

IN THE SUPREME COURT
STATE OF MISSOURI

In Re:

Thomas M. Utterback,

Petitioner-Applicant.

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Case No. SC89223

PETITIONER'S INITIAL BRIEF

Petitioner *Pro Se*
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STATEMENT OF JURISDICTION

Article 5, Section 5, of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 R.S.Mo. establish jurisdiction over attorney discipline matters in the Missouri Supreme Court.

PRELIMINARY STATEMENT

Respondent seems to concede that Petitioner has met the first four elements of Rule 8.04(b), which lists the requirements that a felon must meet before admission to the Missouri Bar. Respondent recommends against Petitioner's reinstatement on the basis of Rule 8.04(b)(5) by stating that Petitioner's reinstatement "would adversely affect the public perception of the profession given the seriousness of the crime and the fact that Applicant continues to make statements that lead the public to believe that he is not very remorseful or is unwilling to take responsibility for his actions."

In this Initial Brief, Petitioner will avoid matters conceded by Respondent and argues against Respondent's recommendation because the findings of the federal investigators and recommendations of the U.S. Attorney's Office are more probative of Petitioner's remorse than Respondent's subjective judgment and that Respondent failed to understand the "seriousness of the crime."

In that regard, Mo.R.App.P. 84.24(g) states that the filings on the original writ constitute the record on appeal. Consequently, Petitioner limits his Appendix ("App.") to Respondent's recommendations, copies of federal court documents not previously submitted by Respondent, and copies of other pertinent authorities.

Mo.R.App.P. 84.04(h).

STATEMENT OF THE FACTS

Petitioner filed his third Application for Reinstatement in March 2008.

Petitioner filed his first application in May 2005 (Case No. SC86822 – denied in December 2006) and his second in January 2007 (Case No. SC88228 – dismissed in 2007).

On December 5, 2008, Respondent sent a letter and a draft Report to Petitioner. *See*, Exhs. A & C to Applicant’s Reply to OCDC’s Recommendation. In her cover letter Respondent informed Petitioner that she would oppose his reinstatement on the ground that Petitioner’s reinstatement would be detrimental to the integrity of the bar and the public’s perception of the profession.

After Petitioner responded, Respondent amended her recommendation by maintaining that Petitioner “continues to make statements that lead the public to believe that he is not very remorseful or is unwilling to take responsibility for his actions.” *See*, ¶18 of Respondent’s Recommendation, App. A at A8. After Petitioner replied to Respondent’s Recommendation, Respondent replied that, “[], when [Respondent] transmitted her Report to [Petitioner] on December 5, 2008, she did not realize [Petitioner] would make statements in his Response that again called into question his ability to admit past wrongdoing.” OCDC’s Response to Applicant’s Reply, App. B at A11.

In support of the three recommendations Respondent made in two of Petitioner's reinstatement cases, Respondent appended many, many pages of Petitioner's writings and many, many pages of the notes and memos of various federal agents. Petitioner has responded likewise. Both Petitioner and Respondent have argued their respective positions based on a substantial, but incomplete, record before this Court.

Three important documents dealing with the facts of Petitioner's offense are missing from the factual record before the Court.¹ These are: 1) United States Motion for Downward Departure (App. C); 2) the first six pages of the U.S. Probation Office's Presentence Investigation Report (attached as App. D); and 3) Judge Catherine D. Perry's Judgment in a Criminal Case (App. E).

The U.S. Attorney's Motion for Downward Departure ("DDM") summarizes the results of the federal investigation into Petitioner's conduct. In the plea agreement executed over four months prior to the DDM, the U.S. Attorney's Office obligated itself only to make whatever recommendation it deemed appropriate with the limitation that it would not recommend a sentence over 54

¹ Petitioner gave a copy of App. D to Respondent some years ago. Petitioner has not seen App. C & E since 1998 and requested copies from the U.S. Attorney's Office. Petitioner should have provided these documents years ago, as well.

months. *See*, Stipulation of Facts Relative to Sentencing, Exh. 2 to Respondent's Recommendation.

The U.S. Attorney's DDM informed Judge Perry that:

- Petitioner's assistance was extremely significant and useful;
- Petitioner provided truthful, complete, and reliable information;
- Petitioner's assistance began immediately upon arrest when he requested that Swiss authorities contact the DEA representative in Switzerland;
- Petitioner waived extradition;
- The investigating DEA agents were fully satisfied with the extent of Petitioner's cooperation;
- Petitioner's concerns for his family's safety were not unwarranted;
- and
- Petitioner's cooperation was timely.

See, App. C at A14-A19.

After confirming to Judge Perry that Petitioner's maximum sentence be no more than fifty-four months, the U.S. Attorney's Office informed the Court that, "Of course, a lesser sentence could also be imposed as the Court see fit under the circumstances." App. C at A18. The DDM did not ask Judge Perry to sentence Petitioner to serve a prison term.

Appendix D, the U.S. Probation Office's Presentence Investigation², confirmed the U.S. Attorney's Office factual statements and in computing the Federal Sentencing Guidelines, the U.S. Probation Office:

- Added no points for 'Victim Related Adjustment' because there were no victims; and
- Gave Petitioner the maximum reduction in points for his Acceptance of Responsibility.

See, App. D at A24-25.

In Appendix E, Judge Catherine Perry, after reviewing the PSI and the Government's DDM (also known as a §5K Motion), sentenced Petitioner to thirty-six months, allowed Petitioner to self-surrender, recommended FPC Eglin, and confirmed that she departed from the Federal Sentencing Guidelines because of Petitioner's substantial assistance. App. E at A26-27. Both the PSI and the §5K motion were filed under seal because of 1) safety concerns and 2) the ongoing investigation into Trober's criminal enterprise.

At the sentencing, Judge Perry also stated that she sentenced Petitioner to such a harsh sentence³ because Petitioner was an attorney and Judge Perry felt

² U.S. Probation officers work for the Judge, not the prosecutors.

³ "Harsh" because of Petitioner's acceptance of responsibility and his lack of involvement in any underlying criminal activities.

compelled to hold Petitioner to a higher standard. Petitioner did not disagree with the Judge or argue otherwise at the sentencing.⁴

Thereafter, Petitioner served his sentence, re-entered the outside world, was released from supervised release two years early in March 2003, moved to Florida, aided the U.S. Attorney's Office and other federal investigators in the summer of 2004 through 2005, and began his quest for reinstatement in 2005.

⁴ Petitioner later filed a Motion for Reconsideration. Petitioner attaches hereto as Appendix F his Suggestions in Support of that Motion. Petitioner also is in the process of attempting to obtain a transcript of the public portion of the sentencing. See, App. G, copies of email communications with the U.S. Attorney's Office.

STANDARD OF REVIEW

Rule 5.06 establishes the Office of the Chief Disciplinary Counsel and charges that Office with investigating matters designated in Rule 5. Thus, the role of the OCDC is advisory and akin to that of a special master, whose findings of fact and conclusions of law are not binding on the Court. *State ex inf. Ashcroft v. Alexander*, 673 S.W.2d 36, 38 (Mo. banc 1984).

Similarly, the findings of fact and conclusions of law of a disciplinary hearing panel are advisory. *In re Zink*, 2009 Mo. LEXIS 40 (Mo. Mar. 31, 2009), which cited *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008) and, also, *In re Lim*, 210 S.W.3d 199, 201 (Mo. banc 2007) for the proposition that this Court is free to reject, wholly or in part, the recommendation of the disciplinary hearing panel.

Thus, this Court reviews recommendations from the OCDC *de novo*.

POINTS RELIED ON

I. THE SUPREME COURT SHOULD REINSTATE PETITIONER BECAUSE PETITIONER DEMONSTRATED HIS REMORSE AND THAT HE TOOK RESPONSIBILITY FOR HIS ACTIONS WHEN HE AIDED LAW ENFORCEMENT AUTHORITIES IMMEDIATELY UPON ARREST IN GENEVA, CONTINUED THAT AID THROUGHOUT THE PROCESS LEADING TO HIS PLEA OF GUILTY, AND AGAIN IN 2004-2005.

In re Zink, 2009 Mo. LEXIS 40 (Mo. Mar. 31, 2009)

In re Martinez-Fraticelli, 850 N.E.2d 155, 162 (Ill. 2006)

In re Wright, 907 P.2d 1060 (Okla. 1995)

II. THE SUPREME COURT SHOULD REINSTATE PETITIONER BECAUSE HIS CONTINUING COOPERATION WITH LAW ENFORCEMENT AUTHORITIES AND THE ABSENCE OF A VICTIM, AS DEFINED IN LAW, MITIGATE THE SERIOUSNESS OF PETITIONER'S CRIME.

USSG §2S1.1(2)

In re Discipline of Janklow, 709 N.W.2d 28, 2006 SD 3 (S.D., 2006)

USSG §2A1.4(a)(2)(B)

USSG §2J1.2(a)

ARGUMENT

I. THE SUPREME COURT SHOULD REINSTATE PETITIONER BECAUSE PETITIONER DEMONSTRATED HIS REMORSE AND THAT HE TOOK RESPONSIBILIITY FOR HIS ACTIONS WHEN HE AIDED LAW ENFORCEMENT AUTHORITIES IMMEDIATELY UPON ARREST IN GENEVA, CONTINUED THAT AID THROUGHOUT THE PROCESS LEADING TO HIS PLEA OF GUILTY, AND AGAIN IN 2004-2005.

Close to midnight on November 19, 1997, Geneva, Switzerland police arrested Petitioner at the Beau Rivage Hotel. The next morning Petitioner asked Geneva Police Inspector Thibault to contact the United States DEA Office in Bern to ask that a DEA agent come to Geneva. That began Petitioner's cooperation with federal law enforcement authorities.

In August 1998 the United States Attorney's Office for the Eastern District of Missouri told the Honorable Catherine D. Perry, District Judge for the Eastern District of Missouri, that Petitioner provided truthful, complete and reliable information as part of his cooperation. This statement by the U.S. Attorney's Office came after a "lengthy investigation" in which the U.S. Attorney's Office and various federal investigators found corroboration for "many of the important factual aspects of the information provided to us by" Petitioner. *See*, App. C at A16.

Respondent cites her legal research, her conversations with the U.S. Attorney's Office and review of DEA reports as bases for her opposition to Petitioner's reinstatement. Yet, the U.S. Attorney's Downward Departure Motion stated that Petitioner provided truthful, timely, and material information to government investigators. The U.S. Attorney's DDM is the document that summarizes the results of a federal investigation and, in Petitioner's case, the DDM summarized the DEA memorandums that Respondent reviewed and many more that neither Respondent nor Petitioner ever saw.⁵

After the sentencing, Petitioner filed his Motion for Reconsideration. In his Suggestions to that Motion [*see*, App. F at A33-34], Petitioner outlined a factual record the same in all material aspects to what he told federal investigative agents in 1997-98 and 2004-05, what he told Respondent in April 2005, and what he maintains to this day. That is, Petitioner was not part of Trober's gang and did not want to be a part of Trober's gang.

Rule 5.085 of the Rules Governing the Missouri Bar limits OCDC investigations to a period of five years from the point that the OCDC knows or

⁵ The DDM refers to Petitioner's help in identifying other individuals. Petitioner was not given copies of DEA or other government documents relative to related investigations. Respondent did not see these related reports either. Most important, however, is that the other investigation corroborated Petitioner's information.

should know of the alleged acts of misconduct. Although the rule exempts investigations into a felony from the five-year limitation, that language in context indicates that a disciplinary proceeding must be involved. Here, Petitioner was disciplined for his misconduct. Petitioner moved this Court to allow him to surrender his license. This Court granted the motion.

Reinstatement, on the other hand, examines six allegations that the disbarred attorney must make and prove before he/she can be reinstated. *See*, Rule 5.25(b). Respondent opposes Petitioner's reinstatement because Respondent does not believe Petitioner's responses to Respondent's questions (April 2005) or accusations [App. A & B] about events in the country of Panama in the few days prior to Petitioner's flight to Geneva in November of 1997.

Petitioner does not know how much federal investigators were able to verify about events in Panama City or Geneva in 1997. Petitioner does know, however, that when federal investigators discovered that Trober was dealing drugs while he was supposed to be working as an informer for the DEA (1998-2003) that everything went back on the table for re-investigation.

Federal investigators informed Petitioner of this when they asked for Petitioner's help in March 2004. At that time, the federal agent told Petitioner that Trober had been under investigation when federal authorities requested an interview with Petitioner in March of 2003, just prior to Petitioner's move to

Florida and the entry of Judge Perry's Order releasing Petitioner from supervised release three years early.⁶ By August 2004, Petitioner had his last substantive contact with federal investigators, but remained in contact and updated because Petitioner was scheduled as a trial witness. Trober finally pled guilty in the summer of 2005.

Petitioner has no information that Respondent contacted any federal agent or assistant U.S. Attorney to verify Petitioner's later cooperation.

While Petitioner is loath to dwell on what Respondent does not care to believe, Petitioner reminds the Court that all professional prosecutors understand that eyewitness testimony is often unreliable because emotions play such a part in interpreting what a person thinks is happening. In Petitioner's case, Petitioner's memories of that night are more emotional than photographic. More important, Petitioner contends, is that the federal authorities are the experts in investigating criminal behavior and in deciding what is relevant, what is not, what could have happened, and what makes no difference.

While federal authorities cannot verify that Petitioner destroyed the documents he had prepared as provenance for Trober's money, they can verify that no bank in Panama or police inspector in Geneva ever saw any documents. Federal

⁶ The U.S. Attorney's Office could have recommended against Petitioner's release from supervised release.

investigators cannot verify the extent, if any, of Trober's willingness or capability to threaten or inflict physical harm on Petitioner (in Panama or St. Louis) or his family, but they will verify that Trober was a resourceful criminal involved in a very high stakes criminal enterprise with some very dangerous people. Federal authorities will also verify, if asked, that they had no documents or evidence connecting Trober to the money. Without Petitioner's aid – given unconditionally (except for the assurance that police protection would be afforded Petitioner's family) – federal authorities would have had no case against Trober.

In *Zink*, supra, this Court accepted the facts as presented by the United States Attorney's Office and the FBI. In *In re Martinez-Fraticelli*, 850 N.E.2d 155, 162 (Ill. 2006), the Illinois Supreme Court accepted information from the U.S. Attorney's Office and the FBI, and relied on what the U.S. Attorney's Office said in its downward departure motion.

In re Wright, 907 P.2d 1060 (Okla. 1995) reinstated an attorney who, as a newly-elected district attorney, was indicted for and pled guilty to distribution of cocaine. In a lengthy discussion of the evidence, the Oklahoma Supreme Court clearly relied on evidence given directly from law enforcement personnel. *Id.* at 1064-1066.

Respondent came to be involved in Petitioner's quest for restatement in April 2005, eight years after the felonious events of 1997. In those eight years,

Petitioner worked with federal authorities, pled guilty, went to prison, restarted his life, worked with federal authorities again in 2004-2005, and applied for reinstatement in May 2005.

Petitioner's remorse began during the process of breaking the law, continued through the process of undoing the harm Petitioner caused to his family, his country, his profession, and continues to this very day.

Petitioner did everything he could to help federal authorities. In prison, Petitioner vowed that he would return to family, friends, and professional colleagues as a better person, one who would not be a burden on them and one who would do all things possible to make sure that their lives did not remain adversely affected by Petitioner's conduct.

Petitioner defines his daily challenge in a paraphrase of a few lines from Kipling's 'IF':

if you can see the things you gave your life to broken, and stoop and
build'em up with worn out tools – and never breath a word about your
loss . . .

Petitioner attempts to live his remorse in a positive way and fully accepts responsibility for what he did.

II. THE SUPREME COURT SHOULD REINSTATE PETITIONER
BECAUSE HIS CONTINUING COOPERATION WITH LAW
ENFORCEMENT AUTHORITIES AND THE ABSENCE OF A VICTIM, AS
DEFINED IN LAW, MITIGATE THE SERIOUSNESS OF PETITIONER'S
CRIME.

In the panoply of money laundering charges, Petitioner's was among the least serious category. As the government's DDM stated, Petitioner's conduct as an attempted money-lauderer had no connection to the criminal activities that most certainly gathered the funds Petitioner took to Panama.⁷ The crime to which Petitioner pled guilty, in fact, was not a crime until 1986. *See*, App. H, §9-105.100 of the U.S. Attorneys Manual at A49.

Throughout the last four years, Respondent has consistently labeled Petitioner's conduct to be so serious as to bar reinstatement; yet, Respondent has offered no legal analysis, relying instead on what she thinks the St. Louis Post-Dispatch might say if Petitioner is reinstated.

While the efficacy of money laundering laws are debated within the offices of the Departments of Justice and State, and are opposed in their present form by a

⁷ Again, no record exists before this Court that the money emanated from criminal activities. Petitioner had no proof of same except for his own surmise. The U.S. Attorney's DDM verifies this.

wide variety of organizations including the Cato Institute, the National Association of Criminal Defense Lawyers, and the Federalist Society, Petitioner will not engage in that debate in his argument that his reinstatement is not barred because of the seriousness of his offense.

Petitioner contends that the United States Sentencing Guidelines (“USSG”) provide legal standards to judge the seriousness of Petitioner’s offense and stand in stark contrast to Respondent’s subjective beliefs. The USSG are rules consistent with the concept of the Rule of Law and were developed to bring consistency, reliability, and uniformity to what was perceived by Congress as a seriously flawed, too subjective federal sentencing system.

Under the USSG, money-laundering charges begin at a base level of 8 to which more points are added depending on how much money was involved in the offense. *See*, USSG §2S1.1(2) at A67.⁸ Thus, Petitioner’s PSI shows his base offense level at 23 (8 + 15 because the sum was \$2 million), which, then, was adjusted upward and downward through the Offense Level Computation to arrive at a point count of 29. Twenty-one (21) of Petitioner’s points derived directly from the amount of the funds he took to Panama. *See*, ¶’s 11 & 13 at A24-25, App. D (15 for the \$2 million and 6 more for the amount over \$2 million).

⁸ Attached as App. I are selected pages from the USSG 2008. Only minor differences, none pertinent here, exist between the 1997 and 2008 versions.

As to the amount of money, the U.S. Attorney's Office will verify that Petitioner had no role in determining how much money was going to Panama.

Petitioner's base offense level of 8 doesn't come close to such offenses as First Degree Murder [43 – USSG §2A1.1(a) at A58] or even Involuntary Manslaughter involving the reckless operation of a means of transportation [22 – USSG §2A1.4(a)(2)(B) at A60]. For example, Former U.S. Representative Janklow was reinstated after killing a person with his automobile. *In re Discipline of Janklow*, 709 N.W.2d 28, 2006 SD 3 (S.D., 2006). If his crime had been federal, Janklow would have started with a base level 22 points.

More recently, the U.S. Attorney's Office in St. Louis placed Attorney Zink in a diversion program after he lied to FBI agents about his attempts to bribe a prosecutor. *See, In re Zink*, supra. Had Zink been prosecuted for obstruction of justice, his base level would have started at 14. USSG §2J1.2(a) at A65-66.

While *In re Martinez-Fraticelli*, supra, is unclear as to what crime the reinstated Martinez-Fraticelli pled guilty, if he was prosecuted as a public official his base level would have been 14 [USSG §2C1.1(a)(1) at A61] plus another 14 for obstruction of justice. USSG §2J1.2(a) at A65-66. Wright, the reinstated former district attorney who pled guilty of cocaine trafficking, most certainly started with a base level 12. *See*, USSG §2D1.1 at A63-64 and *In re Wright*, supra, at 1064.

Petitioner started at an 8 and went upward because of adjustments, i.e., the amount of money involved (21 points) and Petitioner's belief as to the origin of the money (3 points). These upward adjustments did not involve Petitioner's active participation.

Petitioner's crime was serious, but can also be differentiated from *Janklow*, *Zink*, *Martinez-Fraticelli*, and *Wright* in two material respects: 1) Petitioner harmed no victim and 2) Petitioner actively took responsibility for his actions on November 20, 1997 when he asked Swiss authorities to get him a federal investigator so that he could tell the federal investigator that a crime under United States law was being committed.

Petitioner's offense is not, in itself, serious enough for this Court to deny reinstatement.

CONCLUSION

Petitioner should be considered for reinstatement because he has met every criteria for reinstatement that this Court has enumerated in the Court rules and in case law. Petitioner took responsibility for his actions at a very early point and continues to take responsibility. The United States Attorney's Office for the Eastern District of Missouri confirms this.

Petitioner contends that the conclusions of the federal investigators actually involved in Petitioner's prosecution, and the investigations of all the cases that

emanated from the government's investigation and prosecution of Edward Trober, are more probative than Respondent's subjective conclusions.

Respondent expresses her concern about what the St. Louis Post-Dispatch might say if this Court reinstates Petitioner to the Missouri Bar. While, again, Petitioner does not believe that the Post-Dispatch should control this Court's reinstatement judgments, this Court must presume that if it reinstates Petitioner (and Petitioner is still news), the St. Louis Post-Dispatch will print that federal authorities found Petitioner's statements to them to be truthful and that federal authorities relied on Petitioner's testimony as a beginning point to gather in a large, but hidden, criminal enterprise.

Petitioner prays this Court to reinstate him and to base that reinstatement on the competent and substantial record compiled by the United States Attorney's Office for the Eastern District of Missouri, and Petitioner's compliance with all the rules and guidelines established by this Court to regulate reinstatement to the Bar.

Respectfully submitted,

Thomas M. Utterback – Petitioner

Certificate of Service

I hereby certify that on this 20th Day of April 2009, two copies of Petitioner's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to OCDC Staff Counsel Nancy Ripperger, 3335 American Avenue, Jefferson City, Missouri 65109.

Thomas M. Utterback

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information, and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 3,658 words, according to Microsoft Word, which is the word processing software used to prepare this initial brief; and,
4. Used Norton Anti-Virus software to scan the disk for viruses and that the disk is virus-free.

Thomas M. Utterback