



College of Law

Clark D. Cunningham
W. Lee Burge Professor of Law & Ethics

P.O. Box 4037

Atlanta, GA 30302-4037

404-413-9168

fax: 404-413-9225

cdcunningham@gsu.edu

Home page: <http://law.gsu.edu/ccunningham/>

December 10, 2013

Julayaun Maria Waters, Chair
Investigative Panel, State Disciplinary Board
The Law Firm of Lester B. Johnson, III, P.C.
216 W. Broughton St., Suite 201
Savannah, GA 31401
j.mariawaters@lesterbjohnsoniii.com

Robin Frazer Clark
Immediate Past President
State Bar of Georgia
The Promenade
1230 Peachtree Street, Suite 2323
Atlanta, GA 30309
robinclark@gatriallawyers.net

Anthony B. Askew, Chair
Review Panel, State Disciplinary Board
McKeon Meunier Carlin & Curfman, LLC
817 W. Peachtree St. N.W., Suite 900
Atlanta, GA 645-7709
taskew@m2iplaw.com

Paula Frederick
General Counsel
State Bar of Georgia
104 Marietta Street, Suite 100
Atlanta, GA 30303
PaulaF@gabar.or

Re: Conduct of Assistant Fulton County District Attorney Demone Lee

Dear Ms. Waters, Ms. Frederick, Ms. Clark and Mr. Askew:

I write to you regarding the conduct of Assistant Fulton County District Attorney Demone Lee as described in the attached Consent Order Granting New Trial, ordered by the Hon. Alford J. Dempsey on December 3, 2013 in State v. Jon Thieme (Fulton Superior Court Case No. 11 SC 99152) ("Consent Order"), and Supplement to Previously Filed Motion for New Trial filed October 17, 2013 ("Supplement").

I place before you for your consideration whether:

1. The Investigative Panel of the State Disciplinary Board should initiate a grievance on its own motion against Demone Lee based on review of the attached Consent Order and Supplement.¹
2. The Office of the General Counsel of the State Bar, acting either at the direction of the Chairperson of the Investigative Panel or with the approval of the Immediate Past President of the State Bar of Georgia and the Chairperson of the Review Panel, should petition the Supreme Court of Georgia for the suspension of Demone Lee from the practice of law pending disciplinary proceedings, based on

¹ State Bar Disciplinary Rule 4-203(a)(2) provides that the Investigative Panel has the power and duty "to initiate grievances on its motion." Internal Rule 5(e) of the Investigative Panel further provides that "When the Office of the General Counsel receives information that appears to invoke the disciplinary jurisdiction of the State Bar of Georgia, but no grievance form is filed, the information should be brought to the attention of the Panel for the Panel to consider instituting a grievance on its own motion pursuant to Bar Rule 4-203."

sufficient evidence demonstrating that Demone Lee's conduct poses a substantial threat of harm to the public.²

I am not filing a Grievance against Demone Lee; I do not know him and have no relationship with any of the attorneys or parties involved in the Thieme case. I write this letter in the spirit of Georgia Rule of Professional Conduct (GRPC) 8.3: "A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority."

As described in the attached Consent Order, Jon Thieme (Thieme) was indicted and tried on two counts of Aggravated Child Molestation. In Count One Thieme was charged with placing his penis in the mouth of a child under the age of 16; in Count Two Thieme was charged with placing his penis into or on the anus of the same child (i.e. anal sex). Following a jury verdict on March 22, 2013 of guilty on Count One and not guilty on Count Two, Thieme was sentenced to twenty-five years in prison.

The Consent Order finds that after the verdict was returned, the prosecutor, Demone Lee, told one of the jurors "that the victim recanted his allegation of anal sex" but "that he [Lee] left that count in the indictment to see what the jury would do with it." Order at 1. The Supplement puts this statement in the context of Lee explaining to the juror "the reason he [Lee] did not ask [the alleged victim] on direct examination about the anal sex allegation is that [the alleged victim] had told him that the anal sex allegation did not happen." Supplement at 2.

Defendants' counsel, Barry Hazen and Michael Jacobs, confronted Lee with his statement to the juror at a chambers conference with Judge Dempsey on May 9, 2013. Order at 1. According to the Supplement, Lee was asked when did he learn that the victim said the anal sex allegation did not happen; Lee responded that it was "about 30 days ago," i.e. in early April after the conclusion of the trial. Supplement at 2. Judge Dempsey "directed Mr. Lee to review his file to determine when he learned of this exculpatory evidence." Order at 1. On May 10, 2013 Lee sent an email to Hazen stating, "After speaking with [the alleged victim's] mom, I can say it was about a week before trial." Email attached to Supplement, Order at 1-2.

The Consent Order finds that at no point prior to trial did "Mr. Lee inform Mr. Hazen that the victim recanted or changed part of his story regarding these serious allegations." Order at 2. Concluding that "there exists a reasonable probability that the outcome of the proceeding would have been different if the defense was provided this key exculpatory information," the Consent Order grants Defendant's Motion for New Trial.

GRPC 3.8 (d) (Special Responsibilities of a Prosecutor) states: "The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense". These findings of the Consent Order would support the initiation of a grievance against Demone Lee and subsequent issuance of a Notice of Investigation to determine if there is probable cause that Lee violated GRPC 3.8(d).

The Consent Order further finds that Lee presented to the jury two videos of forensic interviews with the alleged victim. In the first video the child "described in minute detail being sexually molested anally" by the child's uncle; the child then said on the video that Thieme did the same thing to him that his uncle did. On the second video the child stated that the uncle had "raped him along with Defendant" and Thieme had "tried to put his penis in [the child's] anus but it was too big to fit in." "Therefore, the State presented audio-recorded

² Disciplinary Rule 4-108 states that "Upon receipt of sufficient evidence demonstrating that an Attorney's conduct poses a substantial threat of harm to his clients or the public and with the approval of the Immediate Past President of the State Bar of Georgia and the Chairperson of the Review Panel, or at the direction of the Chairperson of the Investigative Panel, the Office of the General Counsel shall petition the Supreme Court of Georgia for the suspension of the Attorney pending disciplinary proceedings predicated upon the conduct causing such petition."

evidence to the jury that Defendant had committed anal sex molestation when they were previously apprised that the victim recanted this allegation.” Order at 2.

GRPC 3.3(a)(4) (Candor to the Tribunal) states: “A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false.” The findings of the Consent Order regarding Lee’s presentation to the jury of the alleged victim’s videotaped accusations of anal sex would support the initiation of a grievance against Demone Lee and subsequent issuance of a Notice of Investigation to determine if there is probable cause that Lee violated GRPC 3.3(a)(4).

GRPC 3.3(a)(1) (Candor to the Tribunal) states: “A lawyer shall not knowingly ... make a false statement of material fact or law to a tribunal.” The findings of the Consent Order, combined with the statement in the Supplement that Lee told Judge Dempsey on May 9, 2013 that he learned that the victim said the anal sex allegation did not happen “about 30 days ago,” when Lee in fact knew before trial would support the initiation of a grievance against Demone Lee and subsequent issuance of a Notice of Investigation to determine if there is probable cause that Lee violated GRPC 3.3(a)(1).

GRPC 3.8 (a) (Special Responsibilities of a Prosecutor) states: “The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”. According to the Supplement, Lee “never mentioned anal sex” in his opening statement to the jury. Although he specifically mentioned oral sex, charged under Count One, he “skirted the issue of anal sex entirely,” the subject of Count Two. Supplement at 8. Further, although the alleged victim testified, the child was “never asked on direct examination anything about anal sex with defendant.” Supplement at 8. This conduct may be evidence that Lee knew that Count Two was no longer supported by probable cause, yet, as found in the Consent Order, Lee admitted that he “left that count in the indictment to see what the jury would do with it.” Order at 1. This information would support the initiation of a grievance against Demone Lee and subsequent issuance of a Notice of Investigation to determine if there is probable cause that Lee violated GRPC 3.8(a).

The Consent Order finds that there “exists a reasonable probability” that the outcome of the trial – which led to Thieme’s conviction and 25 year prison sentence – would have been different if Lee had provided the defense with “this key exculpatory information.” Order at 3. This is a final judicial determination not subject to appellate review because the order was entered into by consent, and thus provides an unusually strong predicate for finding that Demone Lee has engaged in conduct that posed a substantial threat of harm sufficient to support a petition for suspension pending disciplinary proceedings. The Georgia Supreme Court looks to the American Bar Association’s Standards for Imposing Lawyer Sanctions for guidance in determining the appropriate sanction to impose. In the Matter of Jack O. Morse, 266 Ga. 652, 653, 470 S.E.2d 232 (1996). ABA Standard 6.11 states: “Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.”³

As to whether Demone Lee poses a substantial threat of future harm to the public, also to be considered is whether he continues to exercise the wide discretion and powers of a prosecutor and whether there are institutional protections and deterrents in place to prevent a recurrence of the conduct described by the Consent Order. Relevant to these considerations is the public statement by the Fulton County District Attorney, Paul Howard, that “Demone Lee will not face disciplinary action in connection with this case.” See attached email dated December 4, 2013, to Aaron Diamant, Investigative Reporter, WSB-TV-DT, Channel 2

³ Although Georgia limits the penalty for violating the provisions of GRPC 3.8 (Special Responsibilities of a Prosecutor) to a public reprimand, a lawyer may be suspended or disbarred for violating either GRPC 3.3(a)(1) or GRPC 3.3(a)(4). A lawyer may also be suspended or disbarred for engaging in any “professional conduct involving dishonesty, fraud, deceit or misrepresentation”. GRPC 8.4(a)(4).

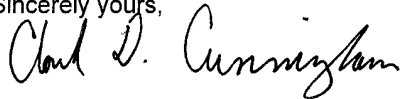
Re: Conduct of Demone Lee
December 10, 2013
Page 4 of 4

Action News. In this public statement District Attorney Howard describes Lee's decisions and actions as "differences in legal opinions" and concludes that such "differences ... should not be subjects of discipline, but rather viewed with respect."

This case can be compared with the disbarment in North Carolina of Durham County District Attorney Michael Nifong for failure to disclose exculpatory forensic evidence and other misconduct in the rape prosecution of three members of the Duke University lacrosse team. The Disciplinary Panel Chairman stated when announcing the disbarment decision: "[T]here are very few deterrents upon prosecutorial misconduct. For very good policy reasons, prosecutors are virtually immune from civil liability. About the worst that can happen to them for the conduct of a case is that the case can be overturned. The only significant deterrent upon a prosecutor is the possibility of disciplinary sanction."

If a grievance is initiated and Notice of Investigation issued, it is to be hoped that the investigation will include inquiry into whether any other attorney in the Fulton County District Attorney's office was aware of or participated in Lee's actions and decisions prior to trial, during trial, and in response to the motion for new trial. By Order dated October 31, 2013 (attached), the State was directed to respond by December 2, 2013 to Defendant's Supplement to Previously Filed Motion for New Trial filed October 17, 2013. My understanding is that the court records will show that the Fulton County District Attorney's office did not file a response despite the Court's Order. Instead the State consented to the Order granting a new trial on December 3, 2013. As a result Demone Lee avoided judicial inquiry into his conduct as well as any inquiry into the conduct of any other attorney in the Fulton County District Attorney's office.

Sincerely yours,



Clark D. Cunningham
W. Lee Burge Professor of Law & Ethics
Georgia Bar # 201979

cc: Members of the Investigative Panel

Jennifer M. Davis
Mark A. Douglas
Michael A. Fuller
Carol Fullerton
Elizabeth King
David Richards
Christian Joseph Steinmetz, III
Laverne Lewis Gaskins
John M. Stephenson
Donna Stanaland Hix
William Dallas NeSmith, III
Sherry Boston
Katherine K. Wood
Hubert J. Bell, Jr.
Thomas Gatewood Sampson, II

Delia T. Crouch
Andrew J. Whalen, III
Dale Pearson Beardsley
Christopher A. Townley
Donald W. Huskins
John David Newberry
Ramon Alvarado
Melody Allen Glouton
Anna Green Bolden
Larry I. Smith
John G. Haubenreich
Daniel S. Reinhardt
Patrise M. Perkins-Hooker
Vera Sharon Edenfield