STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **CHRISTOPHER THOMAS CLELAND,** **Member No. 44976,** A Member of the State Bar.	Case No. **02-O-11782-PEM** **DECISION AND ORDER IMPOSING ADMONITION**

I. Introduction

Respondent **Christopher Thomas Cleland**, a retired distinguished prosecutor in Sacramento County, is here before this court in a contested disciplinary proceeding for having committed multiple acts of alleged professional misconduct as a district attorney some 22 years ago. The charged prosecutorial misconduct includes (1) failure to comply with the laws of the United States and California; (2) improper commentary of a defendant's right to remain silent; (3) suppression of exculpatory evidence; (4) acts of moral turpitude; and (5) seeking to mislead a judge.

Of the five charged counts of misconduct, the court finds, by clear and convincing evidence, that respondent is culpable of failing to disclose exculpatory evidence (one letter) to the defense and improperly commenting on a defendant's invocation of her right to remain silent, in violation of Business and Professions Code section 6068, subdivision (a).

In the interests of justice and after carefully considering all issues and evidence set forth during the seven-day trial, including the compelling mitigation – respondent's 38 years of practice without prior discipline, good faith, cooperation with the State Bar, extraordinary demonstration of good character, passage of considerable time since the act of wrongdoing and excessive delay in conducting disciplinary proceedings, the court has determined that an admonition would be an appropriate disposition of this matter. Any imposition of discipline would not further the objectives of attorney discipline and would be punitive in nature.

II. Pertinent Procedural History

On April 26, 2007, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC). Respondent filed a response on June 1, 2007. On August 9, 2007, the State Bar filed a first amended NDC. On November 1, 2007, the State Bar filed a second amended NDC. On November 15, 2007, respondent filed a response to the second amended NDC.

On January 2, 2008, the parties entered into a stipulation as to undisputed facts prior to the court ruling on various motions in limine. The parties also entered into a stipulation regarding latches and statute of limitations. On March 10, 2008, respondent requested that he be allowed to withdraw two facts that he had previously stipulated to as undisputed. On March 21, 2008, the court granted respondent's request. On March 25, 2008, the State Bar filed a Petition for Interlocutory Review and Motion for Stay of Hearing Department Proceedings. On March 26, 2008, the court modified its March 21, 2008 order to allow respondent to withdraw only two stipulated facts and denied the motion for a stay or continuance. On March 27, 2008, the Review Department denied the State Bar's petition for interlocutory review and denied the motion for stay.

A seven-day trial was held on April 1, 2, 3, 4, 23, and 24 and June 6, 2008. Deputy Trial Counsel Sherrie B. McLetchie and Wonder J. Liang represented the State Bar. Attorney Jesse M. Rivera of Moreno & Rivera, LLP, represented respondent.

Following receipt of closing briefs from the parties, the court took this proceeding under submission on August 11, 2008.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at this proceeding and on the parties' stipulations, which were admitted into evidence.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on January 15, 1970, and has been a member of the State Bar of California since that time.

B. Background

At all relevant times, respondent was employed as a deputy district attorney with the Sacramento County District Attorney's Office (the D.A.'s Office) from 1970 until his retirement in 2003.

On December 9, 1981, during an armed home robbery, Ed Davies was shot twice in the head and murdered, and his wife, Grace, was shot in the right temple but survived. Respondent prosecuted Gary Masse, Stephen DeSantis, Robert DeSantis and Gloria Killian for the murder, attempted murder, burglary, robbery, grand theft and conspiracy. Between 1983 and 1986, these four were all found guilty of committing the brutal crimes against Mr. and Mrs. Davies.

More than 20 years later, in 2007, the State Bar charges that respondent committed prosecutorial misconduct during the course of the criminal prosecution of Gloria Killian.

C. Findings of Fact

The following is a brief history of relevant events arising from the 1981 crimes:

1. 1983

a. Masse's Conviction

On December 9, 1981, Stephen DeSantis entered the Sacramento home of Mr. and Mrs. Davies. After manacling and hogtying the couple, DeSantis was joined by his cousin, Gary Masse, who assisted him in ransacking the house and robbing six suitcases of silver. During the crime, Mr. Davies was murdered and his wife was seriously injured. On December 14, 1981, an anonymous phone call to authorities identified DeSantis and Masse as the perpetrators. When the officers attempted to find Masse, they encountered his wife, Joanne, who told the officers that a woman named Gloria planned the robbery.

Masse surrendered himself to police on December 17, 1981, the same day the police arrested Gloria Killian. After a preliminary hearing, the charges against Killian were dismissed. Killian was not present at the robbery nor was she informed that it would take place on December 9, 1981. Masse, on the other hand, went to trial and was convicted of first degree murder. Prior to Masse's May 16, 1983, sentencing date, he contacted Detective Ray Biondi[1] of the Sacramento Sheriff's Department to see if he could bargain for a reduced sentence. At some point, Biondi had Masse in his office and called respondent, as respondent was the D.A. assigned to prosecute the alleged co-conspirators and negotiate with Masse, to tell respondent that he was going to attempt to interview Masse. When Biondi called, respondent told Biondi to make it clear to Masse that the D.A.'s Office was not going to make any representations to him about what could be done about his sentence and that they were only willing to listen to what he had to say about the circumstances around the murder of Mr. Davies.

[1] In 1983, Biondi was head of homicide investigations in the Sheriff's Department and had worked with respondent for 10 years.

May 10, 1983, was the original date for Masse's sentencing. On that day, respondent had a conversation with Brian Christiansen, Masse's defense attorney, about whether Masse was willing to talk. Respondent started to raise the issue of Masse providing helpful testimony in open court. At that time, the sentencing judge, Judge Joseph DeCristoforo, did not want to hear anything about Masse providing information on alleged co-conspirators. The sentencing was continued to May 16, 1983, on which Masse was sentenced to life without possibility of parole.

On May 20, 1983, Detectives Biondi, Harry Machen and Stan Reed of the Sherriff's Department interviewed Masse. Before interviewing Masse, they telephoned respondent. Respondent told the members of the Sheriff's Department that since Masse had already been sentenced, they should not make any promises or representations. The interview was tape-recorded. Masse wanted his sentence reduced to 12 years in exchange for implicating his cousin DeSantis and Killian. While the Sheriff's Department did not guarantee Masse a reduction in his sentence, they promised that they would personally go to the D.A.'s Office and support his request for 12 years. Masse then implicated Stephen DeSantis, Robert DeSantis and Killian.

b. Killian's Re-Arrest

Killian was re-arrested in June 1983, and named as a defendant, along with Stephen and Robert DeSantis. In August 1983, Masse testified at their preliminary hearing, which lasted five days, including three days of Masse's testimony. His testimony implicated Killian.

As a result of the testimony elicited at the preliminary hearing, in September 1983, Killian, Stephen DeSantis and Robert DeSantis were charged with first degree murder, attempted murder, burglary, two counts of robbery, grand theft of a car and conspiracy. The information alleged that three acts were committed in furtherance of the conspiracy: (1) that Stephen DeSantis entered the Davies's residence on December 9, 1981; (2) that Killian went to the Davies's door sometime prior to the actual robbery in an unsuccessful attempt to gain entry into

the home for Masse and DeSantis; and (3) that Robert DeSantis drove Stephen DeSantis to meet Masse in the Rosemont area on December 9, 1981.

c. Respondent's September 6, 1983 Letter Recalling Masse's Sentence

On September 6, 1983, respondent wrote a letter to Judge Joseph DeCristoforo requesting a recall[2] of Masse's sentence due to Masse's cooperation in the Killian matter. On September 7, 1983, respondent wrote a follow-up letter to Judge DeCristoforo memorializing their communications concerning his request for a recall of Masse's commitment to state prison. Masse's sentence was recalled on September 8, 1983. He remained unsentenced until November 3, 1986.

On September 30, 1983, respondent gave a copy of his September 6 letter to the defense in the Killian matter.

2. 1984

a. Masse's May 13, 1984 Letter Regarding Spouse

On May 13, 1984, while in prison, Masse wrote a letter to respondent's investigator, Tom Brown. Masse believed that DeSantis was involved in a plot to kill his wife.

He wrote:

> How this sound .. conspiracy to contract murder for higher Steve DeSantis wife Gala payed the some of 1000 dollars to Ronee Small to kill Joann Masse. But Ronee Small just took her money he didn't have any thought or thoughts of killing anybody. This all can be proven... But what I am concerned about is .. what if she finds some sick ---- sonofabitch that will do that.. I have two kids that live with her .. you know what I mean. [Quoted as in original.]

Respondent did not disclose this May 13, 1984 letter to the defense.

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[2] Under the provisions of Penal Code section 1170(d), the court has 120 days during which it can recall the commitment for the purpose of resentencing the defendant. Prior to 1983 respondent had never sent a letter asking a judge to recall a sentence.

The jury trials for Stephen and Robert DeSantis and Killian commenced in October 1984. Killian's trial was severed in November 1984 and Stephen DeSantis' trial went first. Stephen DeSantis took the stand in his own defense and testified that he had never met or heard of Killian. Stephen DeSantis was convicted in 1985. Robert DeSantis' testimony at Stephen's trial did not implicate Killian.[3]

3. 1985

a. Respondent's April 18, 1985 Letter Seeking a More Lenient Sentence

On April 18, 1985, shortly before the jury in the case of *People v. Stephen DeSantis* undertook its deliberations, respondent wrote a sealed letter to Judge DeCristoforo in which he stated his intention to support Masse's resentencing as a result of his cooperation in the Stephen DeSantis matter. In pertinent part, the April 18, 1985 letter to Judge DeCristoforo stated:

> While Gary Masse's criminal conduct cannot be condoned, his cooperation, in my judgment, deserves consideration by the Court in determining the appropriate sentence. To that end, the People plan not object to a renewed Williams Motion to strike the special circumstances.
>
> In taking this position, I make the assumption that Mr. Masse will conduct himself properly while incarcerated and will continue his cooperation by testifying truthfully at the trial of Gloria Killian.

Respondent did not disclose this April 18, 1985 letter to the defense.

4. 1986

a. Masse's Testimony at Killian's Trial

Killian's trial commenced in January 1986. Masse testified at her trial. The key elements of Masse's testimony were: (1) a plea agreement for a more lenient sentence for Masse was possible, but no firm deal had been communicated to him from the prosecution; (2) Killian

[3] Stephen's brother, Robert, pled to a lesser role in the Davies robbery in exchange for testimony at Stephen's trial.

was the "mastermind" of the plot to rob the Davies; (3) Killian accompanied Masse on his earlier attempt at Davies's home; and (4) Killian called Masse after learning of the robbery and murder to demand her share of the robbery proceeds. The prosecutor's only direct evidence was Masse's testimony. Clearly without Masse's testimony, the prosecutor had no case against Killian as evidenced by the fact that after an initial investigation and preliminary hearing into Killian's involvement all charges against her were dismissed.

b. Respondent's Commentary on Killian's Silence at Killian's Trial

On December 16, 1981, the police took Killian in for questioning about the crime. Killian waived her *Miranda* rights and spoke to the police for about two hours. The police then formally arrested Killian. She immediately invoked her right to counsel before answering any other questions.

At Killian's trial in 1986, on direct examination, Killian's counsel questioned Killian about her "voluntary" decision to talk to the police and her decision to cease the interrogation.

On cross-examination of Killian, respondent repeatedly asked Killian about her invocation of her right to remain silent. For examples, he asked:

- And when you talked to them you had nothing to hide; did you?
- And when they arrested you was there some reason why you decided that you had told them enough?
- What did you have to hide?
- Why did you stop talking to them?
- If you had nothing to hide, why didn't you explain to the officers further, try and explain to them further so that they could understand that you had nothing to do with this crime?

At some point the court had a sidebar with respondent and told him that his cross-examination was treading on dangerous ground regarding Killian's invocation of her right to remain silent. Respondent thereafter dropped his line of questioning.

But during his closing argument at Killian's trial, he again commented on her silence, as follows:

> Now, Mr. Thielen [Ray Thielen II, defense counsel] makes a lot out of the defendant's willingness to go down to the police department and talk to the police. And I suggest to you that not much should be made out of that....So isn't it just as likely that she went down there in an effort to cover-up her complicity as it was that she was innocent? I submit to you that, yes, you really just can't make anything out of that.... She hasn't talked to anybody about this case. And I submit to you she had the opportunity to do it and she didn't do it, and the reason she didn't do it is because she couldn't do it. Because it is not true.

c. Respondent's Closing Argument at Killian's Trial Re Masse's Sentencing

Respondent argued at closing argument that the D.A.'s Office had nothing to do with how much time Masse serves. In pertinent part:

> And that's where it is, folks. It is not me, not the Police Department. We have nothing to do with how much time Gary Masse serves for his time. He can walk in before Judge DeCristoforo and spend the rest of his life in prison if Judge DeCristoforo so decides. It is not up to me and it is not up to the police. And it is not up to Gary Masse either. He can't tell the judge how much time he is going to do.

d. Killian's Conviction

In February 1986, a jury found Killian guilty of first degree felony murder, attempted murder, burglary, robbery, grand theft and conspiracy. On April 8, 1986, she was sentenced to seven years for attempted murder and to a consecutive term of 25 years to life for murder.

e. Masse's April 21, 1986 Letter Exclaiming That He Lied

On April 21, 1986, Masse wrote a letter to respondent's investigator, expressing his anger with the prosecution's potential repudiation of his belief that there was a verbal agreement to a 12 year deal. In that letter, Masse also commented on his testimony at trial. In pertinent part, the April 21, 1986 letter stated:

> ... as far as I am concerned there was a verbal agreement of no more than twelve years I been as up front and honest as I could be I gave you DeSantis and Killian. I did my part all the way to the end. I even lied my ass off on the stand for you people. I did not kill Mr. Davies or did I shoot his wife. [Quoted as in original.]

Respondent did not disclose this letter to the defense.

5. 1986 – 2002

a. Killian's Multiple Appeals

Killian appealed her conviction to the California Third District Court of Appeal and the California Supreme Court, each of which upheld the conviction. Her convictions were affirmed on direct appeal in an unpublished opinion filed August 28, 1987.

In October 1996, Killian filed a petition for a writ of habeas corpus with the California Supreme Court. The Court denied the petition by one-sentence order filed September 17, 1997.

On October 27, 1997, Killian filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of California. On July 12, 1999, the district court conducted an evidentiary hearing on Killian's writ. On May 17, 2000, the district court denied Killian's petition.

On June 1, 2000, Killian filed a notice of appeal with the Ninth Circuit Court of Appeals. On March 13, 2002, the Ninth Circuit overturned the district court's denial of the writ and instructed the district court to grant the writ unless the state granted Killian a new trial within a reasonable time. The D.A.'s Office decided not to refile charges and Killian was released after serving 16 years of her sentence.

D. Conclusions of Law

1. Count One: Failure to Comply With Laws (Bus. & Prof. Code, § 6068, Subd. (a))[4]

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and the laws of the United States and California.

[4] All references to section are to Business and Professions Code, unless otherwise indicated.

The State Bar charges that respondent willfully violated section 6068, subdivision (a), by (1) failing to comply with the requirements of *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady*, when he failed to disclose two letters – the May 13, 1984 and April 18, 1985 letters – to the defense in the Killian trial; and (2) by failing to comply with *Doyle v. Ohio* (1976) 426 U.S. 610 and subsequent cases interpreting *Doyle* when he stated in his cross examination of Killian and closing argument during the Killian trial that Killian had something to hide by becoming silent upon her arrest.

a. Brady – Duty to Disclose Exculpatory Evidence

Prosecutors have a constitutional mandate to disclose material, exculpatory evidence to defendants in criminal cases. *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady* require prosecutors to disclose, prior to trial, impeaching evidence and evidence favorable to the defense. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." (*Id.* at p. 87.)

The *Brady* due process rule has four components: (1) information must be evidence; (2) evidence must be favorable to an accused; (3) favorable evidence must be material; and (4) favorable, material evidence must be disclosed.

Similarly, in *People v. Ruthford* (1975) 14 Cal.3d 399, 406, the California Supreme Court summarized the duty of the prosecutor as follows: there is a "duty on the part of the prosecution, even in the absence of a request therefor, to disclose all substantial material evidence *favorable to an accused*, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness" (emphasis in original).

May 13, 1984 Letter

The State Bar alleges that Masse expressed concern for his wife's safety in the May 13, 1984 letter to respondent's investigator, Tom. Respondent admits that he did not disclose this letter to Killian's counsel.

At the hearing in this matter, respondent testified that on balance he thought the letter had to do with a murder for hire plan being promoted by Stephen DeSantis and that perhaps new crimes were afoot and they should be investigated. He also testified that he thought that someone reading the letter might figure out where Masse was being held and thereby jeopardizing Masse's safety.

After an evidentiary hearing, the United States District Court for the Eastern District of California made findings and recommendation on Killian's writ of habeas corpus. The court made the following finding regarding the May 13, 1984 letter:

> Masse wrote a rambling commentary on his prison conditions where he also expressed his belief that his co-defendant DeSantis was involved in a plot to kill Masse's wife. The court does not find that this letter would have impacted at all on Masse's testimony in petitioner's case. It does not, for example, evince an intention to protect his wife's involvement in the robbery/murder vis-a-vis petitioner.

On the other hand, the Ninth Circuit Court of Appeals found otherwise. According to Killian's counsel, he explained that this letter would have been useful to show Masse inculpated Killian to keep Joanne Masse out of prison, a relevant point since, according to Stephen DeSantis, it was Joanne who participated in the first attempted robbery of the Davies's residence. (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1210.) The Ninth Circuit Court of Appeals concluded that there was sufficient prejudice to Killian.

> The collective presence of these errors [failure to disclose impeachment evidence, Masse's perjury, and the prosecutor's comments on privileged conduct] is devastating to one's confidence in the reliability of this verdict and therefore

> requires, at the very least, a new trial. For even if no single error were prejudicial, where there are several substantial errors, "their cumulative effect may nevertheless be so prejudicial as to require reversal." [Citations.] (*Killian v. Poole, supra,* 282 F.3d 1204, 1211.)

This court, however, does not find that the May 13, 1984 letter standing alone would have constituted a *Brady* error. It was more the cumulative error principles or the collective presence of all the letters that swayed the Ninth Circuit. The two courts viewed this letter in different ways: the district court saw no *Brady* error and the Ninth Circuit did. Respondent's expert, L. Douglas Pipes, did not see the letter as favorable or material evidence.

This court agrees with the district court and Mr. Pipes. The May 13, 1984 letter was not favorable or material to Killian and thus does not meet the requirements of the *Brady* due process rule.

April 18, 1985 Letter

The State Bar alleges that respondent violated the *Brady* rule by failing to disclose to Killian's counsel the April 18, 1985 letter which he delivered in a sealed envelope to the judge's clerk with a request that the envelope not be opened until the sentencing of Masse. The State Bar argues that the letter is exculpatory because it shows that there was an oral agreement between respondent and Masse as to the disposition of the case.

The federal district court found that it could not in good conscience find that the non-disclosure of the April 1985 letter undermined its confidence in the outcome of the trial because the letter was sealed and had not been communicated to Masse or his attorney. Respondent's expert witness testified that the letter was respondent's work product as it was nothing other than a written version of respondent's evaluation of the performance of Masse as a prosecution witness, and of the appropriate sentence for Masse for his role in the shootings. Furthermore,

Mr. Pipes opined that it was not evidence of any alleged oral agreement between respondent and Masse.

On the other hand, the Ninth Circuit Court of Appeals reversed the district court, holding that the prosecution's failure to disclose its agreement with the prosecution witness constituted *Brady* error. The court rejected the argument that since the witness did not know the contents of the sealed letter, its contents did not constitute an agreement with the witness for benefits. The Ninth Circuit stated:

> Although it might not have been disclosed to Masse, and therefore not sufficient to constitute a plea bargain, the letter would still have been valuable to the defense in impeaching Masse's credibility before the jury. The undisclosed material, considered collectively, exposed Masse's motivation to lie and tended to show that he did lie.

California state court and federal circuit court opinions dating back to at least 1973 have continued to hold that secret deals between prosecutors and prosecution witnesses are favorable to the defendant and must be disclosed pursuant to *Brady*.

Therefore, respondent's failure to disclose the April 18, 1985 letter is a violation of *Brady*.

The State Bar did not allege that the other two letters mentioned in its Second Amended Notice of Disciplinary Charges violated *Brady* – the September 6, 1983 and April 1986 letters – and the court does not find any *Brady* violation. Respondent had disclosed the September 1983 to the defense. And the April 21, 1986 letter was post-judgment evidence – it was written after Killian's trial and sentencing on April 8, 1986. The *Brady* rule does not apply to post-judgment receipt of exculpatory evidence by the prosecution. The purpose of the *Brady* rule is to ensure that the defendant will receive a fair trial (*United States v. Bagley* (1985) 473 U.S. 667, 675). The *Brady* rule is a trial protection which appears to end when the trial ends. (See *Imbler v. Pachtman* (1976) 424 U.S. 409.)

b. Doyle – Commentary on Killian's Silence

Doyle v. Ohio (1976) 426 U.S. 610 and subsequent cases interpreting *Doyle* prohibit a prosecutor from attacking a defendant's silence at the time of her arrest because it violates the Fourteenth Amendment Due Process Clause. The core of *Doyle* is to protect a privilege – the right to remain silent.

Respondent failed to comply with *Doyle* and subsequent cases interpreting *Doyle* when he stated in his cross examination of Killian and closing argument that Killian had something to hide by becoming silent when she was arrested and that she had the opportunity to talk to somebody but did not.

The court, therefore, concludes that respondent willfully violated section 6068, subdivision (a), by (1) failing to comply with the requirements of *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady*, when he failed to disclose the April 18, 1985 letter to the defense in the Killian trial; and (2) by failing to comply with *Doyle v. Ohio* (1976) 426 U.S. 610 and subsequent cases interpreting *Doyle* when he stated in his cross examination of Killian and closing argument during the Killian trial that Killian had something to hide by becoming silent upon her arrest.

2. Count Two: Moral Turpitude – Intentional Suppression of Evidence (Bus. & Prof. Code, § 6106)

Section 6106 provides that a member's commission of any act of moral turpitude, dishonesty or corruption constitutes grounds for suspension or disbarment.

The State Bar charges that respondent committed acts of moral turpitude by intentionally suppressing the May 13, 1984 and the April 18, 1985 letters and that he knew or should have known that the two letters were exculpatory and therefore had to be turned over to the defense, in willful violation of section 6106.

Respondent contends that the two letters were not *Brady* material. He further contends that the April 18, 1985 letter was his work product and did not come within the *Brady* rule.

A violation of the *Brady* rule does not require that the prosecutor have acted in bad faith. The Supreme Court summarized the "no fault" principle of the *Brady* rule best in the *United States v. Agurs* (1976) 427 U.S. 97, 110, where the Court stated: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

Moral turpitude has been described as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) It has been described as any crime or misconduct without excuse (*In re Hallinan* (1954) 43 Cal.2d 243, 251) or any dishonest or immoral act. Crimes which necessarily involve an intent to defraud, or dishonesty for personal gain, such as perjury (*In re Kristovich* (1976) 18 Cal.3d 468, 472); grand theft (*In re Basinger* (1988) 45 Cal.3d 1348, 1358); and embezzlement (*In re Ford* (1988) 44 Cal.3d 810) may establish moral turpitude. Although an evil intent is not necessary for moral turpitude, at least gross negligence of some level of guilty knowledge is required. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363.)

Here, there is no clear and convincing evidence that respondent committed acts of moral turpitude. Since the May 1984 letter is neither favorable nor material to the defense and is not exculpatory evidence under *Brady*, respondent's failure to reveal it is neither a *Brady* error nor an act of moral turpitude or dishonesty.

With respect to the April 18, 1985 letter, respondent believed that the sealed letter was attorney work product and therefore not discoverable. Although the court found in count one

that this April 1985 letter was exculpatory evidence and constituted *Brady* error, respondent did not act in bad faith. In fact, his belief was honest and reasonable and made in good faith. Thus, his non-disclosure to the defense does not constitute an act of moral turpitude or dishonesty.

Therefore, the court does not find respondent culpable, by clear and convincing evidence, of violating section 6106 by failing to disclose the two letters to the defense.

3. Count Three: Suppression of Evidence (Former Rules of Prof. Conduct, Rule 7-107)[5]

Former rule 7-107(A) provides that an attorney must not suppress any evidence that the attorney or the attorney's client has a legal obligation to reveal or to produce.

The State Bar alleges that respondent had a legal obligation to produce the May 1984 letter from Masse regarding his wife and the April 1985 letter from respondent to the court supporting a more lenient sentence for Masse because they were exculpatory.

By clear and convincing evidence, respondent willfully violated former rule 7-107(A) by suppressing the April 1985 letter but not the May 1984 letter. However, because the same facts underlie both section 6068, subdivision (a), and former rule 7-107(A) violations, it is not necessary to find him culpable of both violations. Therefore, the court hereby dismisses count three with prejudice. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

4. Count Four: Misrepresentations (Bus. & Prof. Code, § 6106)

The State Bar alleges that when respondent stated to the jury during his closing statement at Killian's trial that "We have nothing to do with how much time Gary Masse serves," he knew that his statement was false and misleading and therefore he committed an act of moral turpitude, dishonesty and corruption.

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[5] The 1975 former Rules of Professional Conduct were in effect from January 1, 1975 to May 26, 1989.

Respondent urges the court to look at this statement in the context of his entire closing argument. Respondent asserts that his statement is inarticulate but not misleading. This court agrees. Respondent's words that he has nothing to do with how much time Masse serves must be viewed in the context of the entire trial and not in a vacuum.

In view of his entire closing argument, respondent was arguing that neither the prosecution nor the police would control the decision on the sentence to be imposed on Masse. It was up to Judge DeCristoforo's sentencing discretion in re-sentencing Masse.

Therefore, respondent did not violate section 6106 by arguing that "We have nothing to do with how much time Gary Masse serves." The sentence was neither a misleading statement nor an attempt to deceive anyone.

5. Count Five: Seeking to Mislead a Judge (Bus. & Prof. Code, § 6068, Subd. (d))

Section 6068, subdivision (d), prohibits an attorney from seeking to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

The State Bar alleges that respondent employed means inconsistent with the truth and sought to mislead the judge by misrepresenting the prosecution's impact on Masse's sentence.

The court agrees with Mr. Pipes that the State Bar's argument strains all credulity. The court had tentatively dismissed this count at trial. Because there is no clear and convincing evidence that respondent sought to mislead a judge in his closing argument in the Killian trial, respondent did not willfully violate section 6068, subdivision (d) in count five.

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)[6]

[6]All further references to standards are to this source.

A. Mitigation

Respondent was admitted to the practice of law in January 1970 and has no prior record of discipline. Respondent's 16 years of discipline-free practice at the time of his failure to disclose the April 1985 letter and his comment regarding Killian's silence at her trial in 1986 is a strong mitigating factor. More significantly, there is no evidence of further misconduct in the last 22 years since 1986. (Standard 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.) Respondent has now retired.

Respondent's *Brady* error was made in good faith since he thought the April 1985 letter was attorney work product and he had no intent to deceive or cause harm. As previously discussed, his failure to disclose the letter resulted in constitutional error but it is because of the character of the evidence, not the character of respondent. (Std. 1.2(e)(ii).)

Respondent was candid and cooperative to the State Bar throughout the on-again-off-again disciplinary investigations. The State Bar opened an investigation in May 2002, based on the Ninth Circuit's opinion. The investigation was abated until 2005, reopened in December 2005, closed in August 2006, and reopened in late 2006. Respondent was also cooperative and candid during these proceedings. (Std. 1.2(e)(v).)

Respondent presented nine character witnesses – Judge Richard Gilmour; five attorneys (Constance Gutowsky, Stan Kubochi, John Matthew O' Mara, Jan Scully, and Roy K. Simmons); and Tom Brown, Debra K. DeRosier and Debra Morrow. (Standard 1.2(e)(vi).) Favorable character testimony from employers and attorneys are entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Because attorneys have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2

Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

The witnesses all attested to his good moral character. They believe respondent to be truthful, honest, and trustworthy. None of them would change their opinion of him even if he was found culpable of the alleged misconduct in this proceeding.

Jan Scully who is the District Attorney of Sacramento for 14 years and elected four times testified that she never received any complaints about respondent from judges or defense attorney. Respondent had a reputation for being an impeccable "straight shooter" as well as known for exercising good judgment. She would have no reservations in hiring him regardless of the outcome of this proceeding,

Judge Richard Gilmour, a superior court judge for 17 years who has known respondent for 22 years, vouched for respondent's integrity and work ethics. Respondent was not known as an overzealous or publicity seeking district attorney. He never heard any complaints about respondent with respect to discovery or improper cross-examination.

Stan Kubochi, who was a public defender for 12 years and a district attorney for 22 years, and supervised respondent for two years, had nothing but praise for respondent in terms of his ethics and credibility.

Roy K. Simmons, a retired attorney who was a public defender for 30 years and was in the State Legislature for five years likewise vouched for respondent's reputation in the community as an excellent trial lawyer with high ethical standards. He could not point to one instance where respondent's actions were even questioned much less criticized by the public defenders' office or the Sacramento Criminal Defense Bar.

The court finds that these witnesses represent an extraordinary demonstration of respondent's good character attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct.

Another compelling mitigating factor is the passage of considerable time since the acts of misconduct occurred in 1986, followed by convincing proof of no further acts of misconduct in the past 22 years. (Std. 1.2(e)(viii).)

Excessive delay in conducting disciplinary proceedings, which delay is not attributable to respondent and which delay prejudiced respondent, is also mitigating evidence. (Std. 1.2(e)(ix).) Respondent pointed out that numerous witnesses who could have supported him have died and memories have faded for those who remain. The Ninth Circuit's opinion was filed in 2002 and the original NDC against respondent was not filed until five years later in 2007.

B. Aggravation

The State Bar argues that there are several aggravating factors – multiple acts of wrongdoing; significant harm; indifference toward rectification or atonement; and lack of cooperation. (Std. 1.2(b).)

Respondent harmed the public and the administration of justice by failing to uphold his duties as a prosecutor to reveal exculpatory evidence and by making improper commentary on Killian's decision to remain silent. (Std. 1.2(b)(iv).) But the harm has not been shown by clear and convincing evidence to be significant. Had there been a nexus shown between respondent's misconduct and Killian's conviction or 16 years of imprisonment, then there would have been significant harm to the public and the administration of justice. Therefore, the degree of harm is minimal and the court does not give much weight to this aggravating factor.

With respect to the other aggravating factors, there is no clear and convincing evidence to support a finding of aggravation. Thus, the court rejects the State Bar's arguments.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) But the standards "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has been long-held that the court "is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) While the standards are entitled to great weight (*In re Silverton* (2005) 36 Cal.4th 81, 92), they do not provide for mandatory disciplinary outcomes. Although the standards were established as guidelines, "ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case." (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Here, respondent's two acts of misconduct occurred more than 22 years ago, involving his failure to reveal one sealed letter to the defense and his improper commentary on the defendant's invocation of her right to remain silent.

The State Bar urges one year of actual suspension based on the contention that respondent committed acts of moral turpitude by intentionally suppressing evidence and making misrepresentations to the court (counts two and four). The State Bar cited several cases involving prosecutorial misconduct in support of their recommended level of discipline,

including *Noland v. State Bar* (1965) 63 Cal.2d 298 [30 days actual suspension]; *Price v. State Bar* (1982) 30 Cal.3d 537 [two years actual suspension]; and *In the Matter of Kenneth J. Peasley* (2004) 208 Ariz. 27 [disbarment].

In *Noland*, a prosecutor counseled and aided in the unauthorized removal of the names of "pro-defense" prospective jurors from the official jury list. His ex parte tampering with the selection of potential jurors to gain advantage at subsequent trials constituted the calculated thwarting of objective justice. The Supreme Court actually suspended the attorney for 30 days, finding that he had achieved no insight into the grave significance of his actions and that he must be discouraged from attempting any further zealous abuses of judicial administration. (*Id.* at p. 303.)

In *Price*, a prosecutor altered evidence in a criminal trial and attempted to prevent discovery of his misconduct by discussing the alteration with the judge in the absence of opposing counsel and communicating to the defendant – after conviction but before sentencing – an offer to seek favorable sentencing in exchange for defendant's agreement not to appeal the conviction. Because the attorney had no prior record of discipline in 11 years of practice, he was under mental and emotional stress, he was cooperative and remorseful throughout the proceedings, and witnesses testified to his good reputation as lawyer and his active involvement in civic affairs, the Supreme Court found that the mitigating evidence militate against disbarment. Thus, he was suspended for five years, stayed, placed on probation for five years, and actually suspended for two years.

Finally, in *Peasley*, a prosecutor in Arizona was disbarred for intentionally presenting false testimony from a detective in the prosecution of two capital murder defendants.

In this matter, respondent's misconduct is far less serious than that of the cases cited above and is therefore distinguishable, particularly since respondent was not found culpable of committing any act of moral turpitude, dishonesty or corruption.

In hindsight, respondent realizes that he should have revealed the letters to the defense. Respondent argues that either a dismissal or admonition would be the appropriate disposition of this matter.

The court is mindful that the proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are "protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

Moreover, this case does not involve a Client Security Fund matter or a serious offense, such as dishonesty, moral turpitude or corruption. The court further concludes that the offense was not intentional and no significant harm resulted from respondent's misconduct. (Rules Proc. of State Bar, rule 264.)

The State Bar passionately argues in its closing argument that respondent's "misconduct goes to the integrity of the judicial system and the ability of the courts and the public to rely on prosecutors to turn over exculpatory evidence to the defense and make only honest arguments to the judge and jury" and that "[o]ur system of criminal justice cannot and will not work if lawless prosecutors are not held to account just as criminal defendants are." Indeed, the State Bar wants this case "to send a message."

But this is not such a case. It is not a classic exemplar of prosecutorial misconduct. Respondent's actions were done without intent to cause harm or deceive and were done with a good faith belief that his actions were proper.

In light of the presence of compelling mitigation, including respondent's 38 years of practice without prior discipline, good faith, cooperation with the State Bar, demonstration of excellent character, passage of considerable time since the misconduct occurred and excessive delay in conducting disciplinary proceedings, any discipline would not further the objectives of attorney discipline and would be punitive in nature. But because respondent is culpable of failing to comply with the requirements of *Brady* and *Doyle*, a dismissal is not suitable. Yet, not every mistake is disciplinable. Accordingly, the court concludes that an admonition in lieu of discipline is an appropriate disposition of this matter.

VI. Disposition and Order

The court hereby admonishes respondent **Christopher Thomas Cleland** under rule 264 of the Rules of Procedure of the State Bar.

Since an admonition does not constitute either an exoneration or the imposition of discipline, neither respondent nor the State Bar is entitled to an award of costs under Business and Professions Code section 6086.10. (*In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 453.)

IT IS SO ORDERED.

Dated: November 4, 2008

Pat McElroy

PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on November 4, 2008, I deposited a true copy of the following document(s):

DECISION AND ORDER IMPOSING ADMONITION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

JESSE MANUEL RIVERA
MORENO & RIVERA
1451 RIVER PARK DR #145
SACRAMENTO, CA 95815

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Sherrie McLetchie, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on November 4, 2008.

George Hue
Case Administrator
State Bar Court