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

In the Matter of	:	
AMANDA HAINES,	:	**Disciplinary Docket No. 2016-D261**
Respondent	:	
An Attorney Licensed to Practice Law in New York	:	
FERNANDO CAMPOAMOR-SANCHEZ,	:	**Disciplinary Docket No. 2016-D262**
Respondent	:	
Member of the Bar of the District of Columbia Court of Appeals **Bar Number: 451210** **Date of Admission: June 3, 1996**	:	

DISCIPLINARY COUNSEL'S RECOMMENDATION AS TO SANCTION

Disciplinary Counsel hereby submits its recommendation that the minimum sanction for a violation of Rule 3.8(e) should be a six-month suspension.

PRELIMINARY STATEMENT

In response to the Committee's inquiry at the October 7, 2021, hearing, grand jury exhibit 13, the photograph of Mr. Guandique (*see* DCX 6 at 2), was not included

in the Jencks package produced to the defense during the trial. Tr. 122-23 (Sonenberg); Tr. 649-52 (Kavanagh).

ARGUMENT

An appropriate sanction protects the public and the courts, maintains the integrity of the legal profession, and deters other attorneys from engaging in similar misconduct. *See, e.g., In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (*en banc*); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (*en banc*) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). Because the purpose of discipline is not to punish, Mr. Campoamor's character evidence is largely irrelevant. Mr. Campoamor is no longer a prosecutor and unlikely to repeat his misconduct. His character and the effect of these proceedings on his career have little to do with the need to preserve the integrity of the profession and general deterrence of other prosecutors.

1. *Kline* does not preclude a sanction in this case.

The discussion of "materiality" at the October 7 hearing illustrates the difference between how lawyers normally use that term and how it is used in the *Brady* context—a difference that *In re Kline*, 113 A.3d 202 (D.C. 2015), addressed.

"Material," in legal parlance, means "important" or "going to the merits." Black's Law Dictionary at 1128 (Revised Fourth Ed. 1968). Viewed from a pre-trial perspective, the *Kline* hearing committee found the withheld evidence was material. This evidence was an earlier statement by the shooting victim that he could not identify the shooter. He later identified the defendant. When Mr. Kline tried the case, the jury could not reach a verdict. Another prosecutor took over and disclosed the statement, and a jury convicted at a second trial.

Accordingly, the statement, used to impeach at the second trial, was not "material" as used in *Brady* because it did not make a difference to the result. *Brady* "materiality" is more restricted than the normal concept of "materiality." *Kline* discussed the distinction between evidence "material" to the defense's preparation and evidence "material" to the outcome of the trial, and determined the prior statement was the former, but not the latter. *Kline*, 113 A.3d at 207. *Kline* erased that distinction in terms of a prosecutor's obligation under Rule 3.8(e). Rule 3.8(e) requires disclosure of evidence material to the defense's preparation, regardless of whether it would likely affect the outcome of the trial. But because this matter involves a pre-*Kline* prosecution, for purposes of sanction, the Committee must determine if the withheld information satisfied the more restrictive *Brady* concept of materiality.

Unlike *Kline*, this case does not present a situation where the withheld information was disclosed and used at a second trial. The Hearing Committee must make the determination whether the evidence would likely have made a difference. Here, Mr. Morales's prior debriefing with law enforcement was "material" as determined by *Brady*. Mr. Morales's willingness to provide information about his gang activities to the police totally contradicted the way that Respondents portrayed him as a recently converted, hardened criminal with a "don't tell," thug mentality. Mr. Morales provided the only evidence linking Mr. Guandique directly to the murder. Most definitively, the government conceded his centrality to the conviction by agreeing to a new trial when the full extent of Mr. Morales's cooperation came to light and by later dismissing the case altogether when his credibility was further undermined. It is likely, if not certain, that Respondents would have been unable to convince the jury of Mr. Guandique's guilt had they not robbed the defense of the information necessary to impeach Mr. Morales's credibility.

2. A violation of Rule 3.8(e) is as serious a violation a lawyer can commit.

The Hearing Committee suggested that the parties address the typical factors taken into account in assessing sanctions. Some of those are addressed herein, but as the title to Rule 3.8 implies, prosecutors have "special responsibilities." The considerations for prosecutors are therefore different. A Rule 3.8(e) violation is more serious even than stealing client funds, because it can result in the unjust deprivation

of liberty. *See In re Dobbie/Taylor* BDN 19-BD-018 at 37 ("[A] violation of Rule 3.8(e) undermines our entire system of criminal justice."); *see also Vaughn v. United States*, 93 A.3d 1237, 1253 (D.C. 2014) ("Our adversarial system is premised on the belief that [s]ociety wins not only when the guilty are convicted but when criminal trials are fair.").

Due to the seriousness of the violation, the sanction in Rule 3.8(e) cases should be treated similarly to negligent misappropriation, where the presumptive sanction is at least a six-month suspension. *In re Davenport*, 794 A.2d 602, 605 (D.C. 2002). Negligent misappropriation's "hallmarks include a good-faith, genuine, or sincere but erroneous belief that entrusted funds have properly been paid; and an honest or inadvertent but mistaken belief that entrusted funds have been properly safeguarded." *In re Abbey*, 169 A.3d 865, 872 (D.C. 2017), as amended (Oct. 19, 2017). The Court imposes a significant sanction despite this good faith belief; "[t]he virtual certainty of . . . a six-month suspension for acts of [negligent] misappropriation serves the public and the profession by providing a powerful deterrent for any attorney who might contemplate engaging in this most serious misconduct." *Davenport,* 794 A.2d at 605. The same should be true for a violation of Rule 3.8(e), even if the prosecutor has a good faith, but objectively unreasonable belief that the evidence does not tend to negate the guilt of the accused.

3. A six-month suspension is necessary to deter prosecutorial misconduct.

"[O]ne purpose of discipline is to deter other attorneys from engaging in similar misconduct. In the interest of effective general deterrence, the severity of a sanction should take into account the difficulty of detecting and proving the misconduct at issue." *In re Cleaver-Bascombe II*, 986 A.2d 1191, 1199-200 (citing *In re Cleaver-Bascombe I,* 892 A.2d 396, 414 (Glickman, J. dissenting)). Violations of Rule 3.8(e) are inherently difficult to detect, since defense counsel and the courts are unaware of evidence that has not been disclosed. *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L. J. 965, 975 (1984) ("a great deal of [prosecutorial] misconduct . . . goes unreported, either because it occurs in secret or in seclusion or because the various observers of the misconduct do not complain."). The possibility of a six-month suspension will act as an important counterweight to the pressure placed upon prosecutors to win at all costs. *See In re Howes*, 52 A.3d 1, 17 (D.C. 2012) ("[A] prosecutor's desire to 'win' and obtain convictions can be the basis of a selfish motive."). That desire to win may be the result of the prosecutors' genuine belief of the defendant's guilt, particularly in a crime as horrendous as the murder of Chandra Levy. Disciplinary Counsel has no reason to dispute Mr. Campoamor's testimony as to his concern for the victims of crimes (Tr. 2093 (Campoamor); 2175-77 (Liu)) or with counsel's representation that Ms. Haines "dedicated her career . . . to getting justice for murdered women . . . ."

(Tr. 2267). In the cases of the most terrible crimes, the desire to win is at its strongest.

Not only do prosecutors have a strong motive to obtain a conviction, but also there are generally no personal consequences when convictions are overturned due to a *Brady* violation. The prosecutor, like Respondents, may no longer be at the same office. Unlike civil cases, there are no financial ramifications for the lawyers or their clients. In this case, there were no consequences for Respondents. OPR cleared them. "I viewed [OPR's report] as quite favorable . . . ." (Tr. 2181 (Liu)), and, for Mr. Campoamor who remained in his job, the U.S. Attorney's office continued to regard him as one of its top lawyers. Tr. 2113-16 (Campoamor); 2183-87 (Liu). On the other hand, the consequences for a defendant who is convicted due to a prosecutor's failure to disclose *Brady* material could not be more serious: imprisonment and loss of liberty.

A powerful deterrent for Rule 3.8(e) violations is necessary, given the continuing problem of prosecutors withholding exculpatory information. *See United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land.") A recent University of Michigan report found that "concealing exculpatory evidence is the most common type of official misconduct." National Registry of Exonerations, *Government Misconduct and Convicting the Innocent* (2020), at 75 (available at

http://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf). Of the first 2,400 exonerations in the National Registry of Exonerations, *Brady* violations occurred in 44 %—1,064 cases. *Id. See also* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND.L.J. 481, 509-10 (2009) ("The exonerations of more than two hundred criminal defendants based on post-conviction DNA evidence have forced an acknowledgement not only that our criminal justice system convicts the innocent, but also that prosecutorial suppression of *Brady* material constitutes a leading cause of wrongful convictions."). *Compare Gates v. United States,* 481 A.2d 120 (D.C. 1984), with *Donald E. Gates*, The Innocence Project, https://www.innocenceproject.org/case.donald-eugune-gates/ (last visited June 1. 2021) *and* Spenser S. Hsu, *District to Pay $16.65 Million to Wrongfully Imprisoned Man, Attorney Says,* The Washington Post (Nov. 19, 2015) https://www.washingtonpost.com/local/public-safety/district-to-pay-1665-million-to-wrongly-imprisoned-man-attorneys-say/2015/11/19/2f62fd58-8ecf-11e5-baf4-bdf37355da0c_story.html.

Too often prosecutors escape any real consequences for their misconduct. The Center for Public Integrity identified over 2,000 cases since 1970 in which a judge reversed a conviction, reduced a sentence, or dismissed charges at least in part because of prosecutorial misconduct. Only 44 resulted in any kind of disciplinary review. Thomas P. Sullivan and Maurice Possley, *The Chronic Failure to Discipline*

Prosecutors for Misconduct: Proposals for Reform, 105 J. Crim. L. & Criminology 881, 891-92 (2015); *see also* Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* (Dec. 2013) at 8 ("Nine studies have analyzed the professional consequences of prosecutor misconduct. Collectively, these studies examined prosecutorial misconduct conducted at both state and national levels from 1963 through 2013. Of the 3,625 instances of misconduct identified, these studies reveal that public sanctions are imposed in only 63 cases — less than two percent of the time"); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 141 (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"); Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson* (2011), at 12 (available at https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf) (in 660 cases where courts found prosecutorial misconduct, one prosecutor was disciplined).

4. *Kline* does not restrict the Hearing Committee's recommendation to a 30-day suspension.

Kline stated that the issue of an appropriate sanction for a prosecutor who violated Rule 3.8(e) but who had not engaged in dishonesty was "*res nova.*" Other jurisdictions, it noted, had imposed sanctions from public reprimand or censure to a six-month suspension. *Kline*, 113 A.3d at 215. In this context, and without imposing

an actual sanction, the Court said that the 30-day suspension recommended by the Board was "within the wide range of sanctions that generally would be appropriate." *Id.* This is hardly a definitive statement that a 30-days suspension is the appropriate sanction for any Rule 3.8(e) violation not involving dishonesty. In fact, it is *dicta* since the Court imposed no sanction. *Howes* imposed disbarment, in an admittedly more egregious case. *In re Dobbie/Taylor*, BDN 19-BD-018 (2020), recommended a six-month suspension for prosecutors who, like Respondents, professed to genuinely believe that a withheld report was not exculpatory. While there was dishonesty in *Dobbie/Taylor,* that was not the principal violation—Rule 3.8(e) was—and the prosecutors were much less experienced than Respondents. *In re Cockburn*, FCSX 188 (2014), was an informal admonition, not discipline imposed or approved by the Court, and is therefore not precedent. There is no definitive precedent for appropriate sanctions in Rule 3.8(e) cases. *Cf. Atty. Griev. Comm'n of Md. v. Cassillly,* 2021 BL 406717, Md., Misc. Docket AG No. 31, 10/22/21 (Maryland's first decision concerning its equivalent of Rule 3.8(e) violation, resulting in disbarment, despite hearing judge's recommendation of reprimand).

a. Specific Considerations with Respect to Mr. Campoamor.

Mr. Campoamor made a last-minute attempt to claim that he was prejudiced by delay. He never said a word about this until the sanctions hearing, at which point it was too late for Disciplinary Counsel to make a record, for example, as to the

reason why it deferred to the OPR investigation. Based on Mr. Campoamor's testimony, 45 months elapsed from the time Disciplinary Counsel sent a letter of inquiry in August 2016 until a specification of charges was filed in May 2020. Tr. 2117-29 (Campoamor). As the Committee is well aware, Respondents then repeatedly sought to delay the hearing, including the sanctions phase.

The verdict against Mr. Guandique was entered in November 2010. PFF 43. Mr. Campoamor disclosed exculpatory information about Mr. Guandique in November 2012, two years later, although Respondents were alerted to the problem in January 2012. PFF 44-49. The government resisted a new trial until May 2015, resulting in multiple hearings over the course of two and one-half years. PFF 53-54. Then a year late in 2016, it dismissed the case. PFF 55. During this 66-month period, Mr. Guandique was held on his murder conviction, including for some time after his other sentence was completed. PFF 55. Mr. Guandique, unlike Mr. Campoamor, was not successfully pursuing a career or receiving the John Marshal Award.

Mr. Campoamor has also argued that he should receive a lesser sanction because he was the second chair and did not author the final *Giglio* disclosures. This case does not implicate Rule 5.2(b), whereby a subordinate lawyer relies on the reasonable resolution of an "arguable" question of professional duty by his supervisor. No arguable question was raised; Respondents did not, and still do not

believe they were required to disclose this information to the defense. At the time of the absolute final deadline for these disclosures—two weeks before trial—Mr. Campoamor was assigned responsibility for presenting Mr. Morales's testimony. He produced, not one, but two drafts of the *Giglio* disclosures, neither revealing Mr. Morales's prior debriefing, but disclosing parallel information about another witness. PFF 21-24. Contrary to his argument at the sanctions hearing, the second draft was final with respect to Mr. Morales (DCX 9 at 123-24), although not for other witnesses *(see* DCX 9 at 122, 123). While Ms. Haines put the final disclosures into another format, she did not alter the substance of Mr. Campoamor's proposed disclosures about Mr. Morales. *Compare* DCX 11 at 129 *with* DCX 9 at 123-24. Because of the last-minute trial delay, these disclosures were withheld until October 4, 2010, but it was not until October 9, that Ms. Haines decided that she would present Mr. Morales's testimony. *Compare* FCSX 40 at 6 (Sept. 26. 2010 Witness List) *with* FCSX 42 at 6 (Oct. 9, 2010, Witness list).

b. Special considerations with respect to Ms. Haines.

As first chair, Ms. Haines had the greater responsibility, and a sanction greater than a six-month suspension would be appropriate. Moreover, as Disciplinary Counsel's sanctions exhibits illustrate, Ms. Haines numbness toward her *Brady* obligations in the *Guandique* trial was not unique. The transcript of the *Stover* case (DCX 51) shows that when another prosecutor took over from Ms. Haines, he

discovered she had failed to provide impeachment information from three witnesses. The government avoided dismissal by making the disclosures, assisting the defense in locating witnesses, and agreeing to delay the trial for four weeks. At the sanctions hearing, Ms. Haines waived her right to explain her conduct and relied instead on argument of counsel, some of which lacked any record support, that the defense counsel in *Stover* had disclaimed that the government acted with "evil intent." While defense counsel did disclaim evil intent on behalf of the government, writ large, he clearly argued that predecessor counsel, Ms. Haines, kept "evidence that we believe is helpful to us close to their vest until 13 days before trial" (DCX 51 at 17) and that the government [read Ms. Haines] made "a conscious decision" to do so. The court agreed. *Id.* at 16 ("I think that's absolutely correct.").

Ms. Haines engaged in the same kind of conduct in the *Zanders* case, which the Court issued two months before the *Guandique* trial, and which should have served as a recent reminder of her disclosure obligations. In *Zanders*, Ms. Haines suppressed evidence that another person had a motive to commit the murder. Unlike in *Guandique*, she belatedly disclosed this evidence two weeks before trial. The trial court found there was sufficient time to investigate, and the appellate court noted that defense counsel had not asked for a continuance on the ground of inability to investigate. *Zanders* is another application of the peculiar *Brady* concept of materiality. But the Court also wrote "defense counsel was undoubtedly placed in a

difficult position by the receipt of potentially significant exculpatory evidence so close to trial" and "[t]here is no apparent reason for the late disclosure." *Zanders v. United States*, 999 A.2d 149, 163 (D.C. 2010) (DCX 45). It went on to say, "Any doubts should be resolved in favor of full disclosure made well before the scheduled trial date, unless there is good reason to do otherwise . . . ." *Id.* at 164. Two months later, Ms. Haines in *Guandique* ignored this admonition.

The only way to prevent prosecutors from engaging in this misconduct is to impose serious consequences in the rare instances it comes to light. The cluelessness of Ms. Liu, a former U.S. Attorney and experienced Department of Justice lawyer, illustrates why this is so. She regarded the OPR investigation—which found the evidence about a Jencks violation in "equipoise" and which did not even consider the *Brady* violation—as "quite favorable." Tr. 2181. She was concerned that disciplinary proceedings against prosecutors might be "scary" (Tr. 2190) because they are "putting their bar licenses on the line" (Tr. 2191), and she purported to believe that these matters could best be handled by appeals or post-conviction proceedings (Tr. 2200) or by regulation rather than "backward looking" proceedings (Tr. 2192-96, 2199-2200). Does Ms. Liu seriously believe that post-conviction remedies, inherently "backward-looking," are a sufficient remedy for Donald Gates, who spent 27 years in prison for a crime he did not commit? How could regulations—and to what regulatory process does she refer—possibly prevent this

sort of conduct? Prosecutors, like every other lawyer, *should* put their licenses on the line when they engage in dubious conduct, such as deciding to withhold exculpatory information from the defense. They should fear doing so, not only because if affects their licenses to practice but because they should have an interest in seeing that trials are conducted fairly. That is the whole point of deterrence— of which our legal system needs more, not less, and which argues for suspensions of at least six months for these Respondents.

CONCLUSION

The Hearing Committee should recommend that Respondents be suspended for at least six months.

Respectfully submitted,

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[1] Mr. deBoer resigned from the Office of Disciplinary Counsel effective October 22, 2021 to accept other employment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th of October, 2021, I have caused copies of the foregoing Disciplinary Counsel's Recommendation as to Sanction to Amanda Haines, Esquire, c/o Justin Dillon, Esquire, jdillon@kaiserdillon.com and Sarah Fink, Esquire, sfink@kaiserdillon.com, and Fernando Campoamor-Sanchez, Esquire, c/o Mark Lynch, Esquire, mlynch@cov.com, Rae Woods, Esquire, rwoods@cov.com, and Simone Ross, sross@cov.com to James T. Phalen, Executive Attorney, Board on Professional Responsibility at casemanagers@dcbpr.org.

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