins Report or direct Respondents to do anything more to get to the bottom of the credibility issue. And Boyd, Respondents’ direct supervisor, appeared to be entirely disengaged. With the guidance of two much more senior supervisors, and nothing from their immediate supervisor to the contrary, Respondents apparently put to the side their initial misgivings and headed down the path that led to these violations.

We cannot retroactively construct an alternative scenario that would have ensued had Roth not opined, without basis, that “the officer’s written report is simply unclear”; if Ragsdale had directed them to further review the facts that Collins wrote

⁵⁸ As previously noted, the Committee Members are not unanimous on this point.

about in his report; or if Boyd had participated in the chain of events. But Respondents' initial reaction to Childs as a witness was skeptical at best. We suspect that even more experienced prosecutors might well have put their initial misgivings aside in the face of Roth's observations, Ragsdale's limited advice and Boyd's silence. While this history does not absolve Respondents of the consequences for the inadequate effort they put into getting to the bottom of the questions raised by the Collins Report and by Roth's direction to "hash that out," it does inform the Committee's beliefs regarding an appropriate sanction.

With these observations as a starting point, we turn to the factors enumerated by the Court of Appeals.

A. The Seriousness of the Misconduct.

Respondents' misconduct was surely serious. Prosecutors are the gatekeepers of the investigative materials accumulated by the power of the government. While, of course, defense counsel have a duty to independently investigate their cases, the overwhelming resources of the government typically far outweigh the capacity of the defense. And, to the extent the government uncovers potentially exculpatory evidence, it is unlikely that the defense can replicate that evidence on its own. Our criminal justice system is entirely dependent on individual prosecutors fairly and ethically managing the gate to this evidence.

ODC's position regarding sanction, at the end of the day, rests on this reality. It spends a full six pages of its Post-Hearing Brief making this point in various ways. We do not summarize those arguments here; it is enough to say that we largely agree

with the underlying sentiment – if not the rhetoric – of ODC’s arguments on this point. Respondents’ misconduct was serious, and our recommended sanction takes this seriousness – and the need to deter other prosecutors from engaging in similar conduct – into account.

B. The Presence of Misrepresentation or Dishonesty.

A majority of the Committee, with the exception of the Public Member, has found that Respondents committed a Rule 8.4(c) violation by engaging in reckless conduct through their failure to take steps that they reasonably should have taken to “hash out” the issues concerning the Collins Report and Childs’ conduct.

C. Respondents’ Attitude Toward the Underlying Conduct.

This factor is complicated. An attorney’s “failure to accept responsibility for [her] actions” has been “considered as an important aggravating factor.” *In re Howes*, 52 A.3d 1, 20 (D.C. 2012) (citing *In re Pelkey*, 962 A.2d 268, 282 (D.C. 2008)). In a case in which the Respondents contest the allegations made against them, as they are surely entitled to do under the Rules, the very fact of a contest suggests that they do not accept the characterization of their conduct as “unethical” and that they do not “accept responsibility for their actions.” Yet to find from a lawyer’s contest that she is not “remorseful,” or that she “does not appreciate the significance of her conduct” is unfair to lawyers who have a good-faith belief that their conduct was not blameworthy. *See In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014) (“We recognize that an attorney has a right to defend himself and we expect

that most lawyers will do so vigorously, to protect their reputation and license to practice law.”).

Here, Respondents vigorously contested the claim that their conduct amounted to Rule violations. But they also candidly acknowledged that they would do many things differently today if faced with the same problem they faced in 2009. While one could judge those sentiments cynically (of course they would do things differently, given the charges against them), their demeanor during their testimony does not warrant that cynicism. We are persuaded that there is no doubt in Respondents’ minds that there are better practices to employ today than in 2009, even in the face of more experienced supervisors’ unhelpful “advice.”

D. Prior Disciplinary Violations.

Respondents have not been the subjects of any prior disciplinary actions.

E. Aggravating and Mitigating Circumstances.

As to aggravation, Disciplinary Counsel alleges two aggravating factors – Respondents’ status as prosecutors, and Respondents’ failure to acknowledge their misconduct. We have the second of these arguments in the previous subsections. As to the first – Respondents’ status as prosecutors – the Rule 3.8(e) violation is, by definition, one only a prosecutor can engage in and it is therefore inappropriate to also consider their status an aggravating factor. And as regards the violations arising from their statements to the Court, we are unwilling to imply, by treating their status as prosecutors an aggravating factor, that it is any less improper for a non-prosecutor to mislead a court than it is for a prosecutor to do so.

As to mitigation, we have already described what we have found to be the most significant mitigating factor in this case: the entirely unhelpful “advice” of their supervisors. While not a defense to their conduct on the merits, we believe it should weigh heavily in assessing the sanction imposed. In that regard, while there is no question that as the principal attorneys on the case, who signed the Motion *in Limine* and who appeared at the Superior Court hearings where the misconduct occurred, they are responsible for the actions charged in the Petition, we cannot disregard that much more senior Assistant United States Attorneys who were deeply and directly associated with Respondents’ actions do not seem to have been charged with professional misconduct.

Additionally, despite their unhappy experience as Assistant United States Attorneys, Respondents have remained in the Justice Department continuing their careers in public service. And as regards Dobbie’s career, the Committee has received letters from past and current colleagues attesting to her good work and high moral standards. Those letters are in the record, and the Board and Court can assess them for themselves. Without parsing them here, they paint pictures of a lawyer who has a reputation for honesty, integrity and professionalism and who is a credit to the system, not one who is a threat to it.⁵⁹

Finally, Respondents argue, and we agree, that they have already been “punished” with reputational damage, and the Bar has been deterred from engaging

⁵⁹ We draw no inferences from the fact that Taylor has not submitted similar letters.

in similar conduct, by the very public nature of the events leading to this proceeding augmented by the Court's holdings in *Vaughn* and *Kline*.

F. Whether Counterpart Provisions of the Rules of Professional Conduct Were Violated (*i.e.*, the Total Number of Rule Violations).

The Committee has found that Respondents violated four Disciplinary Rules (although, as noted, the Public Member disagrees with the finding regarding Rule 8.4(c)): Rules 3.4(d), 3.8(e), 8.4(c) and 8.4(d). All four Rule violations stem from, and the findings with regard to them are based on, the same conduct.

G. Prejudice to the Client.

It is not entirely clear how this factor applies in this case. If the “client” here is the United States, the most that can be said is that it had to expend considerable resources through post-trial motions practice and on appeal to try to protect convictions obtained and, with respect to at least one defendant (Morton), it was unsuccessful; following the successful appeal, the Government dismissed the indictment rather than retry the case. If, instead of assessing the prejudice to the client, the appropriate measure is prejudice to the *Vaughn* defendants, they were surely prejudiced, by definition, by being subjected to a trial that did not adequately protect their Constitutional rights. And it may be that one of the defendants—Morton—was subjected to prison sentences he did not deserve.⁶⁰

* * *

⁶⁰ As noted previously, in a post-trial affidavit, Vaughn admitted that he was correctly identified as one of the participating inmates. Thus, the *Brady* violation, pertaining to him, was not material and he was properly sentenced for the criminal violation.

We have weighed the conduct in this case and these sanction standards against the cases involving *Brady* violations. We think those cases, rather than the broader universe of cases involving allegations of dishonesty or false statements, are better guideposts for determining the appropriate sanction here based on the violations we have found, each of which is linked inexorably to the basic *Brady/Giglio/Rule 3.8(e)* issue. Those cases are *In re Cockburn*, Bar Docket No. 2009-D185 (Letter of Informal Admonition Mar. 13, 2014) and *Kline, supra*, 113 A.3d 202 (30-day suspension recommended by the Board; no discipline imposed by the Court since the case was one of first impression and Kline was therefore not on notice of the Court's view of the conduct as issue).⁶¹

As between *Cockburn* and *Kline*, ODC and Respondents agree that *Kline* is “the most analogous case” to this case. However, their agreement on sanction ends there. On the one hand, Respondents argue that, like Kline, they should receive no discipline because the facts underlying the violations the Committee has found occurred before *Kline* was decided, and therefore they – like Kline – were not on notice that their conduct was a violation of Rule 3.8(e). ODC resists that conclusion and argues that Respondents should be suspended for at least 60 days – thirty more days than Kline would have been had his case not been one of first impression –

⁶¹ A third case, *In re Howes*, 52 A.3d 1 (D.C. 2012), also involved Rule 3.8(e) violations and resulted in disbarment of the attorney. The facts and violations in *Howes* are not in any way analogous to those here (or in *Cockburn* or *Kline*) and therefore we have not considered the sanction in that case as guidance here.

because, unlike in *Kline*, the undisclosed facts were material as regards at least one defendant in the *Vaughn* prosecution.⁶²

The Committee agrees with ODC and Respondents that *Kline* is the most analogous case, but disagrees with both of their arguments for departure (upward for ODC, downwards for Respondents) from the 30-day suspension that the Board and Court believed would have been appropriate in *Kline* had it not been a case of first impression. And, while we believe *Kline* is most analogous, the Informal Admonition in *Cockburn* is not irrelevant to our assessment.

As to ODC's argument that an upward adjustment from Kline's 30-day suspension is appropriate because the undisclosed information here was material, while in *Kline* it was not, the holding in *Kline* is that an after-the-fact assessment of materiality, while necessary to determine whether the failure to disclose "exculpatory" information to the defense is a *Brady* violation requiring a new trial, is irrelevant to examining a prosecutor's compliance with Rule 3.8(e). If the non-disclosed information is "exculpatory," the failure to disclose it is a Rule 3.8(e) violation irrespective of whether a court orders a new trial (either on a post-trial motion or on appeal) because it finds that the withheld evidence was material. Accordingly, the materiality of the withheld information should have no bearing on the sanction imposed.

Essentially the same holds true as to Respondents' argument that because *Kline* had not been decided when they were working on *Vaughn*, they did not have

⁶² See page 86 & n.60, *supra*.

the benefit of the Court's guidance in regulating their conduct. The guidance they did not have from *Kline* was only that the failure to disclose exculpatory information constituted a Rule 3.8(e) violation even if, after trial, the Court of Appeals concluded that the information withheld was not material and that the Brady violation did not therefore warrant a new trial. Their actions were not driven by a belief that the undisclosed information was not material (or, put more correctly, would not be found to have been material upon appellate review of a conviction). Rather, they believed – incorrectly and without having done the work necessary to support their belief – that they had disclosed it adequately. There is simply nothing in *Kline* – had it been decided when the conduct here occurred – that would have changed Respondents' behavior.


Based on the foregoing, a majority of the Committee recommends that Respondents be suspended for 30 days as *Kline* would have been but for the first impression aspect of his case.⁶³ We considered, but rejected, recommending an informal admonition – the sanction in *Cockburn* – largely because of our additional finding, not present in *Cockburn*, that Respondents violated Rule 8.4(c). One could argue that Respondents' conduct was less egregious than *Kline*'s because their intent was established by aggravated neglect rather than deliberateness. Conversely, one could argue that their conduct was more egregious than *Kline*'s because it extended over a longer period of time in the face of repeated opportunities for them to have

⁶³ As noted in his dissent, because the Public Member has not concluded that Respondents violated Rule 8.4(c), he recommends an informal admonition.

gotten it right. Both are true but, on balance and taking all the other factors into account, a majority of the Committee has concluded that a 30-day suspension fits these facts best and will not “foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted.” D.C. Bar Rule XI, § 9(h)(1).

We could close on our sanction recommendation. But our experience with this case prompts us to make one final observation that may be implicit in what we have laid out in the body of this Report. While it is never easy for any less experienced professional to challenge the wisdom of supervisors, attorneys in general, and prosecutors in particular – even relatively inexperienced ones – have a special duty to the pursuit of justice which, at times, will mean “speaking truth to power” and “pushing back” if they conclude that their supervisors’ advice is potentially misguided. We are confident that Respondents have learned this lesson, and we hope that this case – when it is finally resolved – will send that message to others as well.

AD HOC HEARING COMMITTEE

By: 

Jeffrey Freund
Chair



Aaron Pease
Attorney Member



Hal Kassoff
Concurring in part and dissenting in part
Public Member

DEPARTMENT OF CORRECTIONS
OFFICE OF INTERNAL AFFAIRS



Final Report
OIA-09-04-039

1. PURPOSE OF INVESTIGATION

At the request of the Director of the D.C. Department of Corrections (DOC), Devon Brown, the Office of Internal Affairs (OIA) initiated an administrative investigation to identify the facts and circumstances regarding the use of Oleo Resin of Capsicum (chemical agent) by Lieutenant Angelo Childs, in the North Two Housing Unit of the Central Detention Facility (CDF) on April 7, 2009.

2. CASE INVESTIGATORS

Supervisor of Internal Investigations, Benjamin Collins was the Lead Investigator in this assignment. The OIA is located at 300 Indiana Avenue, N.W. Washington, DC, 20001. The telephone number is (202) 727-2700.

3. STANDARDS

DOC Program Statement 5010.9D Use of Force
DOC Program Statement 3300.1 Employee Code of Ethics
DOC Program Statement 5030.5A Canine Unit

Case Number: OIA-09-04-039

Case Agent(s): Benjamin Collins

Reviewing Official: Wanda Patten

Investigative Activity: Final Report

Date Prepared: June 27, 2009

THIS DOCUMENT IS THE PROPERTY OF THE DEPARTMENT OF CORRECTIONS, INTERNAL AFFAIRS OFFICE, AND ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE, THE DEPARTMENT OF CORRECTIONS WITHOUT THE AUTHORIZATION OF THE DIRECTOR.

**Disciplinary
Counsel Exhibit**

4. BACKGROUND

On April 6, 2009, the DOC embarked upon a (12) day, focused mission operation to eliminate contraband from the CDF. Each day, a team of Search and Recovery Officers (SRO) assembled at a pre-designated Housing Unit as a point of convergence in their search efforts.

Upon entering the pre-designated Housing Unit, members of the Search and Recovery Team (SRT) converge on one tier. The SRT Supervisor designates two SROs per inmate cell. Upon approaching an inmate's cell, the SRO orders the occupant to submit to a visual strip-search while in the cell. Upon completion of the visual search, the SRO places handcuff restraints on each inmate. The inmates then exit their cells and stand near the entrance while the SRO conducts a physical search of the cell.

When the physical search is completed, a Canine Team conducts a supplementary search of the cell for contraband drugs as the inmate occupants stand in the tier walkway. An SRO then escorts each inmate to the Body Orifice Security Scanner (BOSS Chair), which is designed to detect any metal object(s) secreted in the body orifice of the inmate.

Specifically, on Tuesday, April 7, 2009, at approximately 1:35 p.m., a group of approximately (20) Department of Corrections (DOC) SROs were assembled to conduct a comprehensive search and recovery operation in the North Two Housing Unit of the CDF.

The Search Team, under the direct supervision of Major Nora Talley, Lieutenant Angelo Childs, Lieutenant James Holbrook and Lieutenant Gregory McKnight, concentrated their efforts on the upper left tier of the North Two Housing Unit.

Inmate Ernest Heath (309-656), an inmate assigned to the North Two Housing Unit on the upper left tier, was one of several inmates subjected to the Search and Recovery Operation.

During the course of the Search and Recovery Operation, inmate Heath was placed in restraints, and removed from the upper left tier walkway to the common area of the Unit Control Module.

While in the common area of the Unit Control Module with his wrists restrained behind his back, inmate Heath was given a cursory search by Sergeant David Thomas and his canine "Reggie." In an attempt to avoid the search, inmate Heath stomped his foot on the floor and attempted to flee from the immediate area. In response, inmate Heath received a single burst of chemical agent to the face by Lieutenant Angelo Childs.

A preliminary investigation of the incident revealed possible dissimilarities between the written reports submitted by staff members and available video footage.

5. INVESTIGATION

Inmate Ernest Heath (309-656) was ordered to remove all of his clothing and submit to a visual body inspection by SRO Kwadwo Danso and Antonio Butler. Upon completion of the visual body search, inmate Heath was ordered to don his clothing, step out of his assigned cell (9), and stand near the cell entrance while a SRO conducted an inspection of his cell. Before exiting his cell, inmate Heath's wrists were restrained behind his back. Upon the completion of the SRO's cell search, DOC Canine Trainer, Sergeant David Thomas and his canine "Reggie" approached inmate Heath's cell to conduct a supplemental search. Inmate Heath expressed to Lieutenant McKnight that he was fearful of dogs and was reluctant to be in the immediate area of the canine. Consequently, inmate Heath was allowed to stand on the opposite side of the tier walkway as Sergeant Thomas and "Reggie" inspected his cell.

According to video footage reviewed by the OIA, inmate Heath and the canine "Reggie" were never within (10) feet of each other on the tier walkway. Video footage also revealed that inmate Heath was removed from the tier prior to Sergeant Thomas' completing the search of his cell.

Lieutenant McKnight ordered the removal of inmate Heath from the tier walkway to the Body Orifice Security Scanner (Boss Chair) that was located in the area of the gymnasium. Inmate Heath stated to Lieutenant McKnight, "I don't fuck with dogs."

Inmate Heath's wrist restraints were removed prior to Officer Kim Hammond administering a Boss Chair body scan search. Upon completion of the body scan search, Lieutenant McKnight again restrained inmate Heath's wrists behind his back.

Lieutenant McKnight escorted inmate Heath to the area of the Unit Control Module (Bubble). Inmate Heath continued to express his reluctance of being in the immediate area of the canine.

According to Lieutenant McKnight, his intention was to allow inmate Heath to remain near the Unit Control Module until the completion of the Search and Recovery Operation, but was informed by Major Talley that inmate Heath would be subjected to every facet of the search operation, to include returning to the tier walkway where the canine was located.

Lieutenant McKnight relinquished control of inmate Heath and allowed him to stand near the Unit Control Module, in the presence of Lieutenant Childs and Major Talley. Lieutenant Childs stated that there was a period of verbal discord between he and inmate Heath, who stated emphatically that he would not go anywhere near the canine. According to Lieutenant Childs, he viewed inmate Heath's actions as a deliberate attempt to circumvent the search process. Lieutenant Childs further stated that Lieutenant McKnight never informed him that inmate Heath was afraid of the canine.

Lieutenant Childs then walked towards the lower left tier, to get the attention of Sergeant Thomas, and shortly returned to the immediate area of the Unit Control Module. Lieutenant Childs then stood near inmate Heath and motioned with his arm to have Sergeant Thomas and "Reggie" respond to area of the Unit Control Module. Lieutenant Childs took physical control of inmate Heath by grabbing his right arm.

Moments later, Sergeant Thomas and his canine, "Reggie," approached the Unit Control Module area where inmate Heath was standing. As "Reggie" approached inmate Heath, he attempted to walk backwards, away from the canine, but Lieutenant Childs halted his movement. Inmate Heath, stomped his foot in the direction of the canine and Lieutenant Childs responded by placing his container of chemical agent near inmate Heath's face.

Sergeant Thomas positioned "Reggie" behind inmate Heath and while holding "Reggie's" leash with his left hand, Sergeant Thomas placed his right hand against the lower calves and then on the lower back of inmate Heath. Canine "Reggie" followed with his muzzle where Sergeant Thomas placed his hand. Canine "Reggie" stood up on his hind legs and attempted to rest his paws on inmate Heath's back. Inmate Heath hastily moved away from "Reggie." However, his movement was impeded when Lieutenant Childs, who maintained physical control of inmate Heath, sprayed a single burst of chemical agent directly into inmate Heath's face. The residual effect of the chemical agent caused Major Talley, who was standing nearby, to seek momentary refuge from the area of the Unit Control Module.

Lieutenant Childs escorted inmate Heath out of the North Two Housing Unit. As inmate Heath approached the threshold of the North Two sallyport, he fell to the ground and immediately stood back upright as he was escorted through the north side corridor.

Inmate Heath was escorted to the Male Receiving and Discharge Unit where he was given a shower, a change of underwear and bed linen. He was then escorted to the Infirmary where he was treated for exposure to chemical agent and a sprained left thumb.

At 3:36 p.m., Lieutenant Childs prepared an Electronic Incident Notification (EIN) addressed to the DOC Incident Notification Mailing List. Captains Larry Bishop and Walter Coley were also copied.

Lieutenant Childs also prepared a DCDC-2 Incident Report dated April 7, 2009. In the narrative of the Incident Report, Lieutenant Childs wrote: "*On Tuesday, April 7, 2009, at approximately 2:12 p.m., I was on North Two conducting a shakedown. Inmate Ernest Heath (309-656) refuses to be search by the K-9. K-9 Handler David Thomas attempted to search Ernest Heath. Inmate Ernest Heath started kicking at the dog. Because Inmate Ernest Heath's actions interfered with the normal operations of the facility, I sprayed one burst of chemical agent. I then instructed Inmate Ernest Heath to seize his disruptive behavior.*

Inmate Ernest Heath was placed in restraints, escorted to male Receiving and Discharge, given a shower, change of underwear and bed linen. After showering, Inmate Heath was escorted to the Infirmary to be medically evaluated and treated. After being evaluated, Inmate Ernest Heath was issued a Disciplinary Report for Lack of Cooperation, assault without serious injury placed in Pre-Hearing Detention and housed in the Special Management Unit, North Two. Inmate Ernest Heath was positively identified by his D.C. Department of Corrections issued armband and wing card. Photos were taken for the inmate's medical folder.

This incident stemmed from the violent/disruptive behavior of Inmate Ernest Heath. At the time of the incident, the unit was properly staffed. Also, operational mandates and policies were not contributing factors.

Notification was initiated in accordance with Program Statement 1280.2C and terminated at the level of the Major, Nora Talley."

Lieutenant Childs' narrative suggests that at the time of the incident, inmate Heath was not restrained, displayed disruptive behavior, and was "kicking at" the canine causing Lieutenant Childs to use chemical agent to restore "normal operations."

Upon review of the facts and circumstances of this incident, it is evident that Inmate Heath was in restraints and not a threat to "normal operations" when he was sprayed with chemical agent by Lieutenant Childs.

During his interview with OIA Investigators, Lieutenant Childs stated that the Incident Report he prepared regarding this matter was incorrect and written in error. Lieutenant Childs also stated that he was not aware of the fact that the canine made physical contact with the inmate until he reviewed video footage of the incident.

Lieutenant Childs also composed and submitted a Disciplinary Report charging inmate Heath with Assault without Serious Injury and Lack of Cooperation. Video footage of the incident does not support the allegation that inmate Heath assaulted any Correctional Officer or canine.

Sergeant Thomas prepared a DCDC-1 Incident Report regarding this matter. In the narrative of the Incident Report, Sergeant Thomas stated, *"On April 7, 2009, at approximately 2:12 p.m., while allowing canine Reggie to sniff inmate Ernest Heath DCDC#309-653 in North Two outside of cell #9. Inmate Heath became combative kicking at K/9 Reggie. Inmate Heath was taken off the tier and was placed in front of the bubble, Lieutenant Childs advised inmate Heath to stand still and to stop kicking at the dog. When I allowed Reggie to sniff the air near inmate Heath, inmate Heath started kicking at the dog again at that time Lieutenant Childs gave one short burst of chemical agent to the facial area of inmate Heath. Inmate Heath was escorted out of the unit for a medical and shower."*

The facts of this case do not support Sergeant Thomas' written account of what occurred. Video footage capturing the occurrence on the tier shows no contact or direct interaction between inmate Heath and canine "Reggie."

When confronted with video footage during his interview with the OIA, Sergeant Thomas stated that he did not witness inmate Heath kick at his canine on the tier or in front of the Unit Control Module.

In the narrative of his DCDC-1 Incident Report, Lieutenant McKnight stated that inmate Heath indicated that he did not want to be on the tier walkway while the canines were present. Lieutenant McKnight stated that Major Talley informed him that inmate Heath did not have a choice and would have to return to the tier walkway. Lieutenant McKnight stated that when he determined that inmate Heath showed resistance to re-entering the tier walkway, he elected to seclude him in an area near the Unit Control Module.

According to Lieutenant McKnight's statement, Lieutenant Childs then intervened along with Sergeant Thomas. Lieutenant McKnight's narrative also states that the canine made physical contact with inmate Heath. An excerpt from Lieutenant McKnight's narrative states... "*Inmate Heath displayed a fear of dogs, by stating, get that dog away from me. At this time, Lieutenant Childs pulled out his chemical agent and sprayed Inmate Heath in the facial area. Major Talley was standing just in front of Inmate Heath and appeared to receive some of the chemical agent. Lieutenant Childs immediately escorted Inmate Heath out of the unit.*"

During his interview with OIA investigators, Lieutenant Childs stated that he was not aware of inmate Heath's fear of dogs. Lieutenant Childs stated that Lieutenant McKnight never conveyed that information to him. According to Lieutenant Childs, had he known that inmate Heath had a legitimate fear of dogs, he would have taken a different approach in dealing with him.

In the narrative of her DCDC-2 Incident Report, Major Nora Talley emphasized strict adherence to the search protocol by all inmates to include inmate Heath.

Major Talley stated in her narrative, "*I informed him [Heath] that no inmate was exempt from the procedure, inmate Heath began to inform staff that he was not going back to the tier. Lieutenant Angelo Childs took inmate Heath by his restraints, to assist him back to the tier. He [Heath] began to fight and tried to snatch away from Lieutenant Childs stating, you going to have to mace me. Lieutenant Childs and I informed him that if he don't have any contact with any type of drugs on him that he would not have a problem. I further explained to inmate Heath that these dogs are well-trained canine dogs that are trained to sniff for drugs only. Inmate Heath started really fighting and snatching away from Lieutenant Childs. Inmate Heath also started kicking towards the dog. Lieutenant Childs used one quick burst of chemical agent to gain compliance. Inmate Heath was escorted from the unit to R&D.*"

Video footage of this incident reviewed by OIA Investigators does not depict any malicious aggressive behavior towards the canine or any staff member by inmate Heath, and therefore contradicts Major Talley's written account.

During his interview with OIA Investigators, inmate Ernest Heath stated that he informed supervisors who were in the Housing Unit that he had a fear of "Police Dogs." Inmate Heath stated that he was allowed to stand against the wall on the tier walkway opposed to his assigned cell.

Inmate Heath stated that he was escorted from the tier to the area of the Unit Control Module. According to inmate Heath, while in front of the Unit Control Module, Lieutenant Childs summoned Sergeant Thomas and his canine "Reggie."

Inmate Heath stated that Lieutenant Childs told him to "stand still" or he would "spray" him. According to inmate Heath, canine "Reggie" placed his paws on his back and bit him. Inmate Heath stated that when he moved forward, Lieutenant Childs sprayed a burst of chemical agent in his eye. Inmate Heath also stated that Lieutenant Childs "sprayed" him two times.

Recovered video footage of the incident does not depict the canine biting inmate Heath. Nor does the video footage show Lieutenant Childs spraying inmate Heath multiple times.

According to the Inmate Injury Report, inmate Heath was treated in the Infirmary for chemical exposure and a sprained left thumb.

On Friday, April 10, 2009, Major Nora Talley issued Lieutenant Childs a "Letter of Direction" charging him with Neglect of Duty and Incompetence. In the body of the letter, Major Talley stated that inmate Heath was restrained from the rear, and posed no immediate threat that would necessitate the use of chemical agent. ✓

Although it is an established fact that inmate Heath's wrists were restrained in the rear when Lieutenant Childs sprayed a burst of chemical agent in his face, Major Talley did not cite Lieutenant Childs for submitting a false and or misleading Incident Report.

5. FINDINGS

- 1. Lieutenant Angelo Childs' use of chemical agent on a restrained inmate who posed no immediate danger to himself or others was a direct violation of the use of force continuum as articulated in DOC Program Statement 5010.9D
- 2. Lieutenant Angelo Childs submitted a false and or misleading Incident Report of the facts in stating that the inmate was placed in restraints after being sprayed with chemical agent.
- 3. Canine Trainer, Sergeant David Thomas submitted a false and or misleading Incident Report of the facts in stating that inmate Ernest Heath attempted to kick his canine while on the tier of the housing unit.
- 4. Major Nora Talley submitted a false and or misleading Incident Report of the facts in stating that inmate Ernest Heath began to "fight" Lieutenant Childs while in the area of the Unit Control Module.

**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE**

In the Matter of:	:	
	:	
MARY CHRIS DOBBIE,	:	
	:	
Respondent.	:	Board Docket No. 19-BD-018
	:	Disciplinary Docket No. 2014-D208
A Member of the Bar of the	:	
District of Columbia Court of Appeals :	:	
(Bar Registration No. 975939)	:	
_____	:	
	:	
REAGAN TAYLOR,	:	
	:	
Respondent.	:	Disciplinary Docket No. 2014-D209
	:	
An Attorney Licensed to Practice Law :	:	
in the State of Tennessee	:	
_____	:	

DISSENTING STATEMENT OF HAL KASSOFF

I respectfully dissent from the majority’s conclusion that Respondents violated Rule 8.4(c) when they (i) “attempted to muddy” Mr. Collins’ clear finding that Officer Childs had lied about his involvement in an unrelated excessive use of force case; (ii) did not concede that “Childs had made a false and/or misleading statement”; and (iii) omitted key details of the facts surrounding the Collins Report to “portray the motion to be a complete and fulsome summary.” Report and Recommendation of the Ad Hoc Hearing Committee (“Report and Recommendation”) at 75. While all Hearing Committee members agree that ODC did not prove by clear and convincing evidence that Respondents intentionally lied,

the majority believes that Respondents behaved “recklessly,” and thus violated Rule 8.4(c). *Id.* I conclude that, after examining the entire mosaic of their conduct, Respondents’ false statements were the result of honest mistakes, not recklessness. Moreover, I believe that a finding that they were “dishonest” will unfairly tarnish Respondents in the eyes of the public and, on a personal level, in the eyes of their families, who, not steeped in the Court’s disciplinary caselaw, will be led to believe that Respondents intended to mislead, when in my view, their actions constituted aggravated neglect at worst and did not constitute intentional or even reckless dishonesty.

I. Disciplinary Counsel Did Not Prove by Clear and Convincing Evidence that Respondents Made Recklessly False Statements.

I reach this conclusion after considering Respondents’ entire course of conduct, including most importantly, the submission of the issue to the *Lewis* Committee and the directive Respondents received that they could sponsor Officer Childs, and the unclear guidance that accompanied that directive. Roth offered his opinion that the Report is “simply unclear” and questioned whether the Collins Report’s “conclusion that he [the witness] lied is supported by the record.” DX 13. He then left it to the two relatively inexperienced attorneys to “hash that out.” *Id.* Neither of the two levels of supervision to whom Respondents reported offered guidance other than following the course as indicated by Roth. The evidence presented at the hearing showed that Respondents did their best to handle this information correctly and followed the general direction received from their superiors, despite the lack of clarity in those instructions.

Regarding the majority's conclusion that Respondents recklessly attempted to "muddy" Collins' finding that Officer Childs had lied, it is clear and convincing to me that what they were doing was arguing the Roth theory, as they believed they were instructed to do through three layers of the United States Attorney's Office. Although Roth's theory proved to be incorrect, and the Hearing Committee was unanimous in finding aggravated neglect on the part of Respondents for not adequately "hashing it out" as Roth had invited them to do, arguing their case based upon the Roth theory and what Respondents reasonably construed as guidance does not equate to a reckless disregard of the truth.

As to the conclusion that Respondents had a reckless disregard of the truth when they did not concede that "Childs had made a false and/or misleading statement," ODC Br. at 35, in not making such a concession, Respondents were again advancing the Roth theory that it was not clear "*that the DOC conclusion that he lied is supported by the record.*" DX 13 (emphasis added). Their failure to undermine the very theory of the case that Roth had articulated, and that they bought into, was a mistake in judgement that led the Hearing Committee to unanimous findings of other Rule violations, but it does not constitute reckless disregard of the truth.

Finally, as to the Committee majority's conclusion that Respondents were reckless when they "omitted key details of the facts surrounding the Collins Report to 'portray the motion to be a complete and fulsome summary,'" Report and Recommendation at 75, below is the testimony of Ms. Dobbie which I credit,

keeping in mind that in addition to the actions she describes here, Respondents then disclosed the full report to Judge Morin and invited him to add to their summary any additional information from the Collins Report that he thought should be disclosed:

And I'm reading the background section; I'm pulling the cases up, you know, that as we sort of go through the motion, I'm reading the cases and seeing if there's any different arguments that could be made. And I'm reading the final report when I'm drafting the background. I'm starting with the findings. I'm saying, "These are the findings in the report" I'm influenced by Mr. Roth's email, as well as the draft motion in limine. I'm describing how the findings are.

And then I'm going through the report in the background section, in the investigation section, and I am trying to give the defense a very fulsome disclosure about these findings: what is in the report that is about Officer Childs in these findings?

Typically our Brady disclosures, like these kind of things, are like one sentence: "Officer convicted of DUI"; "Officer found to have perjured himself in 2009 and missed trial." That was normal.

So I was trying -- I know it's ironic now, but I was really trying to give the defense a very fulsome picture of these findings, and these are all the facts that pertain to these particular findings. So I'm reading the final report through the lens of those findings as I am drafting up my motion.

Tr. 563-64. This testimony reflects an effort to get the disclosure right, and it precludes finding by clear and convincing evidence that Respondents consciously disregarded their obligations to tell the truth.

As it turned out, Respondents' approach of going through the background and the findings of the Collins Report to produce the summary, though not an implausible approach, did not ensure that all of the relevant information in the report had been captured, which is as much a failing of the Collins Report as it is

Respondents' failure to double check. But to attribute this shortcoming of the summary to a reckless disregard of the truth and to accept that assertion as clear and convincing, especially when Respondents believed that by submitting the Report to Judge Morin they were ensuring full disclosure of what they and the Judge determined was relevant under *Brady*, is well beyond what I am able to accept.

II. A Conclusion that “Recklessly” False Statements Constitute “Dishonesty” Will Unfairly Taint Respondents.

The majority correctly discusses the Court’s caselaw regarding the meaning of dishonesty, including that recklessly false statements violate Rule 8.4(c). *See* Report and Recommendation at 72-75. Members of the Bar and others who understand the intricacies of Rule 8.4(c) may understand that a finding of “dishonesty” in a disciplinary case is not necessarily a finding that the respondent *intentionally* made false statements. However, it seems highly unlikely that members of the public or the families of Respondents would understand that “dishonesty” includes false statements made unintentionally, but made without sufficient care that they were accurate. Indeed, as my colleagues observe, “the four components of [Rule 8.4(c)] – dishonesty, fraud, deceit and misrepresentation – all have the ring of ‘deliberateness’ to them.” *Id.* at 72-73. Thus, it is far more likely that members of the public will be led to believe that Respondents “lack[ed] honesty or integrity,” or “had a disposition to defraud or deceive,” which are the dictionary definitions of “dishonesty.” *Dishonesty*, Merriam-Webster, *available at* <https://www.merriam-webster.com/dictionary/dishonesty>, (2020).


Attaching the term “dishonesty” to the well-intentioned, though misguided and ultimately negligent actions of the Respondents would be an injustice, in the broadest sense. It is therefore incumbent upon the Board and the Court to apply a term other than “dishonesty” when an honest attorney without dishonest intent is found to have violated one or more Rules of Professional Conduct, but where the term dishonesty is clearly and convincingly inappropriate. Rule 8.4(c) should be reserved for those for whom the indelible stigma of “dishonesty” is indeed clearly and convincingly established.

Because the record in this case does not establish that Respondent lacked honesty or integrity, or had a disposition to defraud or deceive, I conclude that Respondents should not be found to have violated Rule 8.4(c).

III. Sanction

The majority “considered, but rejected, recommending an informal admonition – the sanction in *Cockburn* – largely because of [their] additional finding, not present in *Cockburn*, that Respondents violated Rule 8.4(c).” Report and Recommendation at 88. The majority recommended instead that Respondents receive the more severe sanction of a 30-day suspension. Since I conclude that Respondents’ conduct should not amount to a violation of this Rule, I adopt the

remainder of the majority's sanction analysis, but recommend that Respondents receive an informal admonition as a sanction for their misconduct.



Hal Kassoff
Public Member

**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE**

In the Matter of:	:	
	:	
MARY CHRIS DOBBIE,	:	
	:	
Respondent.	:	Board Docket No. 19-BD-018
	:	Disciplinary Docket No. 2014-D208
A Member of the Bar of the	:	
District of Columbia Court of Appeals :	:	
(Bar Registration No. 975939)	:	
_____	:	
	:	
REAGAN TAYLOR,	:	
	:	
Respondent.	:	Disciplinary Docket No. 2014-D209
	:	
An Attorney Licensed to Practice Law :	:	
in the State of Tennessee	:	
_____	:	

**SEPARATE STATEMENT OF THE COMMITTEE CHAIR REGARDING
PROCEDURAL MATTERS**

As Chair of the Ad Hoc Hearing Committee, I write separately on two subjects that do not bear on the outcome of this case, but which involve certain procedural matters that the Board may wish to consider regarding the litigation of complex cases before Hearing Committees. These two matters are: (i) the pre-hearing management of what appear to be undisputed facts; and (ii) the structure and management of closing arguments.

The Pre-Hearing Management of “Undisputed” Facts

From the moment this case was assigned to this Ad Hoc Hearing Committee, the Chair attempted to establish a streamlined and efficient way for the parties to put into the record the facts they believed were essential to their respective cases. To that end, the Chair reviewed the pleadings and determined that Respondents had admitted many of the factual allegations in the Petition and, as a result, there would be no dispute as to many of the material facts at the hearing.

In an otherwise standard Scheduling Order, establishing dates for the hearing and pre-hearing exchanges and filings, the Chair noted both the apparent “agreement” on substantially all of the facts and that much of the case appeared to rest on documents (emails, pleadings and court hearing transcripts), all of which were self-authenticating and spoke for themselves. Accordingly, the Chair directed the parties to “use their best and good faith efforts to reach stipulations that will obviate the need to burden the record with testimony about facts not in dispute and to tailor their respective direct cases at the hearing accordingly.” Hr’g Comm. Order, April 17, 2019.

The Chair followed that theme in a subsequent Order regarding the filing of Pre-Hearing Briefs. In that Order, the Chair directed the parties to note in their briefs those particular facts upon which they intended to rely and that they, in good faith, expected to be uncontested at the hearing. The Chair’s purpose in these directions was to simplify the hearing so that the parties would focus the Committee’s attention

on what seemed to be fairly narrow factual disputes between them. Hr’g Comm. Order, May 13, 2019.

Prior to a Pre-Hearing Conference, the parties reported that ODC was unwilling to agree on any stipulations. Not satisfied with this response, the Chair prepared a document reflecting all of the facts in the Specification of Charges that Respondents had admitted in their Joint Answer and directed the parties to meet and confer to record those agreements (and others they might reach) in a stipulation and advised the parties that “[a]bsent good cause shown, no testimony regarding the allegations [that Respondents admitted] shall be presented at the hearing (except as may be necessary to put testimony regarding disputed facts into context).” Hr’g Comm. Order, July 11, 2019.

The Chair held a Pre-Hearing Conference to review a number of matters in advance of the hearing, including the status of the stipulation. At that Conference, ODC explained that its position regarding stipulations was based on its general rejection of the practice of presenting cases through stipulations; its belief that the Specification of Charges was mere “notice pleading” and did not reflect the full story of the case it wanted to make; that it did not want to appear to be anything other than entirely vigorous in a case in which prosecutors were respondents; and, that the Chair’s limitation on testimony would interfere with a full presentation of the facts without serving the stated purpose of making the hearing more efficient. While the Chair disagreed with ODC’s assessment of the effect of its Order, recognizing that

he could not compel parties to enter into stipulations, the Chair modified its Order to provide that:

With regard to the allegations in Attachment 1 that are double underlined [the language in the Specification of Charges that the Respondents admitted in their Answer] a) the Chair will ask the Respondents prior to beginning testimony whether those allegations are admitted;¹ b) to the extent Respondents acknowledge that any allegation is admitted, the Parties are directed to limit witness testimony designed to “prove” such allegations to the fullest extent possible, taking into account their good faith belief that any such testimony is necessary to assist in proving facts that may be disputed; and c) the Parties may expect the Chair to direct them to move on to other matters if the Chair believes that the testimony sought to be elicited is on a fact admitted by Respondents, is therefore cumulative, and that further testimony is not necessary for the Hearing Committee’s evaluation of the record as a whole.

Hr’g Comm. Order, July 18, 2019.

The hearing commenced on July 22, 2019. Before testimony began, Respondents submitted the document called for by the July 18 Order, identifying all of the facts in the Specification of Charges they admitted and others that they would admit if characterizations of pleadings and transcripts were replaced with direct quotations from those documents.²

¹ The rationale for the Chair requiring an affirmative acknowledgement by Respondents on the record that they continued to admit the facts previously admitted in their Answer was the Court of Appeals decision in *In re Nave*, 197 A.3d. 511 (D.C. 2018), suggesting that admissions in Answers by themselves and without any record evidence may not be sufficient to support a finding of fact. While the opinion in *Nave* seems to turn on the particular facts in that case – namely the sufficiency of an admission in an Answer to a date modified by an “on or about” modifier in a case where precise dates made a difference – the Chair required the affirmative acknowledgement out of an abundance of caution.

² The document was marked as Hearing Committee Exhibit (“HX”) 3 and was subsequently filed with the Board and is contained in the docket of this case.

At the close of the hearing, the Committee directed ODC to respond by August 2, 2019 to Respondent's submission reflecting facts they were willing to admit (HX 3), so the Committee could have a "head start" on drafting its Opinion by identifying early in the process those facts that the Committee could find without dispute well before briefs were submitted. On July 29, 2019, ODC filed its response, again refusing to comply with the Chair's request.

The parties filed their Post-Hearing Briefs over the period August 23 to September 30, 2019. As the Chair anticipated before the hearing began, the parties agreed on virtually all of the facts that formed the basis for ODC's case.

While nothing substantive in this Opinion turns on this procedural history, I bring it to the attention of the Board because the full Committee believes that the Board—in the exercise of its administrative authority over Hearing Committees, ODC and the Board's Rules—may wish to consider an approach to uncontested facts that better serves the disciplinary system. The current Board Rules appear to encourage stipulations. Board Rule 7.20 provides in part:

The Chair of the Hearing Committee to which a matter is assigned, or the other attorney member if designated by the Chair, may conduct a prehearing conference with Disciplinary Counsel and respondent *in order to clarify the issues, encourage stipulations or admissions, and dispense with formal proof of facts not in dispute.* (emphasis added).

Bd. Prof'l Responsibility Rule 7.20 (emphasis added). And while they do not give Hearing Committees the authority to insist on stipulations in circumstances where there are obvious stipulations to be made, they do vest Hearing Committees with some authority to regulate evidence offered at a hearing. More specifically, Board

Rule 11.3 vests Hearing Committees with the authority to manage hearings efficiently. It provides: “*Evidence that is relevant, not privileged, and not merely cumulative* shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies.” Board Rule 11.3 (emphasis added).

Perhaps that is all that is necessary. In fairness to the parties, precious little hearing time was spent plowing ground that was not in dispute. But we do not know whether the same result would have been obtained had the Chair not pressed the matter in pre-hearing conferences and orders. And, despite the Committee’s efforts to get actual agreement on facts before the lengthy process of briefing began, we were unable to do so, and that fact had an appreciable effect on how quickly the Committee was able to produce its Opinion.

There is precedent in practice outside the disciplinary system for removing undisputed facts from litigation. Rule 36 of the Federal Rules of Civil Procedure is designed specifically to place consequences on the refusal of a party to agree to uncontested facts. While there are obvious differences between a civil case and one brought in the disciplinary system, the fact remains that in both systems there is (or ought to be) a premium placed on the efficient use of trial time. To that end, the Advisory Committee Notes to the 1970 amendments to Rule 36 provide that “Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be

eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.” Notes of Advisory Comm. on Rules –1970 Amendment [to Rule 36].

I do not suggest that there is a perfect analogy between disciplinary proceedings and civil cases. I recognize that the consequence from the refusal to admit an undisputed fact in a civil case does not fit well in the disciplinary system and also that there is no analog to Rule 36 in the Criminal Rules. And while it is undeniable that “disciplinary proceedings are quasi-criminal in nature,” *In re Williams*, 464 A.2d 115, 118 (D.C. 1983) (per curiam), they nevertheless share many of the characteristics and consequences of civil proceedings, and it seems to the Committee that the policy underlying Rule 36 applies equally to Bar disciplinary cases. Based on the Committee’s experience in this case, we suggest to the Board that it consider a Rule amendment that would more forcefully “encourage” pre-hearing fact stipulations.

The Conduct of Closing Arguments

As noted in the body of the Committee’s Report and Recommendation, following the close of evidence, the parties gave closing arguments to the Committee. The Committee Members are under the impression that closing arguments are not typical in disciplinary cases—the parties and the Committees rely on post-hearing briefs to make their arguments.

Here, before the hearing began, the parties had advised the Committee that they might want to make closing arguments and asked the Committee to consider allowing them to do so. By the close of the evidence, the Committee Members had

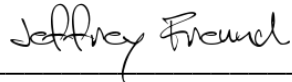
decided that closing arguments were not going to be optional; they affirmatively desired that the parties make them and, on the day prior, posed a series of questions to the parties and asked them to address those questions in their arguments.

The parties took those questions to heart and the following day came prepared to answer them. The arguments spanned over four hours broken up by a short lunch break. The arguments were interactive in a manner that is not typical for a closing argument to a fact-finder; that is, the Committee Members repeatedly interrupted the parties with questions and follow-up questions to their answers. And the lunch break afforded the Committee Members time to talk among themselves, resulting in additional questions that might not have been asked without the benefit of the break.

We describe this process not because anything substantive turns on it but rather because the Committee found the process exceptionally helpful to its deliberations. The Members were able to raise specific issues about which they had particular concerns and which might not have been addressed at all or, if addressed, not as fully had they not been posed directly to the parties. We believe that the process also informed the parties in the drafting of their briefs. Indeed, during the Committee's deliberations, members identified additional questions they wished they had thought of and asked about during closing argument. Had the Committee not undertaken the process in the way it did, there would have been many more unanswered questions during the deliberations.

While we do not necessarily believe that this argument process—or any closing argument at all—will be necessary or even helpful in every case, we have

certainly concluded that in a case where either the basic facts are complicated or, as in this case, the matching up of fairly straightforward facts to the law is complicated, an interactive argument materially advances the Committee's ability to grapple with the parties' positions. We have therefore written separately on this point to encourage the Board to, in turn, encourage Hearing Committees to use this process more freely than might generally be the case.³



Jeffrey Freund
Chair

³ We are conscious of the fact that the Board has proposed an amendment to Board Rule 7.20 that encourages Hearing Committee Chairs to discuss the prospect of opening statements and closing arguments in prehearing conferences with the parties. As is apparent in this Separate Opinion, this Hearing Committee believes the argument process described herein was exceptionally helpful in this case.