In the

SUPREME COURT OF MISSOURI

No. SC86522

In re: WILLIAM M. TACKETT

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE

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INTEREST OF AMICUS

This is an exceptional disciplinary matter. At stake is not just the ability of William M. Tackett to practice law in the State of Missouri, but his position as Prosecutor of Cole County. It is because of the impact of discipline on Mr. Tackett's ability to continue as prosecutor that the Attorney General files this brief as amicus curiae. Unfortunately, in their briefs neither Informant nor Mr. Tackett addresses this issue. But Mr. Tackett has stated publicly that he believes a suspension would have no effect on his ability to continue to serve as prosecutor. Thus, Mr. Tackett has made it clear that should his license to practice law be suspended, the issue of his continuing as prosecutor will arise.

The Attorney General does not take a position as to whether or not Mr. Tackett's license to practice law should be disciplined, nor the form any discipline should take. But should this Court decide to suspend Mr. Tackett's license to practice law, the Attorney General urges the Court to also address the impact of that suspension on his ability to continue as Cole County Prosecutor. This issue should not be left for determination in a later *quo warranto* proceeding, nor to subsequent challenges to convictions obtained by the office of a suspended prosecutor. It is the position of the Attorney General that should this Court impose the penalty of suspension, Mr. Tackett would be disqualified from continuing to serve as prosecutor because he would no longer possess one of the statutory requirements for that office, a license to practice law in the State of Missouri. If this Court concludes that Mr. Tackett's serious conduct warrants suspension, it should not then interpret the statutes so as to render that discipline largely meaningless by concluding that Mr. Tackett can serve as prosecutor during the suspension.

The Attorney General has a particular interest in discipline that impacts the ability of prosecutors to fulfill their statutory duties. Most notably and directly, the Attorney General defends appeals from felony verdicts obtained by prosecutors. Section 27.050, RSMo 2000. Should Mr. Tackett be suspended, the Attorney General would represent the State in this and other appellate courts when criminal defendants challenge, as surely they would, actions taken by a suspended prosecutor and his assistants. And the potential number of criminal appeals in felony and misdemeanor cases prosecuted during any suspension period is significant: the Cole County prosecutor initiates more than 4200 prosecutions a year.[1]

But again, this case presents a unique issue of public interest. The public interest makes it imperative that this Court address, in this disciplinary proceeding, the impact of suspension on whether this elected prosecutor continues in office. The parties having neglected to do so, the Attorney General files this brief *amicus curiae* to fill that void.

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[1] *See* Office of the State Courts Administrator, "FY 2004 Profile – 19th Circuit," available at http://www.courts.mo.gov/osca/index.nsf/fa82e7a49cc31f0d86256660006290ec-/a0bd33eb2584412586256fa3006fe635/$FILE/19%20-%20Profile.pdf, viewed Feb. 18, 2005.

ARGUMENT

"The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession." *In re Disney*, 922 S.W.2d 12, 15 (Mo. banc 1996), quoted with approval in *In re Wiles*, 107 S.W.3d 228, 228-229 (Mo. banc 2003). The disciplinary system accomplishes that goal in part by removing attorneys from situations in which they could cause harm – but more often by publicly noting their ethical lapses and taking some action to reinforce in the mind of the attorney and the minds of the public that such lapses will not be tolerated.

The Informant Chief Disciplinary Counsel has accused Mr. Tackett of significant ethical lapses, and has proposed that his ability to practice law be suspended in response. The Informant addresses the alleged lapses and proposes a sanction without particular regard for the position Mr. Tackett occupies. That approach suggests, correctly, that an elected prosecutor should not be treated more leniently than other attorneys. But it ignores the seemingly obvious fact that "to protect the public and maintain the integrity of the legal profession" may require something more when a prosecutor's law license is at stake. The difference comes in part from the higher profile of a prosecutor – from the fact that while the public generally might never see the ethical lapse of or resulting discipline on an attorney in private practice, it most certainly will see what happens to a prosecutor, and will form its view of the profession based on that very public statement. The difference also comes from the public's need to have as prosecutors persons who can actually fulfill the duties of that office – *i.e.*, persons who can do what the voters elected them to do.

To "protect the public and maintain the integrity of the legal profession," the Court should state unequivocally that a prosecutor whose conduct is so egregious that his license is suspended, making it impossible for him to fulfill his statutory duties, can no longer remain in office. If the Court sanctions Mr. Tackett as Informant recommends, the people of Cole County should not be required to wait for resolution of the inevitable *quo warranto* proceeding before learning what impact that suspension has.

I. The current ability to practice law is a qualification for election to the office of prosecutor.

Missouri statutes impose certain qualifications for a person to be elected prosecutor: the person "shall be learned in the law, *duly licensed to practice as an attorney at law in this state*, and enrolled as such, at least twenty-one years of age, and [have] been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election." § 56.010 (emphasis added). That a prosecutor be learned in the law and "licensed to practice" law is more than simply a policy decision of the sort reflected in the residency requirement. A person who lives just outside a county could, as a practical matter, fulfill the responsibilities of prosecutor. But a person unable to practice law could not – as shown by the statutes that define the authority and responsibility of prosecutors.

The legal duties of the prosecutor are broad. We usually think of the prosecutor's responsibilities in the criminal realm. But he is also, in most counties, the county's civil attorney. Thus the "prosecuting attorney shall represent generally the county in all matters

of law . . . and draw all contracts relating to the business of the county." § 56.070. In that regard, among others, the prosecutor is required to engage in the "law business." The "law business" is defined as:

> The advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document, or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

§ 484.010.2. The prosecutor is paid – *i.e.*, he receives "valuable consideration" – for fulfilling his statutory duties. § 56.060. In performing those duties, he advises, counsels, represents, and draws papers for the county. He is thus statutorily obligated to engage in the "law business."

He is also obligated to engage in the "practice of law" – a particular subset of what the "law business" definition refers to as acting "in a representative capacity" in § 56.060:

> The "practice of law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board,

committee or commission constituted by law or having authority to settle controversies.

§ 484.010.1. In that respect, the prosecutor's responsibility in the criminal realm is paramount. The prosecutor is required "to commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute all forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county." § 56.060.1. *See also, e.g.*, § 56.080 (prosecutor's duty to represent the state in habeas corpus matters); § 151.240 (prosecutor's duty to bring certain tax suits); § 311.770 (prosecutor's duty to bring nuisance suit to enforce liquor control law).

Engaging in the "law business" generally, or the "practice of law" specifically, requires that prosecutors – in the terms of § 56.010 – be "duly licensed to practice as an attorney at law in this state, and enrolled as such." Otherwise, the moment they perform their statutory duties, they violate the law. § 484.020.1. In fact, if someone not "duly licensed" performed the duties of a prosecutor, he would "be guilty of a misdemeanor." § 484.020.2.

Logically, then, the ability to actually engage in the "law business" and the "practice of law" would be requirements for the office of prosecutor even if they were not in the statute itself. Otherwise, it would be possible to elect someone as prosecutor who could collect the salary but not do the work. The legislature simply codified that principle when

it imposed the requirement that a person must be "duly licensed to practice as an attorney in this state, and enrolled as such." § 56.010.

To make that principle effective, the qualification must be read to exclude those who have never been admitted to practice in Missouri, those who have been disbarred, *and* those whose licenses are suspended. Otherwise, persons whose licenses were suspended – *i.,e.*, those who are in some abstract sense still "duly licensed" but who are currently disqualified from engaging in the law business or the practice of law – could take office as prosecutors despite their inability to perform the duties of the office. That simply cannot be what the legislature contemplated; the only reasonable reading of § 56.010 is that to be elected prosecutor, a person must be legally qualified on the date of taking office to fulfill the duties of that office, *i.e.*, to actually engage in the "practice of law."

II. Losing the ability to practice law must disqualify a person from continuing to serve as prosecutor.

Mr. Tackett is not, of course, seeking election as prosecutor. So the question that will immediately arise if the Court follows the recommendation of the Chief Disciplinary Counsel and suspends Mr. Tackett, is whether a suspension that would disqualify Mr. Tackett from *running* for prosecutor also disqualifies him from *remaining* prosecutor. Section 56.010 phrases the law license requirement as a qualifier – *i.e.*, as something without which a person cannot take office. But the requirement should also be construed to be a *dis*qualifier: if someone loses the ability to practice, he cannot continue in office as a prosecutor. That reading of the law is consistent with the Court's most recent precedent

concerning continuing qualification of an elected law enforcement official. And it is required not just to vindicate the specific purposes of § 56.010, but also to ensure more generally that those who occupy public office remain able to perform their statutory duties.

That conclusion is required by *State ex rel. Peach v. Goins*, 575 S.W.2d 175 (Mo. banc 1978), where this Court held that the failure to meet statutory qualifications while in office disqualifies an official from holding that office. *Goins* was a *quo warranto* proceeding addressing the continued tenure of Goins as Sheriff of the City of St. Louis. The statute regarding qualifications for Sheriffs reads much like the statute setting out qualifications for prosecutors:

> [E]very four years ..., the voters in every county in this state shall elect some suitable person sheriff. No person shall be eligible for the office of sheriff who has been convicted of a felony. Such person shall be a resident taxpayer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement.

§ 57.010.1. *See* 575 S.W.2d at 178 and n. 5.

Under the terms of § 57.010.1, Goins was eligible for election as Sheriff in April 1977, and remained eligible when he took office in July of that year. 575 S.W.2d at 176. But in 1978, he was convicted of various felonies. *Id*. The circuit attorney initiated a proceeding in *quo warranto* to declare that Goins "has forfeited his office because he has been found guilty by a jury and sentenced . . . for certain felony offenses." *Id*. The Court

held that because of the convictions, Goins was "not eligible to continue in the office of sheriff" and "is ousted" from that office. *Id*. at 183.

The Court recognized that although the "the General Assembly in adopting [§ 57.010.1] did not specify that a conviction of a felony while in office would result in a disqualification from office, this interpretation is clearly and logically embodied therein." *Id*. at 179. In reaching that "clear" and "logical" conclusion, the Court considered a precedent from Kansas, *State v. Stice*, 348 P.2d 833 (1960). There, the Supreme Court of Kansas ruled that the "statutory qualifications that a judge shall at the time of election be authorized to practice law requires that each attorney becoming a judge must continue to possess that right as a qualification for office." *Id*. That conclusion was consistent with other state precedents regarding whether "qualifiers" are also, implicitly, "disqualifiers." *See Fugina v. Pierce*, 209 N.W. 693 (Wisc. 1926) ("[w]hile this statute by its language provides that such qualification shall exist at the time of election or appointment, still there can be no question but that such qualification is a continuing one..."); *Willis v. Monfort*, 159 P. 889 (Wash. 1919) ("[w]e think it would be absurd to say that this [provision] means that, when a person has been admitted to practice in the courts of record of this state and subsequently he has been disbarred for cause or his admission vacated, he is still eligible to the office of superior judge by reason of his original status.").

Of course, neither *Goins*, *Stice*, *Fugina*, nor *Willis* involved a prosecutor – though *Stice*, *Fugina*, and *Willis* all involved a requirement that the official be licensed to practice law. There was one Missouri precedent that did involve a prosecutor and the practice of

law: the 85-year-old decision in *State v. Sanderson*, 217 S.W. 60 (Mo. banc 1919). There, the Court examined how a disciplinary action against a sitting prosecuting attorney affected his status in office. This Court refused to remove the Callaway County Prosecuting Attorney when his law license was preliminarily suspended.

In *Goins*, this Court referred to *Sanderson* as raising an "analogous issue." 575 S.W.2d at 179. The Court noted the *Sanderson* holding, which Goins cited in support of his claim that qualifiers are not disqualifiers. But the Court did not endorse that holding. Rather than attempt to distinguish it, the Court simply rejected Goins's reliance upon it: "To adopt the respondent's contention that § 57.010, is merely a qualifying and not a disabling statute would lead to illogical results, thwart the public policy behind the statute, and not be in accord with" *Sanderson* and *Stice*. *Id*.

Goins, then, established the proposition in Missouri that a statute such as § 56.010 or § 57.010 "is not merely a qualifying statute to the office . . . but is also a disabling or disqualification statute." *Id*. And it established that rule even though the qualification at issue was not directly related to the core function of the office of sheriff – *i.e.*, there was no legal bar on the Sheriff performing his duties despite a felony conviction, in contrast to the legal bar on a prosecutor who lacks a license to engage in the "law business" or the "practice of law." *Goins* thus implicitly answered the question whether an official who no longer has the qualifications to run for office can nonetheless continue to occupy an office.

Sanderson was driven, in part, by the Court's reluctance to embrace the rule that it later adopted in *Goins*: that qualifications need to be satisfied throughout an official's time in office. In *Sanderson*, the Court stated that disqualification was "not within the intention of the Legislature in enacting either the statute prescribing the qualifications of prosecuting attorney or those providing for the disbarment of attorneys." *Sanderson*, 217 S.W. at 63. If that was the rule before *Goins*, it has not been the rule since.

Not only was the rationale of the *Sanderson* opinion undercut by *Goins*, the subsequent changes in the lawyer disciplinary proceedings also render inapplicable a fundamental concern of the Court in *Sanderson*. The decision in *Sanderson* was influenced by the disciplinary procedures in force in 1919. Under those rules, the circuit court issued the suspension of an attorney's law license, which then could be appealed to this Court. In *Sanderson* this Court was asked to address the impact of the circuit court's suspension on the prosecutor's ability to continue in office while his appeal of the suspension was pending. The Court expressed concern that there was no legal mechanism to return the attorney to office, if his appeal were successful. *See* 217 S.W. at 62. The prosecutor's suspension was in fact ultimately overturned two years later in *Jones v. Sanderson*, 229 S.W. 1087 (Mo. banc 1921). Under the current rules, the *Sanderson* problem does not exist; any order of discipline will be issued by this Court and will be final. Therefore, there is no possibility that the prosecutor might be removed and yet the basis for removal later eliminated.

III. Suspension and disbarment equally merit removal because they both prevent a prosecutor from performing the duties of his office for an indeterminate period.

Among the sanctions available in lawyer discipline are reprimand, suspension, and disbarment. Certainly a reprimand does not preclude a prosecutor from fulfilling the duties of or remaining in office. But the difference between disbarment and suspension is a distinction without a difference, when the question is the ability of the person to fulfill the duties of the office. The criminal penalties in § 484.020.2 do not distinguish between one whose license has been revoked and one whose license has been suspended. Just like an attorney who has been disbarred, an attorney disciplined by suspension is unable to engage in the practice or business of law until his license is reinstated. The prosecutor who receives a suspension is no more capable of performing the duties of his office than is the prosecutor who is disbarred.

It would seem obvious, then, that a suspension would disqualify a prosecutor from office just as disbarment — but for the 85-year-old holding in *Sanderson*. There, the Court declined to remove a prosecutor from office during a suspension. In fact, the Court said (but did not explain nor justify) that the suspension did not "disable him to practice so far as the performance of his duties require." *Id*. at 64. Presumably, if Mr. Tackett were suspended, he would urge the Court to permit him to "practice so far as the performance of his duties require." The Court should decline such an invitation.

To suspend a prosecutor but allow him to continue in office would, in Mr. Tackett's case, hardly be a sanction at all. If a full-time prosecutor is allowed to "practice so far as the performance of [his office's] duties required" (217 S.W. at 64), for him there would be no difference between a suspension and a reprimand. Presumably Sanderson had a private practice – as, indeed, many Missouri prosecutors are allowed to do. A holding that a part-time prosecutor could continue to act in his office (including practicing law) during a suspension, but could not continue private practice, would be a real sanction. But full-time prosecutors are statutorily barred from practicing law except in their official capacity. § 56.067 (prosecutor must "devote full time to his office, and shall not engage in the practice of law"). A suspension that somehow still permitted such prosecutors to practice law to the extent required by their office would only prohibit them from doing what the law already prohibits them from doing – and thus would amount to nothing more than a reprimand. For a suspension of a full-time prosecutor to serve any disciplinary purpose beyond a reprimand, it would necessarily have to preclude a prosecutor from fulfilling the duties of his office.

And if a prosecutor were not allowed to fulfill the duties of his office yet remain there, the people would be paying for services twice – once for the prosecutor who cannot act, and once for the person who actually does the work. And they would be deprived of the electoral accountability that our system of elected prosecutors ensures.

This Court has recognizes the public's right to have the person they elected actually make the decisions assigned to a prosecutor. It has upheld the removal of prosecutors for

willful neglect of their statutorily-mandated duties under § 106.220. *See McKittrick v. Wymore*, 132 S.W.2d 979 (Mo. banc 1939), *McKittrick v. Graves*, 144 S.W.2d 91 (Mo. banc 1940). There, the prosecutors were legally capable of completing their duties, yet failed in some respect to do so. It would be nonsensical to remove them from office, while allowing a prosecutor to remain in office after this Court orders him not to perform his duties because of his ethical violations.

IV. The presence of assistants should not excuse some prosecutors from removal upon suspension.

Some prosecutors – including Mr. Tackett – have assistants who are authorized, to some degree, to stand in for the prosecutor. But the presence of assistants does not remove that subset of Missouri prosecutors from removal under the *Goins* rule.

The duties of a prosecutor do not automatically devolve upon someone else – not even properly appointed and qualified assistant prosecutors – when the prosecutor is unable to act. In fact, Missouri statutes simply do not provide a mechanism for reassigning a prosecutor's duties when he loses the right to practice law. They do provide for reassignment in other instances. For example, when a prosecutor cannot fulfill his duty in a particular case because of a conflict of interest, a court can appoint a special prosecutor. § 56.110. And a court may appoint someone to "discharge the duties of the office" when a prosecutor is "sick or absent." § 56.120. But a prosecutor who is unable to practice due to

a disciplinary ruling is neither "sick" nor "absent."[2] There are no other provisions of law that provide for reassigning the duties of a prosecutor in such a situation.

If a person unable to practice law retained his position, the statutory responsibilities that constitute the "law business" and the "practice of law" would presumably be assumed by others within the office – if (contrary to fact, in many counties) there are persons employed within the office who are themselves eligible to engage in the "law business" and the "practice of law." But that would pose the question of whether such persons – assistant prosecuting attorneys, *see* § 56.151 – can legally act without any supervision and involvement by the elected prosecutor.

Assistants in "counties of class one" are authorized to "discharge such duties" as they may be assigned, and are "empowered to sign in their own name informations in criminal cases." § 56.180. But assistants elsewhere lack comparable statutory authority. *Compare* § 56.180 and § 545.040. Without it, disqualification of the prosecutor from signing informations and performing other statutorily-assigned duties threatens to bring prosecutions to a halt – or at the very least create novel issues in subsequent criminal appeals.

Even where there is statutory authority for assistant prosecutors to act, it seems impractical to suggest that they could really do so without the prosecutor's involvement.

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[2] *See Jones v. Wurdeman*, 274 S.W. 407 (Mo. banc 1925) (the requirements of "sick" or "absent" were to be construed strictly in the predecessor statute to § 56.120.)

And once suspended, a prosecutor cannot be involved; even if he doesn't appear in court, consulting with and advising the assistants constitutes the "law business." The statutes cited above that require the appointment of a special prosecutor where a prosecutor is incapacitated, see §§ 56.110 and 56.120, make it clear that the legislature did not intend that an elected prosecutor merely delegate his duties in toto to assistants when he is incapacitated. If this is true when the incapacity does not affect a qualification for office, it certainly should be true when it does.

Assuming that there are assistants who can act entirely without the prosecutor's supervision and approval, to permit them to do so would still be contrary to the public interest. After all, they are not accountable to the electorate. Of those in his office, only the prosecutor himself was chosen by the democratic process. Though a prosecutor can hire assistants, he cannot appoint his replacement, whether he is being replaced for a particular case or for a particular period of time. Designating a replacement during a prosecutor's term is always left to those who are themselves ultimately accountable through an election: a judge (*see* §§ 56.010, .020) or the governor (*see* § 105.050).

To hold that the ability to practice law is an initial qualification but not an ongoing one, and that a prosecutor could remain in office but leave all legal decisions to be made unilaterally by his assistants, would lead to a result where a suspended prosecutor remains in office and collects a public salary, while unable to carry out the duties set forth by statute.

And a rule that depended on the presence and authority of assistant prosecutors would bring inconsistent results. Where a prosecutor without assistants would be removed from office, a prosecutor with assistants might not – even though the ethical violations that prompted the suspensions were comparable.

Again, then, the requirement in § 56.010 that a prosecutor be not just "learned in the law" but legally authorized to engage in the practice of law, should be read to be both a qualifier and a disqualifier, such that the presence or absence of assistants is not a factor. "Not only does such an interpretation necessarily follow but public policy dictates such an interpretation." *Goins*, 575 S.W.2d at 179.

V. Setting a short minimum suspension period will not avoid the impact of the suspension.

Mr. Tackett might suggest that the Court need not reach the tough questions even if it imposed a suspension, because the suspension originally recommended was just 30 days, and there is no duty that he must perform personally that he could not defer for 30 days. Such a claim would be, of course, entirely speculative; it is impossible to say definitively that no deadline will run during a particular 30-day period on any decision that the prosecutor is required to make or action that the prosecutor is required to take. Indeed, that scenario seems highly unlikely.

But such an argument would also ignore the nature of a suspension under this Court's current rules. The period of suspension set by the Court is merely the minimum period; it is possible that a suspended attorney might *never* qualify for reinstatement. A

suspension ends only when the Court reinstates a suspended attorney in accordance with Supreme Court Rule 5.28. And the attorney must do more than survive the passage of time. Rule 5.28(b)(4) also requires a suspended attorney to take and pass the multistate professional responsibility examination (MPRE). That test is offered three times a year (March, August, and November); the person seeking to take the exam must apply at least a month in advance; and scores are not released until approximately eight weeks later. Once the attorney has the requisite MPRE result and completed his application for reinstatement, the rules impose no deadline on the Court's consideration of that application.

This Court can, of course, set a minimum suspension period. But unless this Court deviates from its own Rules, the actual length of any suspension is ultimately indeterminate. Once a prosecutor's ability to practice law has been suspended, it is impossible to know just when (if ever) it will be restored. Assuming it is even possible and practical for a prosecutor's office to function without a prosecutor who can direct its "law business," the public should not be required to live without the authority and accountability of an elected prosecutor during a suspension period.

CONCLUSION

This Court should address both the appropriate discipline and the impact of that discipline simultaneously. If Mr. Tackett is sanctioned as Informant proposes, the Court should declare his office vacant, and ensure that the people of Cole County are not left without someone in the office of prosecuting attorney who has the ability to perform the duties of his office. The Court could thus promptly assure the people of Cole County of a

definitive answer regarding the continued tenure of their elected prosecutor, rather than be forced to wait while the Attorney General prosecutes a *quo warranto* proceeding.

Respectfully submitted,

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Certificate of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 18th day of February, 2005, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 5,157 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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James R. Layton