DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of AMANDA HAINES, ESQ. Respondent, An Attorney Licensed to Practice Law in New York	Disciplinary Docket No. 2016-D261
FERNANDO CAMPOAMOR-SÁNCHEZ, ESQ. Respondent, Member of the Bar of the District of Columbia Court of Appeals Bar No.: 451210	Disciplinary Docket No. 2016-D262

RESPONDENT AMANDA HAINES'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING COMMITTEE'S REPORT AND RECOMMENDATION

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INTRODUCTION

The investigation into Chandra Levy's 2001 murder and the resulting 2010 trial of Ingmar Guandique was a massive undertaking for the United States Attorney's Office for the District of Columbia (USAO). The government, led by Assistant United States Attorney (AUSA) Amanda Haines, turned over an unprecedented amount of discovery to the defense, including more than 20,000 pages of discovery.

This case is about one sentence, on one page, of one letter in all of that discovery. More specifically, it is about a single reference to a single fact that had nothing whatsoever to do with Levy's murder or Guandique's guilt.

The information at issue is this: more than ten years before Guandique's trial, confession witness Armando Morales debriefed with law enforcement officials—who were not involved in the *Guandique* case—to discuss his own gang involvement. *That's it*. During that debrief, Morales did not incriminate anyone, name any names, seek any benefit, or receive any benefit. He was not a cooperator; he was just a prisoner whose brain some law enforcement agents wanted to pick.

To uphold the Hearing Committee's decision, the Board would have to find that Amanda Haines *actually thought* the information at issue was exculpatory and then *actively decided* to withhold it from the defense—which is what the

Hearing Committee inexplicably found. The Board would also have to find that, among the tens of thousands of pages of discovery, including information that truly *was* exculpatory (and was disclosed), Haines consciously decided to withhold 23 words, in one sentence, on one page, of one letter. And to impose any sanction for the Rule 3.8(e) and 8.4(d) violation, the Board would *then* have to find that those 23 words, in that one sentence, were material to the outcome of the underlying trial.

The Hearing Committee was in a tricky spot. The Chair himself stated during the hearing, "I don't see how you get around *Kline*," meaning that Respondents could probably not be sanctioned because those 23 words, in that one sentence, were not material to the outcome of the case. The Office of Disciplinary Counsel (ODC) could not prove that it was. Nevertheless, sometime been the Chair's making that statement and the decision, the Hearing Committee changed course and suddenly decided that the information learned *post-trial* was material to the outcome of Guandique's trial. In so doing, it stretched the materiality standard beyond the bound of the law.

And finally, to avoid having to take a position on the ruling in *Dobbie*, currently on appeal, that turns "intentionality" into a strict liability standard, the Hearing Committee found Haines *actually, subjectively* knew the information was exculpatory—*something ODC itself never even claimed*. Yet at the same time,

the Hearing Committee *didn't* find that the information was exculpatory on its face. (Why withhold it then?) Instead, it found that the information at issue—that single sentence—"did require investigation to be meaningfully useful." R&R at 32. But if the information required investigation to be "meaningfully useful," then it could not have been exculpatory on its face. And if the information was not exculpatory on its face, it makes *no sense* to conclude that Haines would have intentionally sought to suppress it.

At worst, Haines made a mistake. What she did not do was *intentionally* suppress evidence. The Board should reverse the Hearing Committee's decision and clear Haines. If it will not do that, then it should follow *Kline* and impose no sanction on her.

PROCEDURAL HISTORY

On April 24, 2020, Disciplinary Counsel filed a Petition and Specification of Charges alleging that Haines violated Rules of Professional Conduct 3.4(e), 8.4(d), and 1.6. The hearing began on May 18, 2021 and concluded on May 25, 2021. The hearing was conducted remotely, via Zoom.[1] The Hearing Committee issued its Report and Recommendation on February 24, 2022. It found that Haines violated Rules 3.4(e), 8.4(d), and 1.6. It recommended a 90-day suspension. On March 7,

[1] Haines renews her objections to conducting the disciplinary hearing remotely that Respondents raised in their October 1, 2020 Motion for an In-Person Hearing.

2022, Haines filed her notice of objection to the findings and to the recommendation of the Hearing Committee, and Disciplinary Counsel filed objections to the recommended sanction against Haines.

STANDARD OF REVIEW

In reviewing the factual findings of a Hearing Committee, the Board employs the "substantial evidence on the record as a whole" test. D.C. Board Rule 13.7. Under this standard of review, "the Board must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *In re Ukwu*, 926 A.2d 1106, 1115 (D.C. 2007). The Board reviews a Hearing Committee's legal conclusions de novo, owing them no deference. *See In re Micheel*, 610 A.2d 231, 234 (D.C. 1992).

FACTS[2]

Background

In May 2001, Chandra Levy disappeared. Approximately one year later, Levy's remains were discovered in Rock Creek Park. FCSX 131 at 005. About two months after Levy's disappearance, Ingmar Guandique was charged with assaulting two women in separate attacks in Rock Creek Park in May and July 2001. FCSX 131 at 003–004. Guandique pled guilty to those attacks and received

[2] Citations are abbreviated: Disciplinary Counsel's exhibits are "DCX"; Haines's exhibits are "AHX"; Campoamor's exhibits are "FCSX"; Respondents' joint exhibits are "JX"; the Hearing Committee's Report and Recommendation is "R&R"; and the transcript from the May 2021 hearing is "Tr."

a ten-year prison sentence. FCSX 131 at 005.

In 2007, Haines, a prosecutor specializing in unsolved homicides and former Homicide deputy chief, became the new Levy investigation lead. Tr. 1472:1–4. Fernando Campoamor-Sánchez joined the team in 2008.

Haines and Campoamor further investigated Levy's murder. Evidence of Guandique's guilt included: two women identified him as their park attacker; another woman identified him as her attempted attacker on the day Levy disappeared; his landlady and girlfriend reported him having scratches and a fat lip around the day Levy disappeared; a prison pen-pal reported Guandique said his criminal past involved a dead woman; and several inmates previously incarcerated with Guandique reported he said he murdered Levy. FCSX 131; Tr. 1200:5-22, 1478:11–1480:13.

Armando Morales

Respondents learned about one of those inmates, Armando Morales, *after* an arrest warrant had issued against Guandique for Levy's murder. DCX 5; FCSX 131. That is important—it shows that the government thought they could prove the case without Morales.

This disciplinary matter involves: (1) whether a fact concerning Morales's background was subject to Rule 3.8(e), which requires disclosure of information that "tends to negate the guilt of the accused;" (2) whether Respondents

intentionally failed to disclose that fact; and (3) assuming the disclosure was made, whether it was provided when "reasonably feasible" for the defense to make "use" of it at trial. The fact at issue is this: more than ten years before the *Guandique* trial (and years before Levy's murder), Morales agreed to meet with law enforcement (not involved in *Guandique*) to discuss his own gang involvement; did not incriminate anyone else; and did not seek or obtain any benefits. AHX 9 at 003; DCX 25 at 0492; Tr. 1514:11–1515:9, 1522:13–1523:8.

In 1997, Morales pled guilty to federal drug-related crimes and received a 21-year prison sentence. JX 6 at 005–006. Morales's plea was not pursuant to any agreement to provide information in exchange for a sentencing reduction or other benefit. DCX 25 at 0501; Tr. 818:22–819:2, 1521:21–1522:2. Morales had never entered into a cooperation agreement with any law enforcement or prosecuting entity. DCX 25 at 0493; Tr. 804:15–20. And Morales had never testified against anyone before. DCX 15 at 0232.

Morales never requested or received any sentencing reduction for testifying in *Guandique*. DCX 27 at 0520; Tr. 819:3–7, 1620:2–4. He was not a "cooperator," as the term is used by the USAO (*i.e.*, a witness in a formal cooperation agreement who provides incriminating information and testimony in exchange for some benefit). Tr. 609:4–10, 610:2–8; 865:10–866:18. And indeed, even after the *Guandique* trial, Morales served his entire sentence without

receiving a benefit of any kind for his testimony. DCX 25 at 0500; Tr. 1058:5–11.

Guandique's confession

In 2006, Morales and Guandique were housed together in prison. DCX 6 at 0067; FCSX 4. In two conversations, around late 2006, Guandique told Morales that he had killed Levy. FCSX 12 at 003. Morales did not contemporaneously report Guandique's confession because, although Morales had dropped out of his gang in 1996, he still subscribed to a "no-snitching" philosophy. DCX 6 at 0087–0088, DCX 15 at 0231–0232, 0344–45.

Around April 2008, a man named Miguel Zaldivar became Morales's mentor in a prison rehabilitative program that encouraged Morales to embrace a law-abiding life. FCSX 12 at 001; DCX 15 at 0271. In late 2008 or early 2009, Morales told Zaldivar that Guandique had confessed to killing Levy. FCSX 12 at 001. After that, in mid-February 2009, Zaldivar and Morales saw on CNN that Guandique had been independently identified as a suspect in Levy's murder. FCSX 12 at 001.

Zaldivar encouraged Morales to report Guandique's confession to law enforcement. FCSX 12 at 001; DCX 6 at 0089–0090. Morales agreed to do so and to testify—something he had never done before—against Guandique. DCX 6 at 0089–0090; DCX 15 at 0232, 0277. On February 23, 2009, Zaldivar drafted and thereafter sent a three-page letter (the "Zaldivar letter") to a prosecutor he knew.

FCSX 12. Page one of the Zaldivar letter reported that Guandique confessed to Levy's murder to Morales, provided background on Morales, and indicated Morales would assist law enforcement. FCSX 12 at 001. It also contained a passing reference to Morales's having had a prior conversation with law enforcement about his gang. FCSX 12 at 001 ("[Morales] is one of the founders of the Fresno Bulldogs—a notorious gang closely associated with the Mexican Mafia . . . . **However Morales is also a drop-out; he debriefed to law enforcement about his gang involvement and is no longer considered an active member**.") (the bolded text, which is our emphasis, is what Haines is supposed to have intentionally kept from the defense) . Pages two and three contained additional context and an account of Morales's report. FCSX 12 at 002–003.

Respondents received the Zaldivar letter on March 24, 2009, several weeks after a March 3, 2009 arrest warrant charging Guandique with first-degree felony murder for Levy's death issued. DCX 5; FCSX 131. Upon receiving it, they began investigating Morales to assess his criminal history and whether he had been housed with Guandique. FCSX 3; FCSX 4; Tr. 1028:5–21, 1029:19–1032:21. Respondents transferred Morales to D.C. to interview him and potentially present him to the grand jury prior to Guandique's May 19, 2009 indictment. Tr. 1029:3-5, 1033:13-1034:12.

On April 17, Campoamor and the case detectives met with Morales. Tr.

1038:22-1039:11, 1040:5-22. They put Morales in the grand jury on April 20. DCX 6.

Morales's Grand Jury Presentation

During Morales's grand jury examination, Campoamor introduced all potential impeachment information he knew about—including Morales's criminal convictions, outstanding prison sentence, past gang involvement, and motives and biases. DCX 6 at 0060, 0062–0063, 0087-89, 0096; Tr. 1054:18-1058:4, 1131:6-1132:7. Morales told the grand jury he did not report Guandique's confession for more than two years until a prison program "chang[ed his] value system" causing him to "try[] to become a better … person." DCX 6 at 0088. His testimony was consistent with Campoamor's understanding that the prior debrief was just a conversation with law enforcement about his own gang affiliation. Tr. 1129:1–10, 1129:17–1131:13.

Campoamor intentionally introduced the three-page Zaldivar letter—*including page one with the debrief reference*—as a grand jury exhibit. DCX 6 at 0091–0092; Tr. 1066:7–11, 1066:15–21, 1069:5–1070:11. Campoamor asked Morales about the exhibit, and, five separate times, they referred to its page numbers, indicating it had three pages. DCX 6 at 0092–0093; Tr. 1073:9–1074:8. Campoamor also questioned Morales about the addressor information, which appeared only on page one. DCX 6 at 0092; Tr. 1072:22–1073:8. Campoamor

intended that "the entire letter, including page one, would be given to the defense" if Morales testified at trial. Tr. 1076:9–1077:4, 1260:4–10.

Morales's Trial Preparations

In August 2010, Haines took responsibility for preparing and calling Morales at trial. FCSX 23 at 005; Tr. 1575:7–9. She approached witness assignments as a fluid concept that changed as the trial strategy evolved. In September, Haines reassigned Morales to Campoamor before ultimately taking him back—not because he was viewed as the government's "star witness," but because he spoke fluent English, while the bilingual Campoamor could handle the Spanish-speaking witnesses. FCSX 42 at 006; Tr. 1145:1–7, 1489:8–10, 1575:7–9. The trial team prepared to call numerous more important witnesses, including women who had survived strikingly similar attacks by Guandique. Tr. 1027:3–5, 1580:15–21.

Haines met with Morales on October 5, 2010. He denied having ever previously assisted or worked with the government. Tr. 1513:16–20. When Haines asked about the debrief mentioned on page one, Morales explained that while incarcerated in Atlanta, law enforcement approached him and that he agreed to speak with them regarding only his own gang involvement, saying "I'll tell you ab[ou]t me but no one else." AHX 9 at 003; Tr. 1514:1–1515:9. Morales said he'd been indoctrinated to "not tell[] on individuals" and viewed being a "snitch" or

"testifying" as a "death sentence" because of potential retaliation. AHX 9 at 003; Tr. 1515:14–1516:2. Morales maintained he hadn't pled guilty pursuant to a cooperation agreement, had "never testified," and told "just on [my]self." AHX 9 at 003; Tr. 1514:19–1515:6. Morales further said he had been truthful and not received any benefits. Tr. 1521:12–20. Morales stated that he was coming forward because the prison program and Zaldivar encouraged him to become a better person. Tr. 1679:21–22, 1808:4–9.

Haines met with Morales again on October 30, 2010. She prepared him for questions regarding his prior debrief, showing that she thought the defense would have that information and cross him on it. AHX 10 at 4 ("Have you ever testified before"; "prep for did debrief with gang unit but not about others"; "willing to tell about himself but no one else."); Tr. 1808:10–1809:3. In none of those meetings did Morales indicate he'd previously incriminated anyone. He said the opposite. Tr. 1521:12–20.

Haines didn't just take Morales at his word—she ran down information to test the veracity of his narrative. By trial, Haines and others had verified Morales's information, including by:

- obtaining Morales's prison inmate quarters history and profile to confirm he was housed with Guandique during the alleged confession, Tr. 1527:6-19;
- confirming Morales didn't overlap with other confession witnesses to eliminate possible collusion, Tr. 1528:3-6;

- running PACER searches to confirm Morales hadn't filed sentencing reduction motions or entered into cooperation agreements, Tr. 1398:14–18, 1523:17–1525:20;

- attempting to access his electronic court file, and reviewing the publicly available docket for any mental health history, Tr. 1524:10–1525:1; 1539:20–1540:7;

- obtaining his criminal background report, Tr. 1030:4–20, 1504:1–5;

- reviewing CNN coverage that aired at Morales's prison to exclude the possibility he could've obtained the information from CNN, Tr. 615:14-616:4, 1528:18-1529:6; and

- reviewing Guandique's pre-2008 court paperwork to assess whether Morales could've obtained confession details from paperwork present in their cell, Tr. 1528:14-17.

Trial

At Guandique's trial, Haines was lead counsel; Campoamor was second chair. Tr. 1018:18–21. AUSA Chris Kavanaugh was assigned shortly before trial to assist. Tr. 571:9-14. Santha Sonenberg and Maria Hawilo, both experienced and zealous advocates from the Public Defender Service (PDS), represented Guandique. Tr. 85:13–17, 227:12–14, 343:1–12.

Trial began on October 18, 2010. Tr. 1136:19-21. The government presented a strong circumstantial case-in-chief, calling approximately forty witnesses in nine days. DCX 25 at 0493, 0497; *see generally* DCX 17. The strongest evidence of Guandique's guilt was testimony from three women who survived Guandique's attacks in the park. DCX 25 at 0493. Guandique was

convicted on all counts. DCX 25 at 0497.

On November 4, 2010, Morales testified that Guandique confessed to murdering Levy. DCX 15 at 0253–0269. Sonenberg vigorously cross-examined him about his criminal history, past willingness to work with the government on pleas, purported collusion with Zaldivar, and delay in reporting Guandique's confession. DCX 15 at 0280–0338.

Morales did *not* claim at trial that he had not, or would not, speak to law enforcement, or "debrief." Tr. 131:5–8; DCX 15. He instead specifically claimed that he had not "come forward" and "testified" before, which was consistent with page one of the Zaldivar letter. DCX 15 at 0232, 0318. The debrief did not indicate a self-interested motive in *Guandique* because it is undisputed that Morales received no benefit for it. DCX 25 at 0500. That information would have *undermined* PDS's theory that he fabricated the confession for some benefit. DCX 25 at 0492; Tr. 1340:11–21.

Morales's Jencks Disclosure

At least two days before Morales testified, by November 2, 2010, Kavanaugh gave PDS a packet containing Morales's statements, pursuant to the Jencks Act, 18 U.S.C. § 3500. Tr. 170:1–11, 577:8–10. Kavanaugh recalls handing Morales's Jencks to Hawilo in the USAO lobby after hours. Tr. 580:19-21, 581:13-17, 582:7-13.

The Jencks disclosure contained Morales's grand jury transcript and the three-page Zaldivar letter. Kavanaugh testified that page one was specifically included: "I have a mental image of it being part of the packet." Tr. 588:19-20. If page one wasn't included, Kavanaugh would have raised the issue with Respondents upon seeing page numbers indicating a missing page and again during repeated trial arguments regarding admissibility of the Zaldivar letter. Tr. 588:20–589:14. Kavanaugh had "no doubt in [his] mind" that there was never any discussion, instruction, or suggestion from Respondents to withhold page one; if there had been, he "would have gone to [my supervisor's] office immediately." Tr. 628:3–630:5. An extensive, post-trial investigation found no evidence of any efforts, or intent, to withhold page one. Tr. 867:8–21, 980:7–20.

During the disciplinary hearing, PDS could not describe with any degree of certainty what was in the original Morales's Jencks when received. Tr. 160:19–161:8, 339:8–340:1. Neither Sonenberg nor Hawilo could recall who picked up the Jencks packet and where or how it was delivered. Tr. 159:6–161:8, 335:7–336:12.

Documents that were indisputably in Morales's Jencks packet make the existence of page one screamingly obvious. **The second and third pages are clearly numbered "Page 2" and "Page 3,"** FCSX 12 at 002–003, **and the grand jury transcript *repeatedly* refers to the Zaldivar letter as a *three-page exhibit***,

DCX 6 at 0092–0093. Without page one, with its red grand jury exhibit sticker, the document wouldn't have been recognizable as the referenced exhibit. FCSX 12 at 001; Tr. 215:9–216:2. PDS did not claim it was missing page one upon receipt of the Jencks packet or during Morales's testimony, when the Zaldivar letter was discussed extensively. Tr. 594:13–20, 845:1–846:3, 1177:10–15.

On November 12, eight days after Morales's testimony and at least ten days after PDS received Morales's Jencks packet, Sonenberg claimed, for the first time, "what we were provided was only, *I think*, pages two and three, we were not provided page one of the letter." DCX 16 at 0359 (emphasis added). She claimed this when discussing the admissibility of a trial exhibit comprised of the indented portions of pages two and three (FCSX 56), which Haines sought to introduce as Morales's prior consistent statement. Tr. 1581:5–14.

Haines promptly corrected Sonenberg, explaining the trial exhibit "was turned over as Jencks" and "*it's* ***part of*** *the letter* that we turned over." DCX 16 at 0362 (emphasis added). PDS did not controvert Haines's representation or request a copy of page one, then or at any point during trial, even though the Zaldivar letter was discussed at length three more times. Tr. 231:20–232:12, 1584:15–20, 1585:8–12; FCSX 65 at 066–074, FCSX 68 at 079–085, 102–104; JX 10 at 011–017.

Sonenberg and Hawilo were highly skilled, tenacious advocates.

Tr. 227:12–14 (Sonenberg was "dogged" in pursuing discovery), 342:18–343:8 (Hawilo requested discovery "[s]even ways to Sunday"). It was their practice to request any document they perceived was missing from a production, demand an explanation for why it was not produced, and press the issue until they were satisfied. Tr. 227:15–19, 343:9–17. They promptly and persistently raised perceived discovery deficiencies. FCSX 45 at 001 (Hawilo informing the government PDS was "missing" a page of another witness's grand jury transcript), AHX 21 at 002 (Sonenberg inquiring about pages from a WACIIS report); Tr. 406:4–407:4. *Yet they never did so for page one*. Tr. 845:5–846:3 (Evangelista: The post-trial team "would have expected to see a specific complaint . . . that a page was missing" and a demand for "an explanation" from PDS if page one were missing.).

PDS may have just misplaced page one. *Guandique* involved voluminous discovery that far exceeded the discovery typical in homicide cases, totaling tens of thousands of documents, in addition to recordings, photographs, and physical evidence. Tr. 152:20–153:2, 153:7–10. PDS didn't have policies regarding logging, tracking, or duplicating incoming discovery, Tr. 166:15–21, 168:9–15, nor did PDS consistently save discovery in electronic format. Tr. 167:15–168:5. Sonenberg, who handled Morales's cross-examination, acknowledged she is a "mechanically challenged" "old school" "Luddite" who didn't even know how to

properly operate her office's photocopiers. FCSX 22 at 001; Tr. 167:19–21, 255:14–256:3. She preferred hard copies, which were stacked "floor to ceiling" in her office, where she housed material for *Guandique* and other cases. Tr. 174:18–176:5. And Hawilo acknowledged her filing system was flawed; she mistakenly kept *Guandique* juror questionnaires, contrary to a court order, for months. Tr. 421:19–423:12. Furthermore, unidentified law students, investigators, trial attorneys, and appellate attorneys had unfettered access to PDS's *Guandique* case file. Tr. 176:6–178:21.

Other Disclosures

More than one year before trial, the government gave PDS a detailed summary of the substance of Guandique's confession as reported by Morales (without naming him for safety reasons). AHX 3 at 008-09. The government also provided PDS a summary of other crimes evidence Morales was expected to testify about, FCSX 18 at 047, 053, and a letter, JX 003, in which Morales requested, but did not receive, government assistance in obtaining his preferred prison assignment. DCX 15 at 0313–0314.

In June 2010, PDS moved for immediate disclosure of *Brady* information and early disclosure of *Giglio* information. FCSX 17. Mary McCord, then-Deputy Chief of Appellate who had particular expertise in *Brady* issues, drafted the government's opposition. Tr. 943:21–947:12. The government argued that the

law didn't require, and the circumstances didn't warrant, early disclosure of impeachment information. FCSX 18 at 004; Tr. 954:5–20.

During a July 2010 hearing, Judge Fisher expressed skepticism of PDS's expansive reading of *Brady* and its progeny. JX 4 at 009–10, 015–16, 021. Acknowledging "serious security risks" to witnesses, Judge Fisher rejected the claim that PDS must have an opportunity to "investigate beyond" a witness's impeachment information, and found the law provided only the ability to "*use **at trial***" impeachment information. JX 4 at 009–10, 012 (emphasis added).

Judge Fisher ordered the government to provide two weeks in advance of trial only: (1) "impeachable convictions," (2) "materially inconsistent statements," and (3) "mental issues that would go to [] capacity." JX 4 at 023, 025–26. Considering what each Respondent knew before and during trial, nothing on page one fell within these three categories. Tr. 1166:12–1167:16, 1500:14–1501:8, 1529:11–22, 1708:11–17.

Consistent with the judge's order, on October 4, 2010, one month before Morales testified, Haines gave PDS Morales's name, identifying information, and criminal history, including his convictions and sentences. DCX 11 at 0129. Haines didn't include information about Morales's debrief because it was not "materially inconsistent" with anything she knew at the time. Tr. 1520:9-1521:11.

The government's disclosures allowed PDS to use and develop evidence to

discredit Morales, including (1) Morales's delay in reporting the confession, DCX 15 at 0316–0317; Tr. 138:17–139:2; (2) Morales's long criminal history, DCX 15 at 0280–0281; Tr. 195:19–197:4; (3) Morales's history of "acting out of his self-interest" through pleas, DCX 15 at 0290–0294; Tr. 138:17–139:2; (4) Morales's 1996 gang defection, which could have been used to argue his turnaround predated the confession, DCX 15 at 0231; (5) Morales's request for government assistance in obtaining his preferred prison transfer, DCX 15 at 00313–0314; (6) a defense witness who testified that he shared the cell with Guandique and Morales and the confession never happened, AHX 51 at 006; Tr. 1579:11-21; and (7) two defense witnesses who testified Morales mischaracterized meeting with a PDS investigator, AHX 51 at 006.

Post-trial Investigation

In January 2012, the Fresno Police Department contacted Respondents, through the U.S. Attorney's Office for the Eastern District of California (USAO-EDCA), seeking to question Morales about 1990s unsolved murders. Tr. 713:9–13, 1631:2–15. This led to the post-trial discovery that Morales had provided incriminating information against others before. Tr. 713:14–20.

Respondents immediately notified their supervisors and senior management of this new information and sought guidance from the U.S. Department of Justice (DOJ) Professional Responsibility Advisory Office. Tr. 956:5–957:18, 1636:7–16;

AHX 40, 68.

The USAO formed a team of senior AUSAs (the "post-trial team") to investigate Morales's past attempts to cooperate and determine whether the information needed to be disclosed in *Guandique*. Tr. 711:1–10, 712:20–21, 713:6–20. The post-trial team launched an unprecedented multi-year investigation surveying entities uninvolved in *Guandique* and not part of the prosecution team, including the USAO-EDCA, the Bureau of Prisons, and out-of-state local law enforcement agencies. Tr. 822:16–823:10, 910:7–13. The investigation involved hundreds of work hours by prosecutors and investigators over several years; extensive travel to California, Florida, and Georgia; review of tens of thousands of documents including 95 bankers boxes of *Guandique* case materials; and multiple interviews of prosecutors, law enforcement officials, and Morales. Tr. 714:20–718:5.

The investigation of Morales's prior attempts to incriminate others in the 1990s involved conduct that occurred more than a decade before the *Guandique* trial and was entirely unrelated to whether Guandique murdered Levy. Tr. 992:15–993:1. Unearthing the particulars of Morales's long-ago unsuccessful efforts to incriminate others was not an "easily turned stone." Tr. 824:8–18. The "intense effort" required procuring "voluntary" assistance from an out-of-state local law enforcement agency that was not "eager to share information about a homicide

investigation with federal prosecutors in D.C." Tr. 821:21–825:5, 894:13–15.

The post-trial investigation ultimately revealed Morales had offered incriminating information against others to Fresno local authorities in 1998 and to the USAO-EDCA in 1996 ("the newly discovered information"). DCX 25 at 0491. The information was discovered only through extraordinary effort that well exceeded the government's legal obligations. FCSX 80A at 004 (information possessed by agencies "not part of the prosecution team"); DCX 25 at 0492; Tr. 928:18–21 (noting the Fresno transcripts were not in possession of even the USAO-EDCA).

In 2012, when questioned by the post-trial team, Morales maintained he had never incriminated anyone before Guandique. Tr. 808:10–809:17. Consistent with what he told Haines, Morales said he had discussed his gang involvement with law enforcement but did not incriminate others. Tr. 809:11–17; 813:13–22. Only when confronted with the newly discovered information did Morales remember he'd implicated others. Tr. 809:18–810:8. Morales appeared "shocked and surprised" that he'd violated the code of silence. Tr. 809:22–810:8. He professed that he hadn't remembered or thought about those interactions for a very long time and had continued to live with a "thug mentality" that prohibited him from "testifying against other individuals that committed crimes." Tr. 809:18–810:21, 870:8-21. Because Morales had forgotten about those prior interactions, he said he

had *not* shared them when discussing his prior gang debrief. Tr. 811:9-21. They were not known to either Respondent during the *Guandique* trial. Tr. 814:14–20, 912:15–22.

Neither Morales's prior gang debrief nor the newly discovered information related to Guandique or Levy. Tr. 817:7–12. None involved any law enforcement or prosecuting entities in *Guandique*. Tr. 817:7–12. None resulted in any written cooperation or proffer agreements or any benefits to Morales. Tr. 818:22–819:2; Tr. 818:1–4. Furthermore, nothing revealed during the post-trial investigation suggested that Guandique did not murder Levy, nor did it reveal any information that impeached Morales's testimony about Guandique's confession. Tr. 872:17–873:4, 903:16–904:2; AHX 59 at 003.

In October 2012, the post-trial team recommended the USAO disclose the newly discovered information but concluded that PDS couldn't show that *Brady* was violated because the information wasn't in the prosecution team's *possession* at the time of trial, wasn't *expected* to have been unearthed by the prosecution team, and wasn't *material* to the outcome of the trial. DCX 25 at 0490–0492. The post-trial team further concluded that PDS knew Morales had debriefed regarding his gang involvement because it had received page one of the Zaldivar letter. DCX 25; Tr. 846:22–847:1.

Evidence supporting the post-trial team's conclusion included Kavanaugh's

recollection of a "mental image" of page one in the Jencks disclosure, Tr. 588:19-20; the trial team's unequivocal, consistent reaction when asked whether page one was disclosed, JX 13 at 001-002; the introduction of the all three pages as a grand jury exhibit, FCSX 12; Haines's internal case impression memorandum listing "letter from mentor" as material to produce as Morales's Jencks, DCX 30 at 0529; PDS's failure to raise any concerns about page one until ten days after receiving the Jencks material, DCX 16 at 0362; the inclusion of the full three-page letter in Zaldivar's witness file that would have been disclosed had he testified, Tr. 828:18–22; and a comprehensive review of the trial team's emails, the case file, and post-trial interviews revealed no evidence indicating that either Respondent intended to withhold page one, or believed its contents were harmful to the government's case. Tr. 829:18–830:4, 843:8–9, 849:7–19, 867:8–21,994:11–21.

The post-trial team disclosed the newly discovered information to Judge Fisher on November 13, 2012, and to PDS on November 21, 2012. DCX 27, DCX 28. PDS used it as grounds for extensive discovery requests, which prompted further investigation by the post-trial team and numerous hearings. Tr. 894:19–22. PDS eventually moved for a new trial and to dismiss the indictment. Tr. 522:2–6, 894:16–18.

The USAO opposed but eventually agreed to a new trial, while maintaining the newly discovered information did not "cast any doubt" on Guandique's guilt,

or even relate to the facts of *Guandique*, and was not material. Tr. 903:11–904:2.

In July 2016, Morales was recorded expressing a willingness to commit future violent crimes. Tr. 1364:7–12. Subsequently, for reasons unrelated to Morales's prior interactions with law enforcement, the government moved to dismiss the indictment without prejudice. Tr. 1363:20–1364:3. The court never made any findings of *Brady* or other constitutional violations. Tr. 473:20–474:5.

DOJ's Office of Professional Responsibility (OPR) subsequently conducted an extensive two-year investigation into, among other things, PDS's allegation that page one of the Zaldivar letter had been withheld. FCSX 80A; Tr. 1253:15–16. OPR conducted several interviews, including of Respondents under oath, and reviewed thousands of documents, including PDS's 80-page new trial motion and 120-page motion to dismiss the indictment; the *Guandique* case materials; and the trial team's emails. FCSX 80A; Tr. 1253:17–18, 1254:6–1255:1.

OPR—*which bore a lower burden of proof than ODC*—concluded that "[s]ome evidence supports a conclusion that page one was disclosed; other evidence supports a conclusion that page one was not disclosed. OPR could therefore not establish by preponderant evidence that the trial team failed to disclose page one." FCSX 80A at 003–04. OPR did not recommend any discipline against Respondents in connection with disclosure of page one. Tr. 1255:2–3, 9–10, 1651:13–1652:1. Consistent with OPR's findings,

Respondents were not subjected to professional discipline or any adverse findings related to disclosures in *Guandique*, by the courts or DOJ. Tr. 1255:12–15.

ARGUMENT

I. The Hearing Committee Erred In Concluding That Haines Violated Rule 3.8(e).

The fact that Morales had once debriefed—more than ten years before the *Guandique* trial (and years before Levy's murder), to discuss his own gang involvement, when he did not incriminate anyone else, nor did he seek or obtain any benefits—was not exculpatory. Neither Haines nor Campoamor viewed it as exculpatory, nor did any prosecutor who reviewed the evidence post-trial—even with the benefit of the newly discovered evidence—view it as exculpatory.

This is in direct contrast to the two cases the Hearing Committee looks to for "analytical guidance," *In re Kline*, 113 A.3d 202 (D.C. 2015), and *In re Dobbie and Taylor*, BDN 19-BD-018 (BPR, Jan. 13, 2021), appeal pending, No. 21-BG-024 (D.C.). In *Kline*, the non-disclosed information was textbook *Brady*—it is hard to get more exculpatory than a victim's saying "I don't know who shot me." So it is not surprising that no one believed Kline when he said otherwise. 113 A.3d at 214. What's more, the next *two* prosecutors who took over that case both immediately recognized the information as *Brady*. *Id.* at 205-6. And in *Dobbie*, every prosecutor who worked on that case, *including Dobbie and Taylor* themselves, immediately recognized the material as potential *Brady*.

The Hearing Committee committed multiple errors in its decision that Haines intentionally failed to disclose exculpatory information with enough time for the defense to use that information at trial. Critically, it conflated what Haines knew *at the time of trial*—the fact, on page one of the Zaldivar letter, that Morales had debriefed in the past—with what was learned *post-trial*—the newly discovered information about Morales's offer of incriminating information against others in the 1990s. **The question before the Board is *not* whether the information discovered *post-trial* was exculpatory. The question is whether the information that Haines knew *at trial* was exculpatory.** The answer is, simply, no. Importantly, the Hearing Committee *itself* even acknowledged that the mere fact of Morales's debrief, without more, was *not* exculpatory. R&R at 32.

The Hearing Committee committed another grave error in determining not just that a reasonable prosecutor would have thought the information was exculpatory (despite no evidence to support this assertion), but that Haines *actually, subjectively knew* the information was exculpatory. **But there is no evidence of this, and *even ODC itself did not even make this claim*.** The Hearing Committee appears to have just thrown that in to protect its finding in case *Dobbie* is overruled.

A. Morales's debrief did not tend to negate Guandique's guilt.

Rule 3.8(e) applies to information that "tends to negate the guilt of the accused."[3] For information to be *Brady*, it must be either exculpatory or impeaching information that is "*favorable* to the accused." *Miller v. United States*, 14 A.3d 1094, 1109 (D.C. 2011) (emphasis added); *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006); *see also Brady v. Maryland*, 323 U.S. 83 (1963). But Rule 3.8(e) does *not* apply to any broader classification of information, such as information that might be "helpful to the defense," that "could be useful," or that "defense counsel would think was important." *See* Tr. 1402:2-15, 1895:16-18, 1897:16-21. Nor does Rule 3.8(e) apply to information the defense would like to investigate, as suggested by the Hearing Committee. R&R at 32-33.

The distinction between "favorable" and "helpful" matters. Favorable material is "evidence which is both exculpatory to a defendant and material to guilt or innocence, including evidence that an accused can use to impeach a government witness." *Brown v. United States,* 726 A.2d 149, 156 n.3 (D.C. 1999) (internal quotations omitted). Certainly, there would be an unlimited amount of information

[3] Campoamor's Proposed Findings of Fact and Law, § I.A, outlines why Rule 3.8(e) applies only to exculpatory, and not solely impeachment, information. Haines adopts that position. For the sake of this argument, however, Haines assumes the more expansive—albeit flawed—view that Rule 3.8(e) covers all *Brady* material—both exculpatory information and *Giglio*/impeachment information. Because, even under the overly expansive reading, Haines did not violate Rule 3.8(e).

that PDS would have considered "helpful." But that does not mean PDS was legally entitled to that information (as Judge Fisher repeatedly ruled). And even if the fact of Morales's prior debrief may have been "helpful" to PDS, it was not *favorable*: it had nothing to do with Guandique, let alone with his guilt or innocence, and it wasn't impeachment as to Morales because it was consistent with what he told Respondents and testified to in the grand jury and at trial. Indeed, given Morales's experience receiving no benefit for providing truthful information, it actually undercut PDS's portrayal of Morales as expecting a benefit for truthful information in *Guandique*.

The Hearing Committee wrongly determined that the fact of Morales's debrief was "impeachment evidence." R&R at 37. The Hearing Committee also failed to assess Haines's conduct based on "facts and circumstances as they existed at the time of the conduct in question," and instead assessed her conduct based on information discovered post-trial. D.C. R. of Prof'l Conduct (2014) [Scope Cmt. 3].

Nothing about Morales's having *debriefed* to law enforcement while refusing to incriminate others and his testimony that he had never "come forward" or "testified" against someone before is inconsistent. Both Respondents testified that they viewed a "debrief" as entirely distinct from "testifying." Haines testified that a "debrief" "could mean a meeting" and that "on the face of" the Zaldivar

letter, "debrief" meant "not much more than it says, that he met with law enforcement." Tr. 1805:11-14, 1806:12-17. Haines's interpretation of the word "debrief" is entirely consistent with what Morales testified to in the grand jury, what he told Haines, and what he said at trial. The Hearing Committee criticized Haines for not asking *Zaldivar* what he meant by the word "debrief," R&R at 7-8, yet neglected to mention that Haines did ask *Morales* what *he* meant by "debrief." During their first meeting Morales told Haines that he "debriefed with [a] gang unit" about his own gang involvement and refused to incriminate anyone else. AHX 9 at 003 ("I'll tell you ab[ou]t me but no one else."). Morales also told Haines he'd been indoctrinated to "not tell[] on individuals"; he viewed being a "snitch" or "testifying" as a "death sentence." *Id.*

When Morales testified, Haines had *no evidence whatsoever* that Morales had ever given up information about anyone other than himself to law enforcement. The below chart shows what Morales said and when he said it—and shows that when you look at what he *actually* said, not how ODC *characterized* what he said—it was consistent all along. **Please read it carefully**; it is clear that the Hearing Committee did not, and instead bought into ODC's characterizations.

Consistency of Morales's Statements				
Zaldivar Letter FCSX 12	**Grand Jury** ODCX 6	**To Haines** AHX 9, 10 (10/5/10, 10/30/10 Outlines)	**Trial** JX 7	**Consistent?**
"is also a **gang drop-out**";	Q. What **was** the gang that you belonged to? A. Fresno Bulldogs. ODCX 6 at 0063.	"debriefed w/ gang unit. Told them everything. **defector status**" AHX 9 at 3.	Q. Can you explain to the jury what it means to be a dropout? A. **I defected from the gang.** JX 7 at 16:12.	**Yes**
"**debriefed** to law enforcement"	A. Zaldivar asked "'Do you want to do something about it'?" Q. "What did you say when he told you that?" A. "I got nervous." Q. "Why?" A. "I've never done that before. I've **never done nothing like that**." *Id.* at 0089.	"**never testified**" *Id.* at 3 .	Q. **Have you testified before?** A. **No.** *Id.* at 17:4-5.	**Yes**
"about **his** gang involvement"	A. Zaldivar asked "'Do you want to do something about it'?" Q. "What did you say when he told you that?" A. "I got nervous." Q. "Why?" A. "I've never done that before. I've **never done nothing like that**." *Id.*	"I'll tell you **ab[ou]t me but no one else"** "ex gang unit. just **on yourself**" "**Not telling on individuals**" *Id.* at 3.	Q. Did you tell anyone at the time? A. No. Q. Why not? A. I wasn't thinking like that. Q. What do you mean? A. **I didn't have it in me to tell at that time.** *Id.* at 55:1-6. A. At that time my – my mind wasn't – I was still – I still had a thug mentality, you you, **I still subscribed to them false philosophies of you don't tell**. *Id.* at 130:13-15. Q. **You haven't come forward on any of them, right?** A. **No.** *Id.* at 102:16-103:6.	**Yes**
"I [Zaldivar] worked with Morales ever since he arrived here (I am a	Q. So why is it that you're telling us now when Guandique told you back in 2006? A. …I attended a program, the **skills**	"do you know **Miguel Z.** who is that/**mentor/teacher**" *Id.* at 17.	Q. How has [the skills program] changed you? A. Drastically *Id.* at 57:1-2.	**Yes**

Skills' mentor and tutor)." "Morales repeatedly has expressed his **desire to change his life**"	**program** and it's a program that teaches you life skills…You know, **trying to become a better man**, a better person…While I was there I met **my mentor, Michael Zaldivar."** *Id.* at 0087-88.	"what is the program involve **mind set** **not easy adjustment**" "life direct result of choice you make and the help you **make better choice**s" AHX 10 at 25.	Q. And why did you decide at the point to come forward? A. I was comfortable with myself. Q. And what do you mean by that? A. First, you know, **I don't -- no longer subscribe to those prison philosophies. You know, I don't seek my other homeys and my homeys' approval anymore.** *Id.* at 61:16-22.	

The Hearing Committee asserted that "[e]vidence that [Morales] had previously debriefed to law enforcement stood in sharp contrast to Morales's 'sinner to saint' narrative." R&R at 39. In doing so, it wrongly inferred from Morales meeting with an unknown law enforcement unit once, where he discussed only his own gang activities, that he had a total conversion and was willing to snitch and testify. Nothing in the record supports such a leap. Instead, the record shows that Morales's "conversion" actually occurred in 2009, due in part to a skills program and mentor that taught him "to become a better man, a better person." ODCX 6 at 0088.

As Haines has consistently maintained, and as reflected in her notes, Morales simply told her that the debrief "was with some sort of gang unit" while he was in Atlanta. Tr. 1514:11-18; AHX 9 at 3. The debrief did not indicate a willingness to cooperate, and certainly did not indicate *actually* having cooperated

with law enforcement before. There is no evidence that Haines knew (or reasonably should have known) that Morales had cooperated or attempted to cooperate in the past. Just the opposite. Everything Respondents ran down, and everything Morales told them, indicated that Morales had never been a cooperator. *See, e.g.* JX 6 (nothing on docket to indicate a benefit); AHX 7 (request for accounting of all benefits). Nothing about the debriefing on page one registered with Respondents as impeaching.

B. Haines did not intentionally withhold Morales's debrief.

The Hearing Committee erred in concluding that Haines intentionally withheld Morales's debrief. Haines did not subjectively think that Morales's debrief tended to negate Guandique's guilt. Nor *should* she have thought so—no reasonable prosecutor who reviewed the case thought Morales's debrief was exculpatory. And when assessing the "entire mosaic of conduct"—something the Hearing Committee failed to do—it is undeniable that Haines intended to disclose page one and thought she had.

1. *There is no evidence that Haines actually knew the debrief was exculpatory.*

Incredibly, the Hearing Committee determined the Haines *actually knew* the information about Morales's debrief was exculpatory and then actively decided to withhold it anyway.[4] The idea that Haines knew about the debrief and consciously

[4] By determining that Haines *actually knew* the debrief information was

decided to hide it from the defense despite there being *no actual evidence* to support this, is preposterous. ODC itself did not even claim that Haines "subjectively understood that this was disclosable or impeachment." Tr. 1895:8-1897:14. **It is thus surpassingly strange for the Hearing Committee to have concluded otherwise; that, perhaps more than any other fact, should undermine the Board's confidence in its findings.**

The Hearing Committee stated, "there is ample evidence that Respondent Haines actually knew that the Morales debriefing tended to negate Guandique's guilt." R&R at 39. Neither of the two pieces of "ample evidence" the Hearing Committee cited to show that Haines thought Morales's debriefing was exculpatory. In fact, they show just the opposite.

First, the Hearing Committee pointed to Haines's witness preparation of Morales as evidence that she viewed the debrief as exculpatory. R&R at 13-14, 40. But this is contradicted by Haines's testimony and her notes from her preparation sessions with Morales, where she prepared him for nearly a dozen possible lines of cross examination including whether Morales had (1) requested witness protection in exchange for his testimony; (2) colluded with Zaldivar to fabricate the

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exculpatory and decided to withhold it anyways, the Hearing Committee escaped contending with *Dobbie*'s ruling that turns "intentionality" into a strict liability standard. Haines believes that *Dobbie* was wrongly decided and is likely to be reversed on appeal. Therefore, the Board should not yet treat it as settled law. For the purposes of this argument, however, Haines submits that even if it is good law, she still did not violate Rule 3.8(e).

confession; (3) obtained all of the confession information from CNN; (4) was following a script provided by the government; or (5) entered into an agreement with the government. AHX 10 at 26–28. The answer was no for all. Although the questions might address potential impeachment topics, none of Morales's answers contained exculpatory information.

Haines prepared Morales for these, and other, lines of questioning to "take the sting out" of the information were it to be elicited during cross-examination. Tr. 1569:2-9. The Hearing Committee wrongly concluded from Haines's preparation of Morales that she was "aware[] of" and had "concern for" "its possible effect on his credibility and the success of the prosecution's case." R&R at 40. But the fact that Haines did *not* ask Morales about the debrief during his direct examination indicates *precisely the opposite*—"[t]here was no reason to take the sting out of anything," because Haines did not believe the debrief had any impeachment value. Tr. 1569:24-1570:4. If she thought otherwise, she would have asked him about it.

Second, the Hearing Committee scolded Haines for "disregard[ing] [] the admonition by the Court two months earlier about her own conduct" in *Zanders*. R&R at 40. But *Zanders* supports Haines's view that the debrief was not exculpatory.

The *Zanders* court held that the government's failure to disclose two witnesses' history of *actual cooperation* was not a *Brady* violation. *See Zanders v. United States*, 999 A.2d 149, 165 (D.C. 2010). Furthermore, *Zanders* does not say "you're supposed to disclose if it could be useful." Tr. 1895:16-18. Instead, *Zanders* says a prosecutor should "disclose information that is *on its face exculpatory*." *Zanders*, 999 A.2d at 164 (emphasis added). Morales's prior debrief was not "on its face exculpatory." It had nothing to do with Guandique, let alone with his guilt or innocence. Even the Hearing Committee admitted that the information about the debrief was not "on its face exculpatory" when it stated that "information about the Morales debriefing *did require investigation to be meaningfully useful*." R&R at 32 (emphasis added).

2. No reasonable prosecutor thought the information about Morales's debrief was exculpatory.

No prosecutor testified that they viewed Morales's debrief as exculpatory. Even so, the Hearing Committee determined, with no explanation, that Haines had a duty to disclose the information "[b]ecause a reasonable prosecutor would have known that the evidence tended to negate Guandique's guilt." R&R at 39.

Even when the government knew much more about Morales's prior contacts with law enforcement, no post-trial team member testified that Morales's prior debrief struck them as exculpatory, nor is there any record—no email or internal discussion—that they thought so. Similarly, Kavanaugh testified that the

information did not strike him as exculpatory, nor was anything that Morales testified to at trial inconsistent with anything on page one. Tr. 612:3-9, 617:5-11, 629:3-7. Even OPR—the proverbial "reasonable prosecutor"—did not find that the information was exculpatory.

Supervisors who knew about the Morales developments also did not think Morales's debrief was exculpatory. During a Homicide Section training, Haines explicitly asked two deputy chiefs whether a truthful debriefing that went nowhere—even when done by a *cooperator* (which Morales wasn't)—should be disclosed. *See* AHX 45. They answered, "Why would you?" *See id*. Certainly then, a truthful debriefing by a *non-cooperator* who received *no benefit* would not need to be disclosed as *Brady*. A truthful debriefing with no benefit actually bolstered—not undercut—Morales's testimony that he wasn't expecting to get anything.

The fact that no reasonable prosecutor found the debrief to be exculpatory distinguishes this case from *Kline*. In *Kline*, every prosecutor who reviewed the evidence after Kline agreed that the evidence was exculpatory on its face. The evidence was textbook *Brady* material—after identifying the shooter, that same witness stated that he did not know who shot him. The court called it "instructive that *all of the prosecutors* who later became aware of the [victim's non-identification] after [AUSA] Kline left the U.S. Attorney's Office *recognized that*

the statement was potentially exculpatory and had to be disclosed." *Kline*, 113 A.3d at 211 (emphasis added). The opposite is true here.

3. The entire mosaic of conduct shows Haines did not intentionally withhold Morales's debrief.

While the Hearing Committee quoted *Kline*, stating, "'[i]n assessing intent, the 'entire mosaic' of conduct should be considered," it ultimately failed to conduct that analysis—which would have shown that Haines meant to disclose page one and thought she had.

a. Haines prepared Morales to answer questions about the debrief.

Haines prepared Morales to answer questions about the debrief during trial preparation, indicating that she thought PDS would have page one. AHX 9 at 003; AHX 10 at 004; Tr. 1570: 17–20. Contrary to the Hearing Committee's assertion, R&R at 13, 40, Haines's preparation of Morales for possible questions during cross examination does not signify she considered the debriefing exculpatory. Haines prepared Morales for nearly a dozen possible lines of cross examination, *see* § I.B.1, *supra*. Although the questions might address potential impeachment topics, none of Morales's answers contained exculpatory information.

b. Haines's statements during trial confirm she intended to disclose page one.

The Zaldivar letter was discussed extensively throughout trial, further underscoring Haines's intention and belief that PDS had page one. During trial, when PDS suggested for the first and only time that it may not have received page

one—at least ten days after receiving Morales's Jencks—Haines stated on the record that the Zaldivar letter "was turned over as Jencks" and the trial exhibit, which was composed of pages two and three, was "***part of*** the letter that we turned over." DCX 16 at 0362 (emphasis added).

c. Haines's efforts to discover and disclose other exculpatory and impeachment information are inconsistent with an intent to suppress page one.

Haines and Campoamor provided an unprecedented amount of discovery in *Guandique*, including information that was truly damaging to the government's case, Tr. 152:20–153:2, 716:9–16, 1021:1–18, for example:

- unknown male DNA on Levy's clothes at the time of her death Tr. 1597:13–19;
- witnesses' mental health records, including a history of deception and manipulation, Tr. 1544:1–21;
- failed polygraphs, FCSX 18 at 031, 039, 045;
- voluminous material relating to original suspect Gary Condit, FCSX 18 at 002;
- police reports and investigations pertaining to other suspects and crimes in Rock Creek Park, FCSX 18 at 056–57;
- witnesses and photographs that undermined the government's evidence that Guandique had physical injuries from Levy, DCX 17 at 0439; and
- various flaws in the investigation, including compromised evidence, FCSX 18 at 068.

It is thus not plausible that Haines deliberately withheld page one, which held no exculpatory or impeaching value.

In addition, Haines was trying to find—not bury—evidence that impeached Morales's testimony. For example, Haines and others:

- requested that the prosecution team provide an accounting of all benefits given to witnesses, AHX 7;
- researched Morales's court docket and tried to access his underlying court case to determine whether he had entered into a cooperation agreement, received or applied for a sentencing reduction or otherwise parlayed information into a benefit, Tr. 1398:14–18, 1523:17–1525:20;
- obtained Morales's prison inmate quarters history and profile to confirm he was housed with Guandique during the alleged confession, Tr. 1527:6–19;
- confirmed Morales didn't overlap with other confession witnesses to eliminate possible collusion, Tr. 1528:3–6;
- investigated whether Morales had fabricated the confession by reviewing Guandique's paperwork, Tr. 1528:14–17; and
- for similar reasons, obtained copies of CNN's broadcasts and provided them to the defense, Tr. 1528:18–1529:6.

Haines's actions are consistent with seeking, not hiding, information that could exculpate Guandique or discredit Morales.

d. The trial team has consistently maintained that page one was disclosed to PDS.

Respondents have consistently maintained that page one was provided to the defense. When the post-trial team first asked whether page one was disclosed, the

team's reaction was unequivocal: "We disclosed the letter in its entirety, in an unredacted form"; "The letter was provided to the defense." JX 13 at 001-002. Haines has consistently maintained that the team had no reason to withhold page one and that she believed it was provided. *See* AHX 51; DCX 22 at 0483.

Furthermore, all three trial team members testified that there was never any communication about intentionally withholding page one. Tr. 628:3–8, 1173:1–10, 1727:4–6. All of them continue to believe that page one was disclosed. Tr. 588:14–590:1, 1257:14–1260:2, 1591:18–1592:13.

e. The post-trial investigation did not uncover any evidence suggesting that Haines intentionally withheld page one.

Members of the post-trial investigation team—Evangelista and McCord—testified that an extensive multi-year investigation found no evidence even suggesting that Haines intended, or attempted, to withhold page one or believed its contents were harmful to the government's case. Tr. 867:8–21, 980:7–20. Instead, it found Haines believed it was disclosed. Tr. 843:8–9.

Indeed, after ten years of investigation by multiple agencies including the USAO, PDS, OPR, and ODC, no evidence has been found, no email or other document has been unearthed, and no witness has suggested, that Respondents ever discussed or contemplated withholding page one or its contents. DCX 25; FCSX 80A; Tr. 867:8–21, 980:7–20. As ODC itself argued in its closing in *Dobbie*, "[t]he way to determine the good faith of the prosecutors is

to look at what they said among themselves, not in their pleadings, not in their arguments. Among themselves." Tr. 1019:1-4. When looking at what the Respondents "said among themselves" in hundreds of thousands of internal emails, there is not *one word* indicating Haines intentionally withheld page one.

f. Haines's post-trial conduct is inconsistent with an intentional suppression of page one.

Post-trial, Haines insisted that neither Morales nor Zaldivar would receive any benefit because they came forward "for the right reasons." AHX 37 at 1; Tr. 1620:20–1621:6. And Haines's conduct when first contacted by the Fresno authorities post-trial is completely at odds with an intentional effort to suppress page one. Haines immediately reported the development to her entire chain of command and urged that the newly discovered information be disclosed to the court immediately to "get the ball rolling," conduct that would have led predictably to the discovery of any suppression of page one if it had indeed been withheld. AHX 40; Tr. 956:5–957:18, 1636:7–16, 1803:18–21.

g. Haines listed the Zaldivar letter as Morales's Jencks materials in an internal privileged memo.

Haines's Case Impression Memo—privileged attorney work product relied upon by prosecutors to candidly assess and document a case's strengths and weaknesses—lists the Zaldivar letter part of Morales's Jencks. DCX 30 at 0529.

It does not suggest that Haines viewed page one's debrief reference as having any impeachment value. *Id.*

h. Kavanaugh disclosed page one to PDS.

Kavanaugh testified that neither Haines nor Campoamor ever discussed, instructed, or suggested the team should withhold page one. Tr. 628:3–630:5. Instead, Kavanaugh disclosed the three-page Zaldivar letter to PDS with Morales's Jencks packet. Tr. 588:19–20.

i. Page one was included in another witness's Jencks disclosure.

Page one was included in the Jencks for Zaldivar, who was expected to testify. Tr. 828:18–22. The team ultimately did not call him as a witness, so his Jencks was not provided to PDS. Tr. 829:6–13. But that decision was not reached until after Morales testified. Tr. 1605:18–1606:6. When Morales's Jencks was produced and during his testimony, the team intended the three-page letter would be disclosed through *Zaldivar's* Jencks, so would not have withheld page one from *Morales's* Jencks.

C. PDS was not entitled to receive page one two weeks before trial.

The Hearing Committee erred when it determined that Haines was required to disclose that fact of Morales's debrief two weeks before trial. Its rationale that Haines was required to "provid[e] defense counsel with an opportunity to investigate the disclosed information at issue" is not supported by the law or by Judge Fisher's ruling. R&R at 32. Despite the Hearing Committee's claim

otherwise, Respondent's position that Rule 3.8(e) requires disclosure of information for *use by the defense at trial*—not for *investigation by the defense*—is consistent with the law and with their disclosure commitments. *See* R&R at 32.

Judge Fisher issued an order requiring disclosure of (1) "impeachable convictions," (2) "materially inconsistent statements," and (3) "mental issues that would go to [] capacity" no later than two weeks before trial. JX 4 at 023, 025-026. Haines followed that order; she sent a *Giglio* letter to PDS on October 4, 2010, two weeks before trial. DCX 11. The debrief referenced on page one did not fall within the scope of the order because it was not "materially inconsistent" with what Haines knew at the time. Prosecutors who comply with lawful court orders cannot be later found to have violated a disciplinary rule. *See* Rule 3.8(e), cmt. 3. The Hearing Committee reiterated this, noting that "[d]isciplinary authorities should be 'reluctant to reach a conclusion that [prosecutors] should be faulted for following' the rulings of a court." But bizarrely, the Hearing Committee then faulted Haines for following Judge Fisher's ruling. R&R at 35.

Judge Fisher emphasized that the law does ***not*** require that impeachment information be disclosed for PDS to ***investigate*** it, but rather simply to ***use*** it ***at trial.*** *See* JX 4 at 009-010 ("the purpose of…providing that is for ***use at trial***…I'm not sure that *Brady* envisions…to allow you to then go out and independently investigate ***beyond*** [the impeachment information.]") (emphasis added).

Respondents' representation to the court that "if a particular type of *impeachment evidence* requires investigation, the government will turn that information over in advance or explain why it can not [*sic*]," R&R at 32, is consistent with Respondents' position that turning over page one as Jencks two days before trial was adequate. The Hearing Committee's claim otherwise ignores a crucial point—the information on page one was not impeaching on its face. *See* § I.A, *supra*. The Hearing Committee admitted as much, stating "information about the Morales debriefing did require investigation to be meaningfully useful," acknowledging that the information, on its face, was neither impeaching nor exculpatory. R&R at 32.

Information about the debrief could only be useful with extensive investigation to gather additional facts, which was beyond what Haines knew, or reasonable could have known, at trial. And PDS's admission that extensive investigation—including travel to California and attempted interviews of Morales's associates and law enforcement officers—would have been necessary to effectively "use" the debrief highlights that the information about Morales's debrief, on its own, was not useful for impeaching Morales. R&R at 13; Tr. 323:6-324:3.

The court's ruling that the defense was not entitled to impeachment information to investigate it, but instead to use it at trial, is consistent with the law

at the time of the *Guandique* trial. *See Mackabee v. United States,* 29 A.3d 952, 956–61 (D.C. 2011) (disclosure of impeachment material shortly before opening statements not reversible error in part because the defense was able to make effective use during cross-examination and closing); *Lindsey*, 911 A.2d at 824 (no *Brady* violation for mid-trial disclosure of impeachment information where defense was able to use information during cross-examination); *Ebron v. United States*, 838 A.2d 1140, 1155–56 (D.C. 2003) (no *Brady* violation for trial disclosure of impeachment information; defense was "able to use the information . . . in cross-examination to challenge the [witness's] credibility").

What was learned about Morales through an extraordinary, three-year post-trial investigation, has no bearing on the timing of the disclosure given what Haines knew ***at the time of trial*** in 2010. The Hearing Committee's reliance on that newly discovered information is in error.

II. The Hearing Committee Erred In Concluding That Page One of the Zaldivar Letter Was Not Turned Over As Jencks Material.

Page one of the Zaldivar letter was disclosed as Morales's Jencks, as the trial team has consistently maintained. Even though PDS never asked for the supposed missing page one, and even though the post-trial team found no evidence page one was not disclosed, and even though OPR, applying a lower standard of proof, did not find page one wasn't disclosed, the Hearing Committee inexplicably concluded

that "[t]he first page of the Zaldivar letter was not produced to the defense as part of the Morales Jencks packet." R&R at 20.

A. The Hearing Committee improperly credited PDS witnesses and discounted Respondents' witnesses.

The Hearing Committee relied heavily on the testimony of PDS witnesses, asserting that "[b]oth defense attorneys testified clearly, unhesitatingly and from first-hand knowledge that the first page of the Zaldivar letter was not given to them." R&R at 16. *But that's not what they said*. Sonenberg and Hawilo conceded that they had *no direct knowledge* of whether page one was in Morales's Jencks packet when PDS received it, Tr. 160:19–161:8, 339:8–340:1, and *no recollection* of the circumstances surrounding receipt of Morales's Jencks. Tr. 159:8–22, 160:1–18, 336:1–12. And Sonenberg incorrectly asserted that she received the Morales Jencks—and the Jencks for *all* of the witnesses—the day before their testimony. JX 7A at 149 (noting PDS received "a week and a half" worth of Jencks before openings); Tr. 170:1–7.

By contrast, Kavanaugh, who delivered Morales's Jencks packet to PDS, testified to his "mental image" that page one was on top of the disclosure materials. Tr. 588:17–20. Kavanaugh testified that he would have noticed and raised the issue with Respondents if the page were missing, both when he produced the Jencks and again when the Zaldivar letter was discussed at trial. Tr. 588:20–589:9. And he scrupulously described his level of certainty that page one was included.

Tr. 590:2–12 ("somewhere closer to the standard that is in the middle there of clear and convincing evidence"). His testimony is entitled to particular weight because ODC vouched for his credibility. Tr. 1881:11–12 ("I regard [Kavanaugh] as an entirely truthful and honest witness.").

Nevertheless, the Hearing Committee discounted Kavanaugh's "mental image" because it was "foggier" than his 2017 OPR testimony. R&R at 18. It inexplicably found that Kavanaugh's testimony "although sincere, was mistaken," R&R at 18, while simultaneously crediting PDS's testimony, despite their faulty memories and lack of personal knowledge. *See* Tr. 160:19–161:8, 164:17–19, 336:1–12, 339:8–340:1. The Hearing Committee did not identify any evidence—whether documentary or circumstantial—to support its conclusion that Kavanaugh's clear and direct testimony was "mistaken." Given that the burden of proof was "clear and convincing evidence," this was clear error.

B. The Hearing Committee ignored substantial circumstantial evidence that page one was disclosed.

The Hearing Committee asserted there was "no basis for Respondents' suggestion that the first page was produced, but then lost or misplaced by PDS," relying on speculative statements from PDS about what they imagine they would have done upon receipt of page one. R&R at 16–17. The Hearing Committee has flipped the burden of proof—the burden was on ODC to prove by clear and

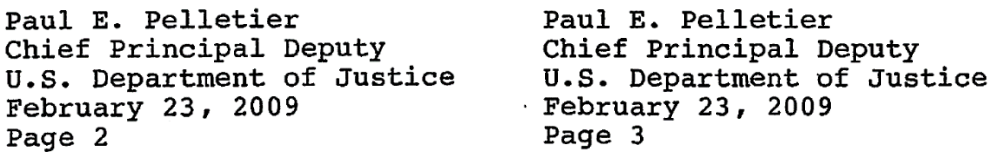
convincing evidence that page one was *not* disclosed, not on Respondents to prove that it *was*.

Regardless, there's strong evidence that PDS simply lost page one. PDS was unable to produce the original Morales Jencks disclosure or establish a reliable chain of custody for it. The time between PDS's receipt and photocopying of the original is unaccounted for. If page one were lost during that period of time, it is no surprise that PDS had multiple copies of only pages two and three.

No witness could testify about what was done with Morales's Jencks following PDS's receipt, including whom within the office disassembled, duplicated, or distributed it. Tr. 172:14–173:9, 340:2–16. If the responsibility fell to Sonenberg, a self-proclaimed "Luddite" who couldn't work a photocopier, the risk of error was even greater. Tr. 167:19–21. Her office had files stacked "floor to ceiling," Tr. 175:4–5, and innumerable people had unfettered access to her case file. Tr. 176:6-178:21.

Moreover, the Hearing Committee failed to address evidence corroborating Respondents' belief that page one was disclosed, as the post-trial investigation team concluded. Tr. 725:20–726:1. Pages two and three, and the grand jury transcript that PDS acknowledged were in Morales's Jencks obviously indicate there was a page one. For example, it is immediately evident from pages two and three that they are preceded by a page one: the words "Page 2" and "Page 3" are

typewritten in the upper left-hand corner of the letter, right below the date on the letter. FCSX 12 at 002–03:



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In addition, the grand jury transcript repeatedly refers to the letter as a three-page exhibit, DCX 6 at 0092–0093 ("on *page three*"; "beginning of *page three*"; "first paragraph of *page three*") (emphasis added). And basic information is obviously missing without page one, including Morales's full name and location, who Zaldivar is, and Zaldivar's contact information. *See* FCSX 12 at 001.

Yet neither Sonenberg nor Hawilo asked the government to provide page one or explain why they were not entitled to it, as they did for other perceived discovery deficiencies. Tr. 227:12–14, 342:18–343:8. The absence of any such claim indicates that the Jencks packet contained page one. Hawilo's testimony that she did *not* notice page one missing is simply not believable. Tr. 345:12-17, 346:8-12.

The Hearing Committee's acceptance of PDS's explanation that "they 'trusted that [they] were being given the Jencks [they] were entitled to,'" R&R at 17, is both laughable (PDS *never* just "trusts" the government) and contradicted by how PDS responded to every other perceived deficiency in government

productions. Hawilo and Sonenberg testified it was their practice to request any document they perceived was missing, demand an explanation, and press the issue until they were satisfied. Tr. 227:15–19, 343:9–17. The Hearing Committee never explained why PDS would not have done the same thing with page one.

Finally, the Hearing Committee ignored that OPR—applying the lower preponderance of the evidence standard—could "not establish by preponderant evidence that the trial team failed to disclose page one." FCSX 80A at 003–04. Though OPR did not speak with PDS attorneys, it *credited* PDS's allegations, thus entitling the OPR report to substantial weight. FCSX 80A at 002–03.

III. The Hearing Committee Erred In Concluding That Haines Violated Rule 8.4(d).

The Hearing Committee concluded Haines violated Rule 8.4(d) because she violated Rule 3.8(e). R&R at 42. A Rule 3.8(e) violation does not necessarily imply a Rule 8.4(d) violation, which would mean Haines "seriously interfere[d] with the administration of justice."

Comment [2] to Rule 8.4(d) includes a list of examples of conduct that the Rule is intended to cover. The Comment also explains that "Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples." D.C. Rules of Prof'l Conduct R. 8.4 cmt. [2].

The examples listed in Comment [2] are:

> failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client.

Id.

Haines's conduct is not "analogous" to any of these examples. Nor did her conduct "seriously interfere with the administration of justice," even if she had violated Rule 3.8(e). Courts exist to hold hearings, and the record is devoid of any evidence—other than the *mere fact that they were held*—suggesting that the hearings here interfered with the administration of justice at all, much less "seriously" so.

The Hearing Committee reasoned that Haines's conduct is similar to the conduct in *Dobbie*, Board Docket No. 19-BD-018 at 35, where the Board found "the failure to disclose impeachment information led to 'the colossal expenditure of resources.'" R&R at 42. But the Hearing Committee ignored an important—and distinct—part of the reasoning in *Dobbie*: the Board found Respondents in *Dobbie* violated Rule 8.4(c); they were found to have "engage[d] in conduct involving dishonesty, fraud, deceit or representation." *Dobbie*, Board Docket No. 19-BD-018 at 30. There has been no such finding—or even any such allegation—

here. *See, e.g.*, Tr. 2216:2-6 (Chair: "Let me be clear. You are not contending there's any dishonesty in this case?" ODC: "No. No I'm not.").

Furthermore, conduct "reprehensible to the practice of law" generally must seriously interfere with the administration of justice *consciously* or *intentionally*. *See In re Hallmark*, 831 A.2d 366 (D.C. 2003); *see also In re Owusu*, 866 A.2d 636 (D.C. 2005). There is no clear and convincing evidence of such intent here. Nor is there any allegation of "numerous" or "repetitive" acts that might demonstrate a Rule 8.4(d) violation; this case involves just one disclosure. *See In re Yelverton*, 105 A.3d 413, 426-28 (D.C. 2014); *see also In re Ekekwe-Kauffman*, 210 A.3d 755, 788 (D.C. 2019) (a pervasive "pattern" can show intent).

IV. Haines's Conduct Related to 3.8(e) and 8.4(d) Does Not Merit Sanctions.

A. *Kline* bars any sanction in this case.

As the Hearing Chair told ODC during the sanctions hearing, "I don't see how you get around *Kline*." Tr. 2208:9-10. When he made that statement, the Chair acknowledged that Morales's debrief was not material to the outcome of the *Guandique* trial, and therefore Haines could not be sanctioned under *Kline*.

Kline was decided in April 2015, five years *after* the Guandique trial. In its decision, the *Kline* court could not have made clearer that it would be applied on a forward-looking basis only, given the "great deal of confusion" about what Rule 3.8(e) actually meant. *Kline*, 113 A.2d at 215. From that point on—but *only* from

that point on—there would finally be "clear guidance on the scope of a prosecutor's disclosure obligations under Rule 3.8." *Id.* at 216.

To get around *Kline*, the Hearing Committee claimed that the information was material to the outcome of the case. In doing so, it conflated the fact of Morales's debrief with the newly discovered information and ignored evidence from the trial record, the post-trial investigation, and hearing testimony that the information on page one was *not* material.

B. Morales's debrief was not material to the outcome of the trial.

The Hearing Committee did not find that the information on page one about Morales's *debrief* was material to the outcome of Guandique's trial. Instead, the Hearing Committee found that "the *details of [Morales's] prior cooperation*" was material to the outcome. R&R at 45-46 (emphasis added). The Hearing Committee again conflated what was known *at the time of trial* with what was learned *years later*, after an extensive post-trial investigation that included hundreds of hours of work by senior prosecutors and investigators, review of tens of thousands of documents, and extensive travel around the country. Tr. 714:20–718:5. That was clear error.

Further conflating the information on page one about Morales's debrief with the newly discovered information, the Hearing Committee also misquoted Campoamor's testimony. Campoamor did *not* say that "the fact of [Morales's]

debriefing 'was directly contrary to what his testimony was at trial.'" R&R at 46. Quite the opposite. Campoamor clearly stated it was Morales's "attempt[] to cooperate, and offer others for his benefit" that was "directly contrary to what his testimony was at trial," *not* "the fact of Morales's debrief." Tr. 1227:21-1228:6.

But even the newly discovered information was not material to Guandique's guilt. There are three reasons for this.

1. *Morales's debrief was not the reason the government withdrew its opposition to PDS's new trial motion.*

First, the government's decision not to retry Guandique had nothing to do with Morales's debrief. Following the post-trial investigation and the new information about Morales's past history of cooperation, the USAO intended to retry the case. Tr. 904:9–12. Morales's debrief did not change the government's assessment of the sufficiency of evidence of Guandique's guilt. Tr. 903:22–904:8. Nor did it change the government's plan to call Morales to testify at the new trial. Tr. 904:13–16.

The government decided to withdraw its opposition to PDS's motion for a new trial only after new concerns arose about Morales's credibility because of his post-trial conduct with an actress who recorded him—not because of Morales's debrief. *See* 1564:22–1565:8. The Hearing Committee overlooked this, reasoning that the "clearest proof" of the significance of Morales's testimony is that the

government withdrew its opposition to PDS's motion for a new trial and ultimately dismissed the charges. R&R at 45–46.

2. The government's case against Guandique was strong even without Morales.

Second, the Hearing Committee ignored the government's strong case against Guandique even *without* Morales, consisting of approximately forty witnesses. DCX 25 at 0493, 0497; *see generally* DCX 17. The government obtained an arrest warrant against Guandique even before it knew anything about Morales. FCSX 131; Tr. 1200:5–22,1478:11–1480:13.

At trial, the strongest evidence of guilt did *not* come from Morales—it came from three women who survived similar attacks by Guandique in the same park where Levy was killed and around the same time, including one just hours before Levy went missing. DCX 25 at 0493 (Judge Fisher: "modus operandi evidence" was "very strong evidence" of guilt); Tr. 1200:5–9, 1479:3–11. One eyewitness testified that she saw Guandique at the crime scene just hours before Levy went missing. The government also presented witnesses who testified that Guandique lived close to Rock Creek Park and, on the day Levy disappeared, had scratches on his face and chest. DCX 25 at 0493. Two witnesses testified that Guandique told them he was involved in a woman's murder. DCX 17 at 0388–0390. And a forensic anthropologist testified that Levy's hyoid bone indicated she was attacked from behind, like Guandique's other victims. Tr. 1559:5–8; DCX 17 at 0393.

3. PDS attacked Morales's credibility at trial.

In spite of the weight of the government's case against Guandique, the Hearing Committee reasoned that page one of the Zaldivar letter was material because PDS "could have used the debriefing in myriad ways to attack his credibility." R&R at 46. However, PDS's claim during the hearing that "there was no real way to attack [Morales's] credibility" without page one, Tr. 322:8-15, is contradicted by almost 60 pages of trial transcript testimony where Sonenberg vigorously cross-examined Morales. DCX 15 at 0280–0338. She suggested his more than two-year delay in reporting the confession was suspect, DCX 15 at 0316–0317; Tr: 138:17–139:2; impeached him with his long criminal record, DCX 15 at 0280–0281; Tr. 195:19–197:4; argued he was seeking benefits through his prison transfer request, DCX 15 at 00313–00314; and argued he had a history of acting out of his self-interest through repeated plea bargains, DCX 15 at 0290–0294.

In addition, PDS called three witnesses to discredit Morales—including his former cellmate who shared the cell with him and Guandique and said the confession never happened, AHX 51 at 006; Tr. 1579:11-21, and two witnesses who testified Morales mischaracterized meeting with a PDS investigator, AHX 51 at 006. These facts could discredit Morales more powerfully than a decade-old conversation about his gang involvement in which he did not incriminate anyone

or receive any benefits. The debrief would not have materially added to the force of the defense's assault on Morales's credibility.

C. At worst, Haines made an honest mistake.

There is not a single piece of evidence, in the thousands of pages in the records, suggesting that Haines suppressed anything intentionally. *See* § I.B, *supra*. When the issue first came up, the trial team unanimously agreed that they had disclosed Page 1. JX 13 at 001-002; Tr. 843:8-9. Even ODC never suggested Haines lied to her supervisors about that. At worst, she was mistaken. And the very concept of intentionality precludes a finding that a simple mistake is unethical conduct.

If it *were* intentional, then then all of these absurd things would be true:

- Even though Respondents were intent on suppressing impeachment evidence, they still actively tried to find all impeaching information about Morales.
- Respondents decided that the debrief alone was so damning to their case that it warranted suppression, unlike Morales's far more damaging (and disclosed) impeachment information.
- Of all the exculpatory and impeachment information Respondents came across during the *Guandique* investigation, this single page was the *one thing* they decided to suppress.
- But they were so incompetent that "Page 2" and "Page 3" were left clearly marked at the top of what *was* disclosed, and Campoamor even introduced page one into the grand jury record.
- Respondents didn't send a *single email*, either before or after this supposed conspiracy, that even *hints* at collusion.

- And they immediately notified their supervisors as soon as new facts regarding Morales came to light—even though they had intentionally suppressed his debrief.

In addition, the Hearing Committee does not identify any motive for Haines to intentionally suppress Morales's debrief. Nor did ODC ever identify one. The reason for that is simple—there is no motive.

D. The Six *Kline* Factors Support No Sanction.

Haines maintains that no sanction should be imposed here. If, however, the Board decides to impose a sanction, it should consider the six factors identified in *Kline*. 113 A.3d at 215 n.9. These factors weigh in favor of, at most, an informal admonition.

1. The nature and seriousness of the misconduct

If the Board finds Haines violated any ethical rules, any violation was an honest mistake, as discussed above.

2. The presence of misrepresentation or dishonesty

As even ODC admits, this case does not involve any allegations of dishonesty. *See, e.g.*, Tr. 2216:2-6 (Chair: "Let me be clear. You are not contending there's any dishonesty in this case?" ODC: "No. No, I'm not."). Because the charges in this pre-*Kline* case do not include any allegations of dishonesty, Haines is not subject to any sanction. Moreover, the dishonesty charge

was the *only* reason the Board in *Dobbie* thought it could impose a sanction. Absent such a charge, the Board is bound by *Kline*.

3. The Respondent's attitude toward the underlying misconduct

Haines has consistently accepted responsibility for her actions as the lead attorney in *Guandique*. She has never shied away from taking ownership over her mistakes, including by immediately accepting responsibility for ODC's 1.6 charge against her. Haines does not, however, accept that she violated Rule 3.8(e) or 8.4(d).

The Report and Recommendation of the Hearing Committee in *Dobbie* acknowledged that "[t]his factor is complicated." *Dobbie* R&R at 81. "In a case in which the Respondents contest allegations 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.'" *Id.* The Hearing Committee added, "[y]et 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 had a good-faith belief that their conduct was not blameworthy." *Id.* (citing *Yelverton*, 105 A.3d at 430).

Here, Haines certainly has a "good-faith belief" that she did not commit unethical conduct; this factor should thus not be weighed against her.

4. Prior misconduct

Haines has no prior misconduct.

5. Mitigating or aggravating circumstances

ODC's relentless pursuit of Haines, even after she was completely cleared by OPR, has changed her life forever, regardless of what sanction, if any, is imposed on her here.

Haines is a good person who gave her life to the USAO. She decided to exclusively work on cold cases because she wanted to bring justice to murdered women, all but one of them forgotten by most people. She preferred not to work on high-profile cases like Chandra Levy's, and instead gravitated toward lesser-known victims whose families needed someone to fight for them. While at the USAO, Haines had no work-life balance—work was her life.

This process has ruined her career, and it has harmed her physical and emotional health. She's also been driven out of law entirely. After retiring from the USAO, she moved to Massachusetts where she intended on practicing law privately. She was precluded from doing that, however, because she could not apply for admission to the Massachusetts bar while this process remained pending. So she has retired completely from the practice of law and, at 60 years old, now works as a waitress.

6. Prejudice to the client

As an AUSA, Haines's client in *Guandique* was the United States. The USAO has consistently stood behind Haines's conduct in *Guandique*.

V. Haines's Conducted Related to Rule 1.6 Warrants, at Most, an Informal Admonition.

Haines has always accepted responsibility for her violation of Rule 1.6. Haines, in a stressful moment during a trial with intense press attention, got angry and vented to her serious boyfriend. Nothing ever came of it. **No one even knew about it until ODC put in the Specification of Charges.** Haines vented in a way that she shouldn't have, and she regrets her actions. But her actions should be treated as what they were—a simple human mistake. She hopes the Board treats it as such.

CONCLUSION

For the reasons states above, the Board should find that Haines did not violate Rule 3.8(e) or Rule 8.4(d), and should impose no sanction for Haines's violation of Rule 1.6.

Date: May 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the length and format requirements of Board Rule 19.8(c) because it contains 13,894 words, double-spaced, with one-inch margins, on 8 ½ by 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2022, I caused a copy of the foregoing to be sent via electronic mail to:

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