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).

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

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	**CASE NO. 11SC99152**
	)	
v.	)	**JUDGE DEMPSEY, JR.**
	)	
JON THIEME,	)	
	)	
Defendant.	)	
	)	

CONSENT ORDER GRANTING NEW TRIAL

Defendant was charged in the above indictment with two counts of Aggravated Child Molestation. In Count One, he was charged with placing his penis in the mouth of C.B., a child under the age of 16 years. In Count Two, he was charged with placing his penis into or on the anus of the same person. After a trial, the jury returned a verdict of guilty as to Count One and Not Guilty as to Count Two (anal sex) on March 22, 2013. Defendant was sentenced to a twenty-five years in prison.

The Honorable Barry Hazen, Esq. and the Honorable Michael Jacobs, Esq. represented Defendant. After the jury trial, the Assistant District Attorney, Demone Lee, who prosecuted the case, told one of the jurors, which was overheard by both defense counsel, that the victim recanted his allegation of anal sex. However, he explained to the juror that he left that count in the indictment to see what the jury would do with it.

On May 9, 2013, both the defense team and the prosecuting attorney met with the Honorable Court in chambers to discuss the issue. The Court directed Mr. Lee to review his file to determine when he learned of this exculpatory evidence. According to trial counsel, Mr. Lee emailed Mr. Hazen stating he believes it was one week before trial. It

seems that Mr. Lee's memory was refreshed after discussing the exculpatory matter with the victim's mother. Furthermore, this also implies that the mother was aware of the recantation and had a discussion with the prosecuting attorney regarding it prior to trial.

During the week leading up to the trial, there was an abundant amount of communication between the parties including a meeting at Mr. Hazen's office where Mr. Lee reviewed some evidence. At no point in time during any of those meetings, or communications, did Mr. Lee inform Mr. Hazen that the victim recanted or changed part of his story regarding these serious allegations.

The recantation was relevant to the evidence the State presented at trial. The State played two videos of forensic interviews with C.B. In the first video played at trial, the victim described in minute detail being sexually molested anally by his Uncle Clarence. When asked what Defendant did to him, he said the same thing that Uncle Clarence did. He said the same body parts were involved when Defendant allegedly molested him. In the second interview, the victim stated that Clarence raped him along with Defendant. The victim said that Defendant tried to put his penis in his anus but it was too big to fit in. Therefore, the State presented audio-recorded evidence to the jury that Defendant had committed anal sex molestation when they were previously apprised that the victim recanted this allegation. Under the laws of both the United States and the State of Georgia, the prosecuting attorney has a legal obligation to disclose this information to defense counsel upon learning of it. *See Zant v. Moon*, 264 Ga. 93 (1994)(where a prosecutor suppresses favorable evidence to the defense, the State violates the defendant's due process rights); *see also*, *Brady v. Maryland*, 373 U.S. 83 (1970).

Additionally, during the trial of the case, the State presented an expert witness, Anique Whitemore, who is the Director of Forensic Services for the Fulton County District Attorney's Office. Her testimony was based on her observations of the forensic interviews including that of the victim in the instant case. She made some statements that pertained to anal sex and the reluctance of young victims to come forward due to the fact that they may be looked upon as "gay." (T. 271). Thus, this testimony supported the victim's claim of anal molestation. If this recantation had been revealed, the defense would have been able to conduct a much more sifting cross-examination on her regarding this opinion.

Based on the above, there exists a reasonable probability that the outcome of the proceeding would have been different if the defense was provided this key exculpatory information.

Presented by:

Lawrence J. Zimmerman
Attorney for Defendant
State Bar No. 785198

Consented to by:

Lenny Krich
Senior Assistant District Attorney
State Bar No. 429711

IT IS SO ORDERED THIS 3 DAY OF December, 2013.

The Honorable ~~Alfred~~ J. Dempsey, Jr.
Judge, Superior Court of Fulton County

Alford

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	
v.	:	CASE NO. 11SC99152
JON THIEME	:	
Defendant.	:	JUDGE DEMPSEY

SUPPLEMENT TO PREVIOUSLY FILED MOTION FOR NEW TRIAL

COMES NOW Defendant in the above styled case, and pursuant to O.C.G.A. Section 5-5-40 files his Supplement to Previously Filed Motion for New Trial. Defendant moves this Court to set aside the guilty verdict returned herein on March 22, 2013, and the sentence entered thereon, and to grant a new trial. Specific references to the trial transcript are made by the letter "T" followed by the page number where the referenced item appears. Defendant offers to show this Court the following:

Defendant was charged in the above referenced indictment with two counts of aggravated child molestation. In count 1 he was charged with placing his penis into the mouth of Curtis Bell, a child under the age of 16 years. In count 2 he was charged with placing his penis into or on the anus of Curtis Bell. A jury returned a verdict of guilty as to count 1 (oral sex count) and not guilty as to count 2 (anal sex count) on March 22, 2013. Defendant was immediately sentenced to serve twenty-five (25) years in prison on count 1. A Motion for New Trial was timely filed on March 26, 2013. A transcript of the trial was prepared. This Supplement follows.

Following the trial, Defendant's attorneys Barry Hazen and Michael Jacobs, were in the jury room talking with some of the jurors. Both Mr. Hazen and Mr. Jacobs heard Demone Lee, the assistant district attorney who tried the case, say that the reason he did not ask Curtis Bell on direct examination about the anal sex allegation, is that Curtis had told him that the anal sex allegation did not happen. He further indicated he nevertheless left the anal sex count in the indictment to see what the jury would do with it.

A hearing on Defendant's Motion for Bail Pending Motion for New Trial was scheduled for May 9, 2013. Instead of having a hearing, Mssrs. Hazen, Jacobs and Lee met with Judge Dempsey in chambers. Mr. Lee was asked directly by Mr. Hazen in Judge Dempsey's presence when did he learn that Curtis Bell said that the anal sex allegation did not happen. Mr. Lee responded that he would have to review his notes to be certain of the date, but it was "about 30 days ago." Judge Dempsey directed Mr. Lee to review his notes and inform defense counsel of the precise day he learned that the anal sex allegation did not happen. Mr. Hazen sent an email to Lee on May 10, 2013 confirming Judge Dempsey's directive. Mr. Lee responded, "I am still trying to nail down the exact date. After speaking with Curtis' mom, I can say that it was about a week before trial." A copy of that email is attached hereto and made a part of this Motion.

At no point before his comment in the jury room following the trial did Mr. Lee inform either defense counsel that Curtis Bell said the anal sex allegation did not happen. There were email transmittals and telephone conversations between Mr. Hazen and Mr. Lee during the week before trial. Further, Mr. Lee actually came to Mr. Hazen's office on March 15, 2013 to view the testimony of a witnesses that had been videoed and stipulated to before Mr. Lee had become

the assistant district attorney in the case. Mr. Hazen wanted to make sure Mr. Lee was aware of it and had the chance to review it. During that meeting and in the emails and telephone conversations Mr. Lee did not inform Mr. Hazen that Curtis Bell said the anal sex allegation did not happen. If Mr. Lee's statement in chambers is true, then he knew about the recantation then. If Mr. Lee knew it about a week before trial per his email, then he might have known it when he visited Mr. Hazen at his office on March 15.

Defendant mailed a Motion For Discovery, Inspection, Production And Copying Of Evidence Favorable To The Accused And In Camera Inspection, With Incorporated Authority to the State on March 29, 2011. The Superior Court Clerk shows it was filed on April 4, 2011, almost two years before trial. That Motion contains the following request :

"Defendant respectfully moves this Court, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, Section 1, Paragraphs 1, 11 and 14 of the Georgia Constitution, as construed and applied in the case of Brady v. Maryland, 373 U.S. 83 (1970) and its progeny including, Giles v. Maryland, 386 U.S. 66 (1967); Giglio v. United States, 405 U.S. 105 (1972); and Hicks v. State, 232 Ga. 393 (1974), to order the State to produce and permit defense counsel in inspect and copy all evidence in the possession and control of the State which may be favorable to the Defendant, impeaching to the State, and material to the issues of guilt or punishment, or could reasonably weaken or affect any evidence proposed to be introduced against the Defendant at trial or at sentencing. The evidence sought includes, but is not be limited to:

1.

All evidence, including statements of individuals, physical evidence or test results indicating or tending to indicate that Defendant is not guilty of the offense charged or mitigating on the issue of sentence.

2.

All statements of any witness which contradict in any way the statements of any other witnesses, or **which contradict other statements made by the same witness."**

It is clear from the language of the Motion that the defense was requesting the very type of information revealed by Curtis Bell to Mr. Lee, to wit: the anal sex allegation did not happen. *Brady v. Maryland*, 373 U.S. 83 (1970) requires that it be turned over to the defense. This information is impeaching to the State in that any statement by Curtis Bell that anal sex did not

happen directly contradicts his previous statements that it did. It is exculpatory to the defense in that is completely negates the allegations of count 2 of the indictment.

The recantation was relevant to evidence the State presented. The State played two videos of forensic interviews with Curtis Bell. In the first video Curtis described in minute detail being sexually molested anally by his Uncle Clarence. When asked what Defendant did to him he said the same thing that Uncle Clarence did. He said the same body parts were involved when defendant allegedly molested him, as when uncle Clarence molested him, nothing was different. In the second interview Curtis said that Clarence and defendant "raped" me. It is obvious that Curtis was referring to anal sex when he used the word "rape" because he alleged anal molestation only with Uncle Clarence. Curtis said in the video that defendant tried to put his penis in his anus, but it was too big to fit in. Curtis never alleged that Uncle Clarence molested him orally. Thus, the State presented audio recorded evidence to the jury that defendant had committed anal sex molestation when knew that Curtis had recanted. The State had the legal obligation to inform the defense of the recantation so that defense counsel could use it in whatever lawful way it saw fit.

The State may seek to argue that failing to reveal that Curtis Bell recanted regarding the anal sex allegation is harmless because Defendant was acquitted of the anal sex charge. Curtis' original video statement regarding anal sex and his later admission that it did not happen goes directly to his credibility. If he originally lied about one part of the allegation, he might have lied about the other part too. It was not for the State to hide this information and then later express the opinion that it was harmless anyway.

The recantation information was relevant not only to the videos of Curtis' Bell's forensic interviews, but to several of the State witnesses as well. Two of those witnesses are Kathy Burke and Corinna Oliver. Ms. Burke was Curtis' teacher, and was the outcry witness. She testified that Curtis told her, "My uncle had raped me." (T117). The next witness called by the State was Corinna Oliver, who was a counselor at the school Curtis Bell attended. She testified that Ms. Burke told her what Curtis had reported to her (Burke). She questioned Curtis and asked him who did "it" to him (T123). It is obvious they were talking about rape (T123). Curtis said Clarence **and Little Jon** (T123). Little Jon refers to defendant. It should be noted that Curtis in his forensic videos never alleged that uncle Clarence molested him orally. Therefore, there is no doubt that Curtis is referring to anal sex when he uses the word "rape." Thus, the State was introducing evidence through these two witnesses that defendant anally molested Curtis when it knew full well that Curtis said it didn't happen, and failed to notify the defense.

The State also called Curtis' mother Lashunda Bell as a witness. Ms. Bell testified on direct examinations that "ever since everything has been going on, he (Curtis) has been trying to prove himself that he is a boy or that he is not—how can I use the term gay." (T180). The Following questions and answers occurred on direct examination:

Q: "So initially when you were told about Little Jon raping your child, what did you think initially.

A: When it was told to me by Curtis or—

Q; By law enforcement

A; I didn't want to believe it

Q: At what point did that change for you?

A: **When I heard it from my son."** (T190).

Later in her examination Ms. Bell was also asked on redirect "What made you take the allegation of sexual assault seriously?" She answered "when I heard it from my son." (T212). According to Mr. Lee's email to Mr. Hazen, it seems that Ms. Bell knew about the recantation more than a week before she testified to the above. This information could have been used for cross examination purposes by the defense. Had the State revealed the recantation the defense could have revealed that she also heard from her son that it did **not** happen.

The recantation was also central to the expert testimony of State's witness Anique Whitmore, the Director of Forensic Services for the Fulton County District Attorney. Ms. Whitmore's testimony essentially boiled down to observations of forensic interviews, including that of Curtis Bell, that in her opinion are consistent with those of a child who had actually been molested. Whitmore testified, "Little boys, young men are reluctant to share intimate details of sexual offenses because stereotypically they are going to be—they assume people might think they are gay…It's very difficult for young boys to come forward and especially in very explicit details about what happened **especially penetration** with boys it's very difficult for them to expose because it is not what a young man is supposed to experience." (T271). She essentially testified that boys who are sexually penetrated are even more reluctant to reveal it because there is the stigma of homosexuality. Her testimony lends support to Curtis' initial claim of being anally molested. Her opinion could have been challenged by the defense with the knowledge that Curtis Bell had made up the entire story of being anally penetrated, if the recantation had been revealed by the State.

LAW

In *Brownlow v. Schofield*, 277 Ga. 237 (2003), which is a habeas corpus case, issues almost identical to those presented in this case were addressed. Mr. Brownlow was convicted of two counts of child molestation and two counts of aggravated sexual battery. The alleged victim was his grandson. Ten days before trial the child victim was interviewed by the prosecuting attorney and **shook his head negatively** when asked if Brownlow had put his mouth on his penis. The prosecuting attorney considered dropping the charge but decided to keep it in the case. The prosecutor did not inform the defense of the child's negative response.

"Where a prosecutor suppresses evidence favorable to the defense, the State violates the defendant's due process rights. Zant v. Moon, 264 Ga. 93 (1994). To prevail on a claim of denial of due process based on the State's suppression of evidence favorable to the defense, a defendant must show that the State possessed evidence favorable to the defendant; the defendant did not possess the evidence not could he obtain it himself with any reasonable diligence; the prosecution suppressed the favorable evidence; and had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different" *Gulley v. State*, 271 Ga.337, 341-342 (5) (1999)."

In this case it is obvious both from Mr. Lee's admission to Judge Dempsey in chambers, and from his subsequent email to Mr. Hazen that the State did indeed possess evidence favorable to the defendant. Thus, the first prong of *Brady* and *Gulley* has ben satisfied.

It is also obvious that the State failed to disclose this information. The failure to disclose the recantation was more than just an oversight. In fact, it appears that the State made an effort to suppress the recantation by avoiding any live testimony concerning the anal sex allegation.

Avoiding any testimony concerning the anal sex allegation is good strategy because it minimizes the risk that any witness will blurt out anything about the recantation. Reading the trial transcript in retrospect, now knowing that the State knew about the recantation, it become obvious that the State tried to avoid any live testimony regarding the anal sex allegation.

The first clue is the State never mentioned anal sex in its opening statement to the jury. It specifically mentioned oral sex, but skirted the issue of anal sex entirely.

The second clue is the State avoided eliciting live testimony about anal sex. For example, Curtis Bell was never asked on direct examination anything about anal sex with defendant. If Curtis Bell was asked about it on direct examination there is the risk that he might reveal that it didn't happen.

The third clue is the State avoided asking Curtis' mother Lasunda Bell on direct examination anything about anal sex. It is inconceivable that the mother of Curtis Bell would not be asked about the anal sex allegation unless the State was deliberately avoiding any mention of it. Given Mr. Lee's May 10, 2013 email to Mr. Hazen where he said "**After speaking with Curtis' mom,** I can say it was about a week before trial", it is obvious that Ms. Bell knew that her son had recanted. The State had to avoid questioning her about the anal sex allegation because if she was going to testify truthfully she would have had to reveal the recantation.

Thus, a second prong of *Brady* and *Gulley* is satisfied.

This case took almost two years to reach trial. During that extended time Mr. Hazen attempted to interview almost all witnesses in the case. He interviewed Curtis' mother, Lashunda Bell by telephone. She did not indicate to Mr. Hazen that Curtis had ever told her that the anal sex allegation did not happen. She would not allow Mr. Hazen to interview Curtis in

person, or on the telephone. When she was asked by Mr. Hazen if he could telephone her again if he needed to she told him she had told him all she was going to say, and to not call her again. Mr. Hazen respected her request. Further, according to Mr. Lee's email to Mr. Hazen, he didn't know about the favorable evidence until approximately a week before trial. There is no evidence that Curtis Bell prior to that time revealed to anyone that the anal sex allegation did not happen. Thus, even if defense counsel was able to interview Curtis he would have to have been lucky enough to conduct the interview during the precise time period Curtis decided to "come clean." Thus, there was no reasonable way defendant could have obtained the suppressed evidence. The third prong of *Brady* and *Gulley* is established.

The last prong is that a reasonable probability exists that the outcome of the proceeding would have been different. In *Brownlow*, our Supreme Court has interpreted this **not** to mean whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *Nikitin v State*, 257 Ga. App 852,865(1)(C). Curtis Bell was the only witness whose words implicated defendant. His suppressed recantation undermines confidence in the outcome of this trial.

O.C.G.A. Section 5-5-20 provides that "In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury. In this case, the suppressed evidence that Curtis said the anal sex allegation did not happen goes directly to the videoed forensic interviews of Curtis where he claimed that it did. Note that the entire case rests on the credibility of Curtis Bell.

Defendant has alleged in his Preliminary Motion for New Trial that the verdict is contrary to evidence and the principles of justice and was decidedly and strongly against the weight of the evidence. O.C.G.A. Section 5–5–20 and 5–5–21. 'afford the trial court broad discretion to sit as a "thirteenth juror" and weigh the evidence on a motion for new trial alleging these general grounds.' *Walker v. State*, 292 Ga. 262(2), 737 S.E.2d 311 (2013).

A trial court, in reviewing a motion for new trial based on the grounds alleged by defendant here "has a duty to exercise its discretion and weigh the evidence **and consider the credibility of the witnesses**. *Alvelo v. State*, 288 Ga. 437 (2011); *Brockman v. State*, 292 Ga. 707 (2013); Walker v. State supra, 292 Ga.at 294.

WHEREFORE, Defendant requests that this Court:

a. schedule a hearing when inquiry may be had into the issues raised above;

b. set aside the verdict in this case;

c. grant defendant a new trial.

Respectfully submitted this 11th day of October, 2013.

Lawrence Zimmerman
Attorney for Defendant
Georgia Bar No. 785198

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	
v.	:	CASE NO. 11SC99152
JON THIEME	:	
Defendant.	:	JUDGE DEMPSEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing Supplement to Previously Filed Motion for New Trial by mailing same with sufficient postage attached to assure delivery to:

Demone Lee, ADA
Office of the Fulton County District Attorney
Lewis Slaton Courthouse, Third Floor
136 Pryor St. SW
Atlanta GA 30303

This 11th day of October, 2013.

Lawrence Zimmerman
Attorney for Defendant
SBN: 785198

"Lee, Demone" <Demone.Lee@fultoncountyga.gov> May 10, 2013 3:05 PM
To Barry Hazen
RE: Thieme

Same here! I am still trying to nail down the exact date. After speaking with Curtis' mom, I can say that it was about a week before trial. Have you ever tried to interview Curtis?

-----Original Message-----
From: Barry Hazen [mailto:Barry@barryhazen.com]
Sent: Friday, May 10, 2013 3:04 PM
To: Lee, Demone
Subject: Thieme

Hi Demone. As always, it was a pleasure talking to you yesterday. i just wanted to confirm that you were going to review your notes to determine and inform me of exactly when before trial Curtis Bell told you that the anal sex allegation didn't happen. I know you have lots to do. Please feel free to email me when you have made that determination. Thank you.

From: Jones, Yvette [**mailto:Yvette.Jones@fultoncountyga.gov**]
Sent: Wednesday, December 04, 2013 2:24 PM
To: Diamant, Aaron (CMG-Atlanta)
Subject: RE: Please call ASAP

Aaron,

In response to your follow-up question, please find the following statement from District Attorney Howard.

"Demone Lee will not face disciplinary action in connection with this case. Mr. Lee is one of the most honest, forthright and hard-working attorneys I have ever known or been associated with during the course of my career. In the legal profession, differences in legal opinions occur frequently. That is why in written legal decisions there are majority opinions and dissents. Those differences are central to our systems of laws and should not be subjects of discipline, but rather viewed with respect."

Paul L. Howard, Jr.
District Attorney

From: Jones, Yvette [**mailto:Yvette.Jones@fultoncountyga.gov**]
Sent: Wednesday, December 04, 2013 1:15 PM
To: Diamant, Aaron (CMG-Atlanta)
Subject: RE: Please call ASAP

Aaron,

Per your request, please find included a statement from Mr. Howard regarding the matter of State vs. Jon Thieme.

"Providing Brady material is both a legal and moral obligation resting upon every prosecutor. When the line of demarcation is close or somewhat unclear, we believe the better practice is to make the disclosure. Such was not done in this case. Accordingly, as communicated through the consent order, we believe honesty requires that this matter is retried."

Paul L. Howard, Jr.
District Attorney

Yvette Jones
Director of Public Affairs
Office of the Fulton County District Attorney
136 Pryor Street, 3rd Floor
Atlanta, Georgia 30303
404-612-0560 Direct
404-392-8867 BlackBerry
Yvette.jones@fultoncountyga.gov

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
v.	:	**CASE NO. 11SC99152**
	:	
JON THIEME	:	
	:	
Defendant.	:	**JUDGE DEMPSEY**

Order Requiring Written Response from State to Defendant's Supplement to Previously Filed Motion for New Trial

The Defendant filed a motion designated "Supplement to Previously Filed Motion for New Trial" on or about October 11, 2013. The Court believes that a written response from the State would facilitate the decision of said motion. Accordingly, the State is ordered to respond in writing to said motion by the close of business on December 2, 2013, with a copy to the Court in Chambers.

SO ORDERED, this 31st day of October, 2013.

ALFORD J. DEMPSEY, JR., JUDGE
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

PLEASE SERVE:

Raquel Stokes
Assistant District Attorney
136 Pryor Street SW
Atlanta, Georgia 30303

(Service Names Continue on next page)

Demone Lee
Assistant District Attorney
136 Pryor Street SW
Atlanta, Georgia 30303

Barry Hazen
Attorney for Defendant
2060 Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303

Lawrence J. Zimmerman
Attorney for Defendant
Suite 300
1800 Peachtree Street, N.W.
Atlanta, Georgia 30309