SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-062
District Docket No. XIV-05-605E

IN THE MATTER OF

CLAUDE STUART

AN ATTORNEY AT LAW

Decision

Argued: May 10, 2007

Decided: July 18, 2007

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") pursuant to R. 1:20-14(a). Respondent received a three-year suspension in New York for giving false information to a judge during a homicide trial, while prosecuting a case on behalf of the Queen's County District Attorney's Office. Respondent was charged with conduct

involving dishonesty, fraud, deceit or misrepresentation (DR 1-102(A)(4) of the Lawyer's Code of Professional Responsibility [22 N.Y.C.R.R. 1200.3(a)(4)]; conduct prejudicial to the administration of justice (DR 1-102(A)(5) [22 N.Y.C.R.R. 1200.3(a)(5)]); and conduct that adversely reflects on a lawyer's fitness as a lawyer (DR 102(A)(7) [22 N.Y.C.R.R. 1200.3(a)(7)]. Those charges are comparable to New Jersey's RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).[1]

The OAE seeks a suspension of three to six months, retroactive to the date of respondent's New York suspension, October 26, 2005. We determine to impose a three-month retroactive suspension.

Respondent was admitted to the New Jersey bar in 1985 and the New York bar in 1989. He has no history of discipline in New Jersey. In 1999, however, the New York Grievance Committee for the Ninth Judicial District issued a Letter of Caution to respondent for prosecutorial misconduct. Specifically, respondent "exceeded the boundaries of appropriate advocacy, gave his own opinion regarding the truth and falsity of witnesses' testimony, vouched for the victim's credibility and advocated a position which he

[1] There is no exact counterpart in New Jersey for DR-102(A)(5) (conduct that adversely reflects on a lawyer's fitness as a lawyer). RPC 8.4(b) requires that the conduct be criminal.

knew to be false." His conduct caused the New York Appellate Division to overturn a judgment of conviction.

On May 11, 2004, the New York Grievance Committee for the Second and Eleventh Judicial Districts filed a one-count petition charging respondent with giving false information to a judge during a homicide trial, thereby violating DR 1-102(A)(4), DR 1-102(A)(5), and DR 1-102(A)(7).

Following an August 9, 2004 disciplinary hearing, the special referee found respondent guilty of the charged violations, but made no recommendation for discipline.

On September 26, 2005, the Appellate Division, Second Judicial Department, confirmed the special referee's report and suspended respondent for three years, effective October 26, 2005. Respondent's attempts to appeal the determination were denied by the New York Court of Appeals and the Appellate Division, Supreme Court of New York.

The underlying facts are set forth in the special referee's report:

> The undisputed and admitted facts are that the respondent, who was then an Assistant District Attorney in Queens County, was the prosecutor in the criminal homicide matter of The People of the State of New York vs. Tyrone Johnson. . . . Prior to jury selection, defense counsel raised the issue of a Brady violation[2] in

[2] Brady V. Maryland, 373 U.S. 83 (1963) (prohibits a prosecutor from withholding evidence favorable to a defendant).

that a police report concerning a witness, Shanese Knight, had not been received by him and that the statement may have been exculpatory. On May 8, 2002, in the course of an argument over the possible Brady violation and while considering defense counsel's requests, Justice Rios asked the following question:

> THE COURT: Do the people know - has anyone on the prosecution side been in contact with the witness?
>
> MR. STUART: Judge, since this morning I have-we have made several attempts In [sic] trying to locate this witness. Her last address was in Queens. She's no longer at that residence. Before I left I had information that they were being - tracking another residence in Manhattan for her and we continue to work on that, but right now as I stand here before you I cannot indicate to this Court that we have located her as of yet.

On or about Friday May 31, 2002, the respondent learned where the witness resided and worked and met with her later that day at her place of employment. . . . On the previous day, the prosecution had rested its case and the matter had been adjourned to Monday, June 3, 2002 for the defense's case.

On June 3, 2002, the defense presented one witness who contradicted the testimony of the prosecution's cooperating witness and may have jeopardized the prosecution if he had been believed. The respondent asked for and received a continuance to June 4, 2002 for the purpose of deciding whether he would present a rebuttal witness. Shanese Knight could have been used as a rebuttal witness because the incident occurred across the street from her home and the defense witness

claimed to have been inside that house at the time of the shooting. Her statement to police would seem to have contradicted that testimony or at least not have supported it. On the evening of June 3rd the respondent tried to contact Ms. Knight at her home and place of employment without success. . . .

On June 4, he presented a different rebuttal witness [who testified] that she had been in contact with Ms. Knight several weeks earlier. That information prompted defense counsel to again raise the Brady material question because if the prosecutor's witness knew of the whereabouts of Ms. Knight, then it would follow that the prosecutor must also know. He asked for a mistrial or alternatively a continuance so as to follow-up with the potential testimony of Ms. Knight. . . .

During the colloquy concerning the renewed discussion of the possible Brady violation, the following questions were asked by Justice Rios:

> THE COURT: Do you have knowledge - you indicated earlier, during the course of the trial, that you did not have any knowledge of Miss Shanese Knight's whereabouts?
>
> MR. STUART: That's correct, Judge. That's correct.
>
> THE COURT: And is that still your position?
>
> MR. STUART: Yes, Judge.

There is no question but that at the time, the answers to Justice Rios' questions given by the respondent were false. Respondent first attributed the false statements to a narrow interpretation of the questions suggesting that the question concerned the whereabouts of the witness at that very moment and later

> suggesting that his answer was motivated by the fact that he believed that the witness was now trying to avoid him and didn't want to be located. . . . At the hearing of this charge, he suggests that upon reflection, his answers constituted a poor exercise of judgment. . . .
>
> [OAEEx.C2-Ex.C3.]

As to the ultimate issue of whether respondent's statement was intended to mislead the court, or was just "an unfortunate incident," that is, the transmittal of false information due to a momentary lapse of judgment during the pressures of trial, the special referee concluded that

> a careful reading of the discussion with the Court by defense counsel and the respondent leads to the ultimate conclusion that the respondent had to have been aware that his response to the Court's inquiry about the whereabouts of the witness was false and misleading. Moreover, the colloquy which followed the exchange was so directly relevant to the questions asked by the Court that the respondent should have corrected any misconception during that exchange. The arguments made during that discussion continually reverted to defense counsel's demand for information about Ms. Knight's location, yet the respondent continued to conceal the fact that he had contact with her just four days earlier. . . . Instead of correcting his earlier false statement or if it was a mistaken one, clarifying it, the respondent argued that his office had no obligation to locate any witness for the defense. . . . That argument may have otherwise been a valid one but is at least disingenuous when he knew that he had moments before made a misleading and false statement to the Court which could have been corrected promptly. He had ample opportunity to clear

> up any misunderstanding during that exchange but chose not to do so.
>
> [OAEEx.C2-Ex.C4.]

In imposing a three-year suspension, the New York Appellate Division, Second Judicial Department, considered (1) respondent's record as an assistant district attorney for more than twelve years and his handling of more than seventy felony trials; (2) his service to his church; (3) his service in the United States JAG Corps Reserve; and (4) his good character testimony from his military chaplain, church pastor, professional and social acquaintances, as well as character letters from two Justices of the Supreme Court, Queens County, all of whom attested to his excellent reputation.

The court also considered that respondent had been previously disciplined for prosecutorial misconduct and that his "costly misrepresentation to the trial court . . . necessitated the retrial of the criminal action involving a major felony." The court highlighted respondent's ample opportunity at trial to correct or clarify his earlier false statement and his failure to do so.

Respondent submitted additional mitigation in a letter to the OAE. According to respondent, the Johnson trial started on May 6, 2002. On May 13, 2002, his grandmother, with whom he had lived until he was twenty-seven, died suddenly. Her death had a profound effect on his "mental state." At the time of her death,

the grandmother had been visiting friends and family in Belize. The Court granted respondent's motion for a continuance of the case to enable him to fly to Belize, on May 17, 2002, for the funeral. Respondent's letter to the OAE further stated:

> [Respondent] left Belize on May 23, 2002, arriving in New York at 12:00 a.m., May 24, 2002. The travel time . . . was approximately 12 hours. [Respondent arrived at his home at approximately 1:30 a.m. and arose five hours later] to prepare for the resumption of trial that day at 9:30 a.m. The questions posed to [respondent] by the trial court occurred on June 4, 2002, some twelve days later.
>
> During the period following [respondent's] return to New York until the time of the trial court's questions, much travel, the lack of sleep, depression over his grandmother's death, his obligations to his family, and the pressures of the trial compromised [respondent's] ability to properly respond to the trial court's inquiry.
>
> Why [respondent] responded as he did, with no motive to secrete evidence since Ms. Knight had in separate interviews denied knowledge by reason of her having failed to witness the crime, is impossible for anyone to explain, except to attribute it to the cumulative effect of the afore-stated facts.
>
> [OAEEx.H17.]

Respondent argued that the information sought by defense counsel did not fall within the Brady obligation, but acknowledged that it did not excuse him from replying accurately to the trial court. He further argued that the ethics rules require intent to mislead or scienter in failing to correct misrepresentations that

can induce detrimental reliance by another. Finally, he argued that his reply to the trial court's inquiry about Knight was not predicated on a plan to fabricate or deceive, because he had "no venal motive" to do so, since the information Knight had imparted to law enforcement was that she had not witnessed the crime. Respondent's letter also challenged, at length, the constitutionally of the New York attorney disciplinary process, that is, New York's lack of an automatic right of appeal to the Court of Appeals and the lack of oral argument, presumably at the appellate level.

According to respondent, the special referee found that the proofs did not establish venality on his part. However, respondent claimed, without having had an opportunity to appear before the appellate division, "this critical factual determination was altered" when the Appellate Division "implicitly found venality." Respondent further claimed that he was deprived of due process because the Appellate Division's abbreviated procedures prevented him from appearing before the trier of fact, who could have observed his demeanor on his defense of "mistake through mental exhaustion."

Ultimately, even though Knight testified favorably for the defense at the second trial, the defendant was again found guilty.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

At the outset, we find that respondent's constitutional challenges to the New York disciplinary process are not properly before us. Those challenges should have been raised in the New York proceedings. Moreover, in New Jersey ethics matters, constitutional challenges are preserved for consideration by the New Jersey Supreme Court. R. 1:20-15(h).

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which the Board rests for purposes of disciplinary proceedings. We, therefore, find that respondent violated RPC 8.4(c) (misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
>
> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
>
> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (D) the procedure followed in the foreign disciplinary matter was so lacking in

> notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

We agree with the OAE that subsection (E) applies here. Respondent's conduct does not warrant a three-year suspension in New Jersey. Lack of candor to a tribunal has resulted in discipline ranging from an admonition to a long-term suspension. See, e.g., In the Matter of Robin K. Lord, DRB 01-250 (September 24, 2001) (admonition for attorney who failed to reveal her client's real name to a municipal court judge when her client appeared in court using an alias, thus resulting in a lesser sentence because the court was not aware of the client's significant history of motor vehicle infractions; in mitigation, the attorney disclosed her client's real name to the municipal court the day after the court appearance, whereupon the sentence was vacated); In re Whitmore, 117 N.J. 472 (1990) (reprimand imposed on a municipal prosecutor who failed to disclose to the court that a police officer whose testimony was critical to the prosecution of a DWI charge had intentionally left the courtroom before the case was called, resulting in the dismissal of the charge); In re Mazeau, 122 N.J. 244 (1991) (attorney reprimanded for failure to disclose to a court his representation of a client in a prior lawsuit, where that representation would have been a factor in the court's ruling on the attorney's motion to file a late notice of tort claim); In re

Shafir, 92 N.J. 138 (1983) (an assistant prosecutor who forged his supervisor's name on internal plea disposition forms and misrepresented information to another assistant prosecutor to consummate a plea agreement received a reprimand); In re D'Arienzo, 157 N.J. 32 (1999) (three-month suspension for attorney who made multiple misrepresentations to a judge about his tardiness for court appearances or failure to appear); In re Chasan, 154 N.J. 8 (1998) (three-month suspension for attorney who distributed a fee to himself after representing that he would maintain the fee in his trust account pending a dispute with another attorney over the division of the fee, and then led the court to believe that he was retaining the fee in his trust account; the attorney also misled his adversary, failed to retain fees in a separate account, and violated recordkeeping requirements); In re Norton and Kress, 128 N.J. 520 (1992) (both the prosecutor and defense counsel were suspended for three months for permitting the dismissal of a DWI charge; although the attorneys participated in a representation to the court that the arresting officer did not wish to proceed with the case, they did not disclose that the reason therefore was the officer's desire to give a "break" to someone who supported law enforcement); In re Forrest, 158 N.J. 428 (1999) (attorney who failed to disclose the death of his client to the court, to his adversary, and to an arbitrator was suspended for six months; the

attorney's motive was to obtain a personal injury settlement); In re Telson, 138 N.J. 47 (1994) (after an attorney concealed a judge's docket entry dismissing his client's divorce complaint, he obtained a divorce judgment from another judge without disclosing that the first judge had denied the request; the attorney then denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was scared; the attorney was suspended for six months); In re Cillo, 155 N.J. 599 (1998) (one-year suspension for attorney who, after misrepresenting to a judge that a case had been settled and that no other attorney would be appearing for a conference, obtained a judge's signature on an order dismissing the action and disbursing all escrow funds to his client; the attorney knew that at least one other lawyer would be appearing at the conference and that a trust agreement required that at least $500,000 of the escrow funds remain in reserve); and In re Kornreich, 149 N.J. 346 (1997) (three-year suspension for attorney who had been in an automobile accident and then misrepresented to the police, to her lawyer, and to a municipal court judge that her babysitter had been operating her vehicle; the attorney also presented false evidence in an attempt to falsely accuse the babysitter of her own wrongdoing).

Respondent's conduct was closest to that of Whitmore (reprimand) and Norton and Kress (three-month suspension).

Whitmore was a municipal prosecutor in the Borough of Monmouth Beach, where an eighteen-year-old had been charged with driving under the influence and having an open container of alcohol in a motor vehicle. On the evening of the trial, the officer who conducted the breathalyzer test, Officer White, asked Whitmore if the case could be prosecuted without the breathalyzer evidence. Whitmore replied that it could not.

Later that evening, White told Whitmore that he was going to leave the courthouse. Whitmore urged White to stay, to no avail. When the case was called for trial, Whitmore informed the judge that he was not ready to proceed because the testing officer was unavailable. When the judge asked him why the officer was unavailable, Whitmore did not reply. Defense counsel then asked that the DWI charge be dismissed and that the court accept a guilty plea on the open container charge. The court granted counsel's motion.

In Whitmore's disciplinary proceeding, the Court concluded that he was generally aware or had a definite suspicion that White had deliberately made himself unavailable to testify, that he had an opportunity to explain his suspicion to the court, and that his lack of candor toward the court had led to the inappropriate disposition of a DWI citation.

In Norton and Kress, which dealt with conduct similar to Whitmore's, the Court determined that a three-month suspension was required for each attorney. Norton was the lawyer for a DWI defendant in the municipality where Kress was the prosecuting attorney. Norton had gone to great lengths to have the case transferred to that municipality. Norton and Kress were former law partners.

At one point, Norton misrepresented to one of the arresting officers, Officer Gallagher, that he was a friend of a certain detective lieutenant. Norton also told Gallagher that his client was a strong supporter of law enforcement. He asked Gallagher to give his client a "break."

On the evening of the trial, Gallagher asked Kress what would happen if he refused to testify or go forward with the case. Kress replied that he would be unable to proceed. When the case was called for trial, Kress made an application to dismiss the DWI charge, on the basis that Gallagher did not wish to go ahead with it. After confirming Gallagher's intention, the judge dismissed the charge.

In assessing the extent of Kress' unethical conduct, the Court noted that, although he had disclosed to the judge the reason for his application for the dismissal of the DWI charge, when a prosecutor makes an application of dismissal, the judge

assumes that the prosecutor supports the application and that there are sufficient facts or law to support the dismissal. The Court concluded that Kress' response to the judge about the reason for dismissal had been inadequate; he knew that the officers wanted to "dump" the case for an improper reason, namely, that Norton alleged that he was friendly with a detective lieutenant and that his client was a supporter of law enforcement. Pointing out that an allegedly strong DWI case had been dismissed for an improper reason, the Court held Kress partially responsible for that outcome.

As to Norton, too, the Court found that he could not escape responsibility for actions that were very instrumental in causing the case's dismissal. The Court found reprehensible his request that the officers "dump" the case against Donnelly. The Court emphasized that, like Kress, Norton knew that the DWI charge had been improperly dismissed.

The Court concluded that, although neither attorney had lied to the court, they had not been completely candid either. Their silence had led to the improper disposition of a DWI charge, a dismissal that both knew was wrong. Perceiving no distinction in terms of culpability between Norton and Kress -- "each in his own way was responsible for the dismissal of the DWI case," ibid. -- the Court suspended each of them for three months.

The question that confronts us is whether respondent should receive a reprimand, as in Whitmore, or a short-term suspension, as in Norton and Kress. Like those attorneys, respondent knowingly failed to disclose material information to the court -- here, his knowledge of the whereabouts of a witness whose testimony could have been critical to the outcome of the case. Those attorneys' inadequate explanation or lack of candor to the court subverted the administration of justice, as did respondent's false statement to the trial judge.

The consequences of respondent's misrepresentation were of much greater proportion, however. Whereas in Whitmore and Norton and Kress, the attorney's conduct caused DWI charges to be dismissed without good cause, respondent's lie to the court, in the words of the New York Court, "necessitated the retrial of the criminal action involving a major felony [homicide]." Furthermore, one other circumstance aggravates respondent's conduct, a circumstance not present in Whitmore and Norton and Kress: unlike those attorneys, who, until the court incident, had a stainless disciplinary record, respondent has been disciplined before.

Without the consideration of other relevant factors present in this case, thus, it would appear that the right discipline for this respondent should exceed the three-month suspension imposed

in Norton and Kress. Compelling mitigation, however, not present in Norton and Kress (or in Whitmore), persuades us that discipline no greater than a three-month suspension is adequate here.

First and foremost, the special referee found no venality on respondent's part. In addition, the referee considered (1) respondent's position as an Assistant District Attorney in Queens County for more than twelve years and his handling of in excess of seventy felony trials during his tenure; (2) his role as a trustee in his church, where he is also an organist and a member of the choir; (3) his current service in the U.S. Army JAG Corp. Reserve and current position as the Command Judge Advocate of the 8th Medical Brigade; and (4) his good reputation in the general community and among many of his professional peers -- six character witnesses appeared on his behalf and two Justices of the New York Supreme Court submitted letters in his favor; the special referee noted that the letter of caution previously issued to respondent "did not appear to me to affect that reputation among witnesses."

In addition, as the OAE pointed out in its brief, respondent advanced further mitigation in his letter to that office: his grandmother's death in the course of the trial, the extensive travel time that his attendance at her funeral in Belize required, his lack of sleep and depression at the time,

and the pressures of the trial. Respondent claimed that those circumstances "compromised his ability to properly respond to the trial court's inquiry."

After weighing the seriousness of respondent's conduct against the considerable mitigation present in this case, we are convinced that a three-month suspension, retroactive to the date of respondent's suspension in New York, October 26, 2005, is the appropriate form of discipline in this matter.

Member Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Claude N. Stuart
Docket No. DRB 07-062

Argued: May 10, 2007

Decided: July 18, 2007

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy		X				
Pashman		X				
Baugh						X
Boylan		X				
Frost		X				
Lolla		X				
Neuwirth		X				
Stanton		X				
Wissinger		X				
Total:		8				1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel