IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
LAWRENCE J. FLEMING	)	**Supreme Court #SC94203**
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. COUNTER STATEMENT OF FACTS

(References in this Brief are to the "Appendix" filed by Informant (App.) and, where necessary, to the "Record" also filed by Informant (Rec.).

1. BACKGROUND REGARDING INVESTIGATION, COMMUNICATION, DELAY, AND RECORDED CONVERSATIONS

This case is unusual in several respects which are indicated in the files of the OCDC, including letters to the Complainants which were provided to the Disciplinary Panel, as well as to Respondent Fleming.

A. DELAY IN PROSECUTION

First, the cases concern client contact which occurred, in the case of Mr. Guerra between 2005 and 2008, **more than six years ago**, in the case of Mr. Younger between 2004 and 2006, **more than seven years ago**, and in the case of Mr. McVeigh in early 2010, **more than four years ago**. At least part of the delay in addressing these matters has been due to the extraordinary time that these matters were under investigation by the Office of Chief Disciplinary Counsel after the complaints were filed, in the case of Mr. Guerra, since August 11, 2008, in the case of Mr. McVeigh since April 28, 2010 and in the case of Mr. Younger since January 3, 2011.

Although Section 5.085 provides for a five year statute of limitations for the filing of an information from the time the Chief Disciplinary Counsel knows or

should know of the alleged acts of misconduct, there has been no satisfactory explanation given as to why these matters were held in the Office of the OCDC as long as they were. For example, CDC Alan Pratzel testified that the Guerra Complaint was specifically assigned to the OCDC for investigation on September 21, 2009, but no information was filed until March 28, 2013, a delay of 3 ½ years. (**App. 77**.) However, Mr. Fleming expected to respond to "things that Mr. Guerra said happened between five and eight years" ago. (**App. 78**.) Moreover, the fact that a complainant characterizes his Complaint as a fee dispute and requests resolution of that dispute does not influence the OCDC which can and does file disciplinary complaints rather than referring the matter to a fee dispute committee. (**App. 78-79**.)

B. COMMUNICATION BY OCDC WITH COMPLAINANTS BUT NOT WITH RESPONDENT

The second unusual aspect is the degree to which the OCDC continued to communicate with all these Complainants to advise them of the status of its investigations without advising Respondent of these communications.

For example, Shannon Briesacher of that office sent Mr. Younger a letter dated September 20, **2011** (**18 months prior to filing an information in this case**) advising him that:

> **The Office of Chief Disciplinary Counsel has decided to seek formal discipline against the license of Mr.**

> **Fleming. More specifically, we will be asking that Mr. Fleming be suspended or disbarred.** For this reason, investigation in your case is being transferred to our Jefferson City, MO office. I remind you that at this point our investigations are confidential. Though you may be participating in a fee dispute resolution with Mr. Fleming, **I ask that you not share the information that I provide you regarding our intentions.** (Emphasis supplied.) (**App. 1650**.)

The September 20, 2011 letter goes on to request additional information from Mr. Younger to be received "no later than October 4, 2011."

On the same date Ms. Briesacher wrote a letter to Mr. Fleming saying nothing about the determination to seek disciplinary action which she had asked Mr. Younger to keep confidential, but requesting additional information from Mr. Fleming by October 4, 2011. The letter said nothing about the suggestion by both Fleming and Younger to refer the matter to a fee dispute committee.

The reference to "fee dispute resolution" in the September 20, 2011 letter was obviously a reaction to the letter that Respondent had sent Mr. Pratzel on August 22, 2011 with which he attached a letter from Mr. Younger asking that his dispute be referred to a fee dispute committee and requesting directions as to how

to proceed with that request (**App. 1652**). The OCDC did not respond to that request. However, on August 24, 2011 Mr. Younger also wrote a letter to Cheryl Walker at the Regional Disciplinary Committee again acknowledging his request to refer the matter to a fee dispute committee. For unexplained reasons the OCDC refused to respond or provide guidance as to how to invoke the services of the fee dispute committee despite requests to do so by both Younger and Fleming.

On September 28, 2011 Mr. Fleming responded to Ms. Briesacher request for more information with a copy of the letter he had sent to Mr. Pratzel, six months previously and again stating his willingness to refer this matter to a fee dispute committee and also stating that he was unaware of any "open complaints" pending against him, other than the Younger complaint. Despite its regular communication with all three Complainants the OCDC did not copy Mr. Fleming on any of its correspondence and, most importantly, did not share with him its advice in the September letter to Mr. Younger that the OCDC "has decided to seek formal disciplinary action against the license of Mr. Fleming" which information it asked him to keep confidential.

Then on March 15, 2013, some 17 months after her September 20, 2011 "confidential" letter to Mr. Younger, Ms. Briesacher wrote to Mr. Younger again saying "I am currently drafting an information against Mr. Fleming and intend to

file it within the next two weeks… We will be seeking a long-term suspension or disbarment." (**App. 1654**.)

In fact, between August 11, 2008 and March 15, 2013 the OCDC received and responded to numerous letters written by the three Complainants herein complaining about the length of time their complaints were taking, but Respondent Fleming was not copied on any of this correspondence.

Nevertheless, without any prior notice or warning, Respondent on April 15, 2013 received the 374 paragraph information filed by the OCDC in this case which had been filed on April 3, 2013.

C. RECORDING AND TRANSCRIPTION OF ATTORNEY-CLIENT PHONE CALLS

The fourth unusual aspect of this case is the action taken by the OCDC in 2010 to obtain recordings of all the phone calls placed by Tim Guerra to Mr. Fleming between July 2006 and March 2008 (when Mr. Guerra was released from prison). As a result of this action recordings of over 125 phone calls which had been made and preserved by the DOC were provided to the OCDC by letter dated September 29, 2010. However, Mr. Fleming was not advised that such recordings had been requested or received by the OCDC. (*See* **App. 1655**.) The OCDC then arranged and apparently paid for transcripts of those conversations to be prepared and produced as evidence at the hearing. About eight of those conversations were played at the hearing and form the basis of the allegations that Mr. Fleming made

certain misrepresentations to Mr. Guerra regarding the status of the matters he was handling for Mr. Guerra.

Mr. Fleming objected to the use of the recorded conversations and stated several constitutional grounds for his objections. Those objections were overruled but remain part of the record. (**App. 88**.)

While these objections have not been raised before this Court, it does appear to be overreaching to record and use in a disciplinary hearing all of an attorney's conversations with his incarcerated client even if the client consents to that use as Mr. Guerra did. To Respondent's knowledge this has never before been done, but this action should certainly serve as a warning to attorneys who regularly communicate with their incarcerated clients over prison phones.

2. FACTS REGARDING TIMOTHY GUERRA

A. Background of Tim Guerra

Mr. Fleming's first contact with Tim Guerra was in June 2005 when he was confined at the Farmington Correctional Center program for sexual offenders. At that time, he told Mr. Fleming that he was 51 years old and serving two concurrent 15 year sentences having pled guilty to several counts of promoting child pornography, which were alleged violations of the since repealed R.S.Mo §573.025. (**App. 1311**.) In fact, in Berry County Mr. Guerra had been charged in three felony counts of promoting child pornography and one felony drug count involving methamphetamine, all of which were alleged to have occurred between November 1994 and June 1995 (**Rec. 1614**.) The information also alleged that Guerra was a "prior offender" since he had been convicted of drug offenses in California in 1987 for which Guerra acknowledged serving three years in prison. (**App. 150**.) He had been charged with one count of promoting child pornography which was alleged to have occurred during April or May 1995. In Newton County he was charged with one count of promoting child pornography between January and June 1995 (**Rec. 1616**.) By agreement all these cases in Berry and Newton Counties were consolidated for disposition in Newton County where three counts were dismissed in exchange for his plea of guilty to one count. (**Rec. 2655**.) He was sentenced to 15 years in prison on that count. (**Rec. 2686**.) After a very

contentious plea hearing at which he accused several lawyers who had represented him of being ineffective and not producing the witnesses he wanted (**Rec. 2661-2671**), including Dee Wampler, who he said had "lied to the court" (**Rec. 2670**). He later pled guilty to the single count in Green County and was given a 15 year sentence concurrent with the sentence in Newton County. Mr. Guerra's primary problem at the time he first contacted Mr. Fleming and during the following year was that the Department of Corrections had recommended that his "conditional release date" be extended or revoked because he had been unable or unwilling to complete the Missouri Sexual Offender Treatment Program (MOSOP) which was regarded as a prerequisite before sexual offenders qualified for conditional release. He could, therefore, expect at least an additional three years of confinement before being released on his maximum confinement date. (**App. 899, 975**.)

His cases had been prosecuted in Newton and Barry counties and, on a change of venue, in Green County. Mr. Guerra was alleged to have provided methamphetamine to seventeen year old males in exchange for their allowing Mr. Guerra to video tape the teenagers in acts of masturbation. However, the transcript of Mr. Guerra's plea of guilty indicates that 19 or 20 recordings were made which were seized by the police and that Mr. Guerra contended that one seventeen year old was responsible for the actions he took and for having "extorted" him.

These alleged offenses occurred in 1994 and early 1995 when Mr. Guerra was about 40 years old. However, at his guilty plea hearing he asserted that he had been entrapped or manipulated into the situation by "a group of teenage prostitutes who tried to exact payment out of me in the form of methamphetamine and money." (Plea transcript, Ex. 37, **Rec. 2662**.) He acknowledged that he had made "more than 20 videotapes of teenagers masturbating." (Ex. 37, **Rec. 2663**.) At his plea of guilty he continued to complain about the inadequacies of his attorneys (Ex. 37, **Rec. 2664-2672**) and about the conditions at the Berry County jail (Ex. 37, **Rec. 2676**).

However, Mr. Guerra insisted that the acts of the seventeen year old boys were consensual and Mr. Guerra had not in any way assaulted, threatened or physically injured the young men and that he was never charged with, nor found guilty of, any "sexual assault crime" so as to invoke the provisions of Missouri's Sexual Offender Registration and Treatment provisions (MOSOP), which at the time he contacted Fleming were required to be completed before Guerra could be released on "conditional release" after completion of about 12 years of his sentence. (**App. 976**.)

Mr. Guerra was, at the time of his prosecution, represented by attorneys William Crosby, Shane Cantin and Dee Wampler with whom he quickly became quite dissatisfied as he explained in some detail at his plea hearing. (**Ex. 37, Rec.**

2664-2672.) He proceeded to serve his sentence at various institutions including the Fulton Diagnostic Center, Jefferson City Correctional Center, Moberly Correctional Center, Farmington Correctional Center and NECC at Bowling Green, at all of these institutions he encountered disciplinary problems.

For about ten (10) years Mr. Guerra served primarily as his own attorney filing hundreds of administrative complaints against employees of the Department of Corrections, several habeas corpus actions alleging ineffective assistance of his attorneys and at least two federal civil rights lawsuits. He vehemently contested his treatment by prison staffs and particularly his treatment in the required Missouri Sexual Offender Program (MoSOP) as it was administered at the Farmington Treatment Center.

B. Mr. Guerra's Pro-Se Submissions

Mr. Guerra had also filed several hundred internal complaints, some of them very rambling and threatening, with the various institutions and the Director of the Department of Corrections contesting his treatment by prison counselors, guards, supervisors and medical staff. The responses to these complaints, some of them quite long and detailed, were submitted as a group exhibit at Respondent's hearing, but were obviously not been reviewed in any detail by the panel.

Mr. Guerra also acknowledged that he had filed disciplinary complaints against medical providers with the State Board of Registration for the Healing Arts

and the State Board of Nursing as well as complaints with public officials. (**App. 126**.) Copies of these many complaints and responses thereto were also produced at the hearing but were deemed too voluminous to review.

When his issues were not resolved, Mr. Guerra filed two civil rights lawsuits in the Federal District Court in St. Louis. These lawsuits are styled Guerra v. Kempker, et al. and Guerra v. Public Safety Concepts, et al. The filing of these cases pre-dated Guerra's contact with Fleming, and, in fact, the **Kemper** case had been dismissed by the District Court, reversed by the Eighth Circuit and dismissed again by District Court and again appealed by Mr. Guerra. (**App. 909-941**.)

The Public Safety Concepts lawsuit was filed *pro se* in December 2005 and the very extensive and complex complaint, which he wrote, consisted of 179 pages, and was received as an exhibit at the hearing, but again not reviewed in any detail because of its length. (Ex. 26, **Rec. 1899-2082**.) Nevertheless Mr. Fleming was challenged as to the time he spent reviewing and outlining that complaint, as well as the time he spent reviewing large volumes of internal complaints to assure that Guerra had "exhausted" his administrative remedies before filing his lawsuits. (*See* **App. 1338-1347**.) Fleming wrote to Guerra on December 30, 2005 providing him with comments and suggestions regarding the Public Safety Concepts case. (**App. 1328**.) He later prepared a ten page outline of the federal complaint to assure that he had a correct understanding of what Guerra was alleging in his

lawsuit (Ex. 8, **Rec. 1714-1723**). This outline was not included in the Appendix filed by the Informant but is included in the record since it is a critical piece of evidence indicating the work that Mr. Fleming did and the nature of the lawsuit that Guerra wanted to pursue (**Rec. 1714-1723**). The primary thrust of this lawsuit was to demonstrate the inadequacies and oppressiveness of the Missouri Sexual Offender Program such that he should not be required to undergo that program as a condition to his early release. This, of course, was important to him at the time he drafted the federal civil rights complaint because he had been advised that he would not be released on conditional release unless he completed MOSOP.

In addition to arguing that he was not required to participate in the Sexual Offender Program, Mr. Guerra had asserted, and continued to assert, that he was "actually innocent" of any crime since his alleged victim was over 17 years of age and the Missouri statutory scheme at the time of his alleged offenses did not clearly state what the maximum age for a "child" was under Section 573.025. He also argued that the statute was repealed and replaced shortly after his conviction because it was known to be unconstitutional as an infringement of privacy and free speech. (Ex. 26, **Rec. 1899**, Ex. 8, **Rec. 1714-1723**.)

Mr. Guerra had been unsuccessful in convincing either the parole board, the Department of Corrections or the state or the federal courts of his position in the numerous post conviction motions he had filed during his incarceration. (*See* Ex.

36, **Rec. 2633-2653**.) (However, his arguments were later articulated in a Petition for Declaratory Judgment which was drafted and filed by Mr. Fleming on his behalf in Cole County in 2008 after he had been released since completion of a MOSOP program was made a condition of his continued release. (**App. 1292-1310**.)

C. Guerra's First Contact with Fleming

Mr. Guerra first contacted Mr. Fleming about assisting him with these various matters in June, 2005, and Mr. Fleming later agreed to visit with him at Farmington to discuss his lawsuit, as well as his post conviction motions for a flat fee of $1,500. However, Mr. Fleming made it clear at that time that he would not be able to represent him on any of these matters unless he could pay a substantial retainer in advance.

Mr. Guerra advised Mr. Fleming that he had been trying to collect a distribution from his father's estate in California for the prior three years, and if and when that came through he would be able to retain Mr. Fleming as his attorney of record.

Exhibits 2, 3, 4 and 5 (**App. 1323-1330**.) are Mr. Fleming's letters of June 11, November 30, December 30, 2005 and March 30, 2006 in which he discussed the possibility of representing Mr. Guerra and the fact that he could not begin to do so unless and until a substantial retainer was paid in advance. However, Mr.

Fleming was willing to visit with him and review his complaints and pleadings for a small flat retainer.

D. Flat Fee Received and Services Provided Prior to March, 2007

On May 3, 2006, Mr. Guerra wrote to tell Mr. Fleming that his brother was sending him $1,500 to be considered a flat fee retainer to review his documents and advise him but not to represent him as an attorney of record (a copy of his letter to Mr. Fleming documenting this was submitted as **Exhibit 5a**.)

Mr. Fleming did, in fact, receive a $1,500 retainer on May 9, 2006, and did visit with Mr. Guerra at Farmington two days later. Over the next year, Mr. Fleming continued to communicate with him and review the many documents he continued to send and to respond to his numerous phone calls without any further charge. He also submitted the letter dated May 18, 2006 to the Department of Corrections articulating Mr. Guerra's position, and, thereafter, during 2007 continued to inquire of Mr. Guerra's caseworkers as to the DOC's position on his eligibility for conditional release. (**App. 1672.**)

Mr. Fleming received and reviewed almost weekly communications from Mr. Guerra, including copies of complaints and legal briefs which he continued to file. (**App. 1349**.) The Disciplinary Panel was presented with the very large file of these internal complaints but elected not to review them. As indicated by the phone records provided by the Department of Corrections Mr. Guerra spoke with

Fleming or his office by phone on almost a daily basis but he was never charged a fee for any of these consultations. (**App. 1656-1665**.)

E. Guerra Estate Matters

During late 2006, however, Mr. Fleming also communicated with Mr. Guerra's brother and the attorney representing the estate of his late father to try to dislodge a distribution for Mr. Guerra from that estate. Despite his efforts as indicated by his letter of April 3, 2006 (**Exhibit 6**) Mr. Guerra had been unable to obtain any response from persons responsible for the estate. As indicated by his letters of April 3, 2006 and November 24, 2006, (**Exhibit 6 and 6a**) he did not trust his brother or niece to provide him accurate information on the estate. (**App. 1331-1332**.)

Contrary to Mr. Guerra's assertions that he did not ask Mr. Fleming to become involved in the estate matter, his letters of April 3 and November 24, 2006 specifically directed the attorney for the estate to contact Mr. Fleming, which he did and which commenced a series of conversations between Mr. Fleming and the estate attorney over the next year and a half. (**App. 1331-1332**.) These discussions are documented in the estate file which was submitted as a group **Exhibit 6b** at the hearing, but which the panel elected not to review. (**App. 130**.)

Guerra also acknowledged during his testimony that he expected Fleming to obtain money due him from his father's estate. (**App. 130**.) During his

conversations with the attorney for the estate, Mr. Fleming learned that Mr. Guerra's father, a California resident, had died in September, 2003, leaving a holographic will that was admitted to probate. The estimated value of the estate was about $1.4 million which included real estate, stock and an ongoing pharmacy business. His father had been in the process of a divorce, but his estranged wife claimed a spousal share of his estate. He had three children, one of whom was deceased and was survived by two adult children and one of whom, Mr. Guerra's brother Ron, had assigned his interest in the estate to Inheritance Funding Corporation.

Mr. Guerra's niece, Jennifer Guerra, had been appointed administrator by the California Probate Court in February, 2004 and had paid herself extraordinary fees and expenses which Mr. Guerra and his brother contested. Mr. Guerra also asserted that the estranged wife had stolen cash and other property from the estate. Additionally, he asserted that four rental properties had been mismanaged by the administrator such that they greatly depreciated in value. They also asserted that the estate had been undervalued and that some property had been sold without adequate consideration.

These various complications and disputes had held up Mr. Guerra's distribution more than three years and Mr. Guerra was upset and suspicious. He requested that Mr. Fleming do something to obtain his inheritance. Upon

establishing communication Mr. Fleming found the attorney for the estate, Dean Lloyd of Palo Alto, to be relatively cooperative and informative. So Mr. Fleming continued to communicate with him informally with fairly positive results. He also shared with Mr. Guerra all information he obtained on the estate, both written and oral, during his phone conversations with him, and later during his prison visits.

During July, 2007, Mr. Fleming continued to work on the various matters Mr. Guerra had pending, and he again focused on analyzing his father's estate to assure that he would receive his full distribution. He reviewed documents from the Kings County Court in California discussing the difficulties encountered with the estate and by mid-August, Mr. Fleming had an agreement with Mr. Lloyd that Mr. Guerra would receive about another $100,000 in addition to certain stock options. In fact, another $98,063.91 payment was received from the Guerra estate on October 23, 2007. (**App. 980**.) These efforts are reflected in the Guerra estate file and on Mr. Fleming's billing, although they were not specifically made part of the engagement agreement, nor did the Hearing Panel accept or review the estate file as a group **Exhibit 6b** (**App. 131**.) The chairman's reasoning was that since there was no allegation of professional misconduct regarding this matter the files were not relevant. This is the same reasoning that was applied to the files concerning the real estate purchase. (**App. 195**.) The chairman sustained Informant's

objections to both the estate file and the real estate file. (**App. 195**.) The substantial time Mr. Fleming devoted to these matters was, therefore, disregarded.

F. Efforts Regarding Conditional Release Date

Mr. Fleming also continued to communicate with officials at the Missouri Department of Corrections to try to clarify why Mr. Guerra was being threatened with the loss of his "conditional release date" which would make him eligible for release in June 2008 instead of his "maximum" time of November 2011, a difference of more than three years.

As indicated, Mr. Guerra had been told and thereafter was issued a memorandum recommending that he would not be released early unless he "successfully" completed the Missouri Sexual Offender Program (MOSOP) while in prison which he had failed to do because of disagreements with that program. Mr. Guerra did not believe he could emotionally complete that program which was the primary focus of his 179 page federal complaint which he had filed in the Public Safety Concepts case (**Ex. 26, Rec. 1899**.) (**Memorandum Ex. 23, Rec. 1770**.)

At the hearing Mr. Fleming explained the importance of the threat to extend Mr. Guerra's conditional release date:

> MR. FLEMING: Because they pertain to the same thing 25A this is the Adult Institutional Face Sheet that

> was issued to Mr. Guerra back in 2001. It listed his conditional release date as 11/5/08 and his maximum discharge date of 11/5/2011. In other words there's a three year difference between his getting out on conditional release and his serving his sentence. This is very important because as I discussed with Mr. Guerra the conditional release date is not a firm guaranty that an inmate is going to be released on his conditional release date and the reason for that is that the Department of Corrections can file a complaint with the parole board as is recommended in Exhibit 23 that his conditional release date be extended and up to this point conditional release dates were always extended if somebody had not completed MOSOP and this was really the beginning and this was what started the big conflict. (**App. 194**.)

During his testimony Mr. Guerra agreed with this analysis and acknowledged that if he had not been released on his conditional release date he would have had to serve three more years, and he understood that the Director of Sexual Offender Services was recommending that his conditional release date be extended because he had not completed MOSOP. (**App. 120**.) He also

acknowledged that he had raised objections to being treated as a sex offender in a lawsuit he had filed in St. Francois County and also in a federal action in the Western District of Missouri, but these efforts had failed. (**App. 122**.)

Mr. Fleming initially wrote a letter to the Chairman of the Parole Board on May 18, 2006 setting out Mr. Guerra's position (**App. 1672**.) and continued to discuss this issue with officials at the Department of Corrections during 2006 and 2007. Ultimately, in mid 2007 the DOC relented saying they would not oppose his release on his conditional release date which had then been advanced to March or April of 2008.

Resolution of this dispute during the summer of 2007 significantly changed the focus of Mr. Fleming's representation of Mr. Guerra since the primary purpose of the Public Safety Concepts lawsuit was to demonstrate why Guerra should not be required to participate in and complete that program in order to qualify for conditional release. Once that issue was resolved favorably to Guerra, Fleming wanted to assure that Guerra would do nothing to motivate the Department of Corrections to change its position and object to Mr. Guerra's then stated conditional release date based on Guerra's behavior at the prison. This behavior had been extremely disruptive as indicated by the literally hundreds of internal appeals and complaints he had filed during his

ten years of incarceration, and it would have been quite easy for the DOC to point to one or more of these as a basis for extending his conditional release date.

G. Hourly Fee Engagement

In late March, 2007, almost two years after Mr. Fleming was first contacted by Mr. Guerra, and after numerous phone conversations with attorneys for the Guerra estate, he received a phone call from attorney Lloyd advising him that he would soon be able to issue a check to Mr. Guerra for slightly over $215,000.

Mr. Fleming then began a serious review of everything Mr. Guerra had sent him and made plans to receive the check, deliver it to Mr. Guerra for his endorsement and to deposit it into the firm's IOLTA account.

Mr. Fleming then presented Mr. Guerra with a **standard engagement agreement, which he signed on March 30, 2007** (**Exhibit 7, App. 1333-1337**).

That agreement specified a billing rate at $250/hr and, contrary to Mr. Guerra's assertions, did not provide for any set fee or any maximum charge for any particular matter. It also specifically provided for fee dispute resolution through the Bar Association or binding arbitration, at the option of the law firm. (**App. 1337**.)

Mr. Fleming also told him that IOLTA trust accounts cannot pay interest on any money held.

A number of conversations took place by phone in which Mr. Fleming agreed to try to deposit a portion of the money held on behalf of Mr. Guerra in an interest bearing account but Mr. Fleming did not accomplish that despite his representations to Mr. Guerra to the contrary.

The engagement agreement also referenced the six areas on which it was believed Mr. Guerra needed representation, including inmate grievances, parole eligibility and post conviction motions. (**App. 1333-1337**.)

However, the engagement letter did not specifically reference two other matters which arose during the following six months: (a) The purchase of a fully furnished home and farm in Hickory County, which would allow Mr. Guerra a place to live upon his release (this purchase also included household furniture, a truck, tractor and boat), and (b) an additional distribution from his father's estate of about $100,000, which Mr. Guerra insisted was due him, but which he had not received.

Nevertheless, Mr. Fleming testified that it was necessary for him to provide services on both of those matters in order to facilitate Mr. Guerra's release since he needed a place to live and a means of employment or business which did not violate any rules pertaining to sexual offenders while he continued to contest the applications of those rules.

These two unanticipated matters were pursued at Mr. Guerra's request under the same terms and conditions set out in the engagement agreement, but Mr. Fleming did not have him execute a new or separate agreement as to that representation. Mr. Guerra knew and agreed that Mr. Fleming would charge him on an hourly basis for all work then being done at the same rate he was charging on the post conviction and civil rights matters.

However, Mr. Guerra remained interested in pursuing the 179 page federal civil rights complaint, which he had filed in the Eastern District of Missouri, so Mr. Fleming later prepared a ten page outline of that complaint (**Ex. 8, Rec. 1714-1723**), reviewed that with Mr. Guerra and began preparing a legal research file of the many cases Mr. Guerra had cited in his various pleadings. (**App. 1338-1347**.) As indicated, the outline which Fleming prepared was a critical piece of evidence at the hearing but was not included in the Appendix filed by the Informant. However, it does appear as Exhibit 8 in the record filed with this Court. The Court is respectfully urged to review that outline. (**Rec. 1714-1723**.)

On April 13, 2007, Mr. Fleming visited with Mr. Guerra, again at Bowling Green, and suggested that he try to consolidate his two federal cases into one (that being the Public Safety Concepts case) and that he not expend the time and expense to continue the appeal of the earlier case of Guerra v. Kempker which was then pending in the Eighth Circuit.

Mr. Fleming asserts that neither case would have much jury appeal or damage potential if they proceeded to trial and any victory would be one of principle and an embarrassment to the Department of Corrections. As indicated by the outline he prepared (**Ex. 8, Rec. 1714-1723**) the principle purpose of these lawsuits was to discredit the Missouri Sexual Offender Program (MOSOP) and to show why Mr. Guerra should not be required to complete that program in order to qualify for conditional release. Of course, once he learned that the DOC would not act to disqualify him for conditional release based on his refusal or inability to complete MOSOP, this purpose became much less significant. Mr. Fleming also asserts that it was his fear that pursuing those lawsuits, to the embarrassment of the Department of Corrections, would cause the DOC to reconsider its position on Mr. Guerra's conditional release. (**App. 197**.) Nevertheless, Mr. Fleming was not candid with Mr. Guerra during his phone conversations with him and Mr. Fleming has admitted that this lack of candor was a violation of professional ethics.

H. Preparation of Cole County Petition

At Mr. Guerra's insistance, Mr. Fleming later prepared an eighteen page Petition for Writ Habeas Corpus and Declaratory Judgment which was later filed in Cole County (**App. 1292**), but advised Mr. Guerra that it would probably be about a year before he could obtain relief, if any, on such a writ and that, in his opinion, he should wait until he was released, as then anticipated, before creating any waves

with the DOC or parole board. Since he would then be subject to conditional release restrictions he would still have standing to file a Habeas Corpus action to vacate his conviction, which Guerra fully understood. Consequently, a decision was made to delay filing that petition until Mr. Guerra had been released.

Thereafter, during May, 2007, and early June, Mr. Fleming devoted a very substantial amount of time to reviewing the background material relating to Mr. Guerra's civil rights complaints including the several hundred administrative complaints he had filed with the Department of Corrections during his entire period of incarceration. Mr. Fleming acknowledged receiving such additional material by his letter of June 4, 2007 (**Exhibit 10, App. 1349**), but again cautioned Mr. Guerra that his primary concern should be getting out of prison on conditional release since his civil matters would be much easier to handle if he were not incarcerated.

Specifically, Fleming stated in his June 4, 2007 letter to Mr. Guerra:

> The grievance appeals and responses will also be very helpful in putting together a history of what you have endured while you've been incarcerated. However, please understand that it is going to take me a while to get through all of this material so things may not happen as

> quickly as you would like, **but I am going to give top priority to convincing the Parole Board that you were incorrectly denied both eligibility for parole and good time so that hopefully you will be released within the next several months**. Obviously, your federal cases will be a lot easier for me to handle if you are here to help me. That is what I am aiming for. (**App. 1349**.) (Emphasis supplied.)

The next visit Mr. Fleming had with Mr. Guerra was on June 23, 2007, when Mr. Fleming again discussed with Mr. Guerra his suggestion that he simplify his civil rights complaints, including dismissing his appeal in the Kempker case, which alleged substantially the same things as the Safety Concepts case. Mr. Fleming had contacted the Attorney General and the other attorneys on the latter case, in writing, and had asked them to withhold any discovery actions on that case until he had an opportunity to sort things out. Mr. Fleming entered his appearance in the Kempker case and obtained an extension of the briefing deadline. After several more extensions that appeal was dismissed on October 26, 2007 and this dismissal was apparently without Mr. Guerra's consent.

However, in mid July, 2007, Mr. Guerra was quite anxious to proceed full steam ahead on all matters, including the filing of a Petition for Writ of Habeas

Corpus in Cole County on the issues raised in his prior pleadings. Consequently, Mr. Fleming drafted a Habeas Corpus Petition for filing in Cole County (**App. 1292**), which he reviewed with Mr. Guerra and with which Mr. Guerra acknowledged his satisfaction in a letter to Mr. Fleming. However, Mr. Fleming again cautioned that any aggressive legal moves might affect the Department of Corrections inclination to grant him the conditional release he sought and release him in March or April of 2008 instead of requiring that he serve time until his maximum release date of June or perhaps November 2011, three years beyond his conditional release date. (**App. 151**.)

During the summer of 2007 Mr. Fleming also encouraged Mr. Guerra to begin thinking about where he would live and what he would do when released and Mr. Guerra indicated he would contact a real estate agent to begin shopping for a home in rural Missouri.

I. Real Estate Purchase and Closing

By mid-October, Mr. Guerra informed Mr. Fleming that he had found a house and farm he wanted to purchase and asked that Mr. Fleming contact Rebecca Walker, a real estate agent in Hickory County, Missouri to conclude the transaction. Mr. Fleming promptly did that and obtained pictures of the property, a real estate contract and other documents from Ms. Walker.

However, there was some urgency to conclude the purchase of the real estate since it was exactly what Mr. Guerra wanted but the sellers were moving out of the country in early November and needed the funds from the sale to do so.

As anticipated, Mr. Fleming also received a check from the Guerra Estate for another $98,063.91 which together with the real estate contract, he delivered to Mr. Guerra for his review and signature on October 19, 2007. Mr. Fleming then deposited the Guerra estate check into Mr. Guerra's IOLTA account. (**App. 944**.)

As requested by Mr. Guerra, Mr. Fleming arranged with Ms. Walker to conduct a closing on the property in Hickory, at which Mr. Fleming would appear on behalf of Mr. Guerra. Mr. Fleming proposed that the property be conveyed by a contract for deed, so that the sellers would remain the record owners and would continue the insurance on the property until after Mr. Guerra was released from prison and could actually occupy the property, hopefully, in March 2008. This required some additional research on Mr. Fleming's behalf since he does not generally practice real estate law. It also required several discussions and an exchange of e-mails with the Title Company and real estate agent Walker who obtained the sellers' consent to such an arrangement. It also required a careful review of the proposed contract and the cross deeds and escrow agreements which had been faxed to Fleming by the Title Company. This exchange was documented in the real estate file which Mr. Fleming presented to the Hearing Panel, but the

chairman ruled that it was not relevant since Fleming was not charged with any misconduct regarding the real estate transactions. (**App. 195**.) The extensive work that Mr. Fleming did on the real estate closing was, therefore, disregarded.

Mr. Fleming then promptly obtained and sent to the title company closing agent two checks, one in the amount of $130,000 payable to Hickory Title Company and one to the sellers of the property, Richard and Sparta Fraser for the furniture in the house in the amount of $1,600. These checks were sent on October 24, 2007, prior to the closing, so that they could be deposited and cleared by the closing date. (**App. 944**.) Other purchases and closing costs, such as the truck, boat and accrued taxes Mr. Fleming agreed to pay himself and obtain reimbursement when he returned from the closing.

However, the closing was further complicated by the title company's refusal to do the closing with a power of attorney and insistence on notarized documents signed by Mr. Guerra who, of course, remained confined at Bowling Green. This demand required that Mr. Fleming engage a notary public who would go with him to the Bowling Green prison to meet with Mr. Guerra and witness his signatures on all closing documents.

This was accomplished on October 31, 2007, but not without considerable difficulty since special permission had to be obtained for the notary to enter the prison and since once in the prison, the guards refused to release Mr. Guerra from

handcuffs behind his back. They claimed he had been "disruptive" and presented a threat to the staff and others. (**App. 136**.)

Nevertheless, the signing and notarizing was accomplished without releasing Mr. Guerra's hands, as his illegible signatures on the documents attest. The notary public, a retired IRS Special Agent, was paid $367.50 from the trust account for time travel and services on this matter. (**App. 944**.)

Two days later, on November 2, 2007, Mr. Fleming set aside other matters on his calendar and traveled to Hickory County, which is about 30 miles west of Camdenton, met with real estate agent Rebecca Walker and the sellers of the property, inspected the property to be sold as well as the furniture, truck and boat. He then proceeded to the title company to complete the closing.

The closing was further complicated by the fact that Mr. Guerra did not want the deed to be recorded until he had been released from prison. Accordingly, it was necessary for Mr. Fleming to pay the real estate taxes and insurance as well as payments for several personal properties himself and to be reimbursed from the trust account. He was reimbursed $640.41 by check dated October 31, 2007. (**App. 944**.)

Another problem arose with the real estate closing when the agent raised concerns about Guerra being on the sex offender list and Guerra wanted to "sue them for discrimination." However, the chairman of the panel refused to receive

any testimony or other evidence as to how this issue was resolved saying it was not pertinent to the allegations before the panel. The chairman stated, "we're not talking about the house anymore Mr. Fleming. We're not talking about that transaction or transactions relating to the sale of the house." (**App. 142**.) This ruling was consistent with the chairman's previous ruling that no evidence relating to Fleming's services regarding the Guerra estate or the purchase of house and farm would be considered because the Relator had stipulated that no misconduct occurred regarding those matters. Obviously, this ruling prevented Mr. Fleming from producing documents or testifying about the very substantial time he spent on the two very significant matters – the Guerra estate distribution and Guerra's purchase of a house, farm, furniture and equipment in Hickory, Missouri including his trip to that location to inspect the property and conclude the purchase.

J. Other Non-Fee Disbursements

Other non-fee disbursements were made from the trust account after the real estate closing at Mr. Guerra's request. These included payments to Rebecca Walker ($800.00) and William Mason ($500.00) for maintenance of the property, and a $500 payment to Ronald Guerra, the client's brother for attorney's fees in California and a $750 payment to attorney Michael Shipley for services to William Earnst, a friend of Mr. Guerra. (**App. 945**.)

Payments of $18,000 and $5,000 had previously been made from the trust account, at Mr. Guerra's request, to his brother, Ronald Guerra, to reimburse him for his payments on behalf of Mr. Guerra during his incarceration and $5,000.00 to attorney Jeffrey Anderson. The Anderson payment was returned after six months and re-deposited to the trust account. All of these payments were documented in letters to Mr. Guerra. (**App. 944-945**.)

All trust account receipts and disbursements were set out in the schedule provided to Mr. Guerra, as are a detailed listing of the time Mr. Fleming devoted to the various Guerra matters. (**App. 944-945**.) (**Exhibit 11**.) The request for payment to Mr. Anderson was produced as **Exhibit 11a**.

At Mr. Guerra's request, Mr. Fleming did not send Mr. Guerra statements as these fees, charges and disbursements were incurred since Mr. Guerra did not want anyone at the prison to know what money he had or how he was spending or disbursing it. Consequently, no bills were generated or sent. (**App. 133**.)

However, on January 13, 2008, Mr. Fleming sent Mr. Guerra a letter with which he enclosed the trust transaction journal indicating all deposits, withdrawals and payments from Guerra's IOLTA trust account. (**App. 135**.)

K. Guerra's Demand for $100,000 from the Account

Shortly after the real estate closing, Mr. Guerra informed Mr. Fleming that he expected to have at least $100,000 left in his trust account to start a retail

business when he was released and did not want Mr. Fleming to spend any more of his money on legal services. (**App. 143**.) Mr. Fleming agreed with him that Guerra would be best served by the funds remaining in the IOLTA account and by preserving those funds for Mr. Guerra's use after he was released. (**App. 144**.)

Accordingly, Mr. Fleming stopped withdrawing money from the trust account for his services after November 2007, and told Mr. Guerra he would put things on hold to the extent he could until after he was released, or until he retained new counsel.

Mr. Fleming told him that he would be happy to remit the balance in his trust account to another attorney or to anyone else as he may direct. Of course at that time, Mr. Guerra was not in a position to receive any remittance himself since he was still incarcerated.

However, Mr. Fleming effectively stopped working on the litigation matters after November 2007 pending Guerra's release or retention of new counsel since he had assured Mr. Guerra that he would have about $100,000 left in his trust account when he was released in order to support himself and start his own business. (**App. 143**.) At the hearing Mr. Guerra acknowledged that he insisted that this amount of money be available to him when he was released. (**App. 144**.) **It is, therefore, important to note that Mr. Guerra paid no fees to Fleming for any services after November 2007 which services included his visit to Mr.**

Guerra at the Bowling Green prison on March 14, 2008 before he was released to assure that his release was in place. He also visited Mr. Guerra in Camdenton the day after he was released to deliver his files and records of the real estate transaction to him. He visited with him in Jefferson City on May 30, 2008 when he filed the Writ of Habeas Corpus in Cole County. He also appeared with Mr. Guerra when his deposition was taken at the Attorney General's Office on the Public Safety Concepts case on September 16, 2008 (Ex. 31, App. 142), although at the hearing Guerra said he had no recollection of appearing for a deposition at the Attorney General's Office. (App. 142.) Mr. Guerra has paid nothing for any of these services during 2008, which are set out in greater detail below and which are itemized on the bottom half of Appendix p. 971.

On January 31, 2008, the trust account check in the amount of $5,000, which had been written to attorney Jeffrey Anderson in August, 2007, was returned. Mr. Fleming immediately cancelled that check, credited Mr. Guerra with an additional $5,000 and wrote him a letter (**Exhibit 14**) advising him that he now had a balance of $106,131.30, which would be transferred to him or anyone else he may designate.

As indicated, Mr. Fleming last visited Mr. Guerra in prison on March 14, 2008, to assure that his anticipated release date of March 17, 2008, was still in

place since he had been in disciplinary lockdown for long periods over the previous several months and the infractions resulting in these lockdowns could be used by the DOC to prevent his conditional release. He also needed to assure his transportation from Bowling Green to his new home in Hickory.

Mr. Guerra was released on March 17, 2008 and Mr. Fleming met with him in Camdenton the next day. Mr. Fleming delivered a number of files and documents to him together with cash of $1,500 and obtained a receipt (**Ex. 15, Rec. 1661**). Again, Mr. Fleming did not charge Mr. Guerra for this trip to Camdenton which consumed an entire day. At that time, Mr. Fleming urged Mr. Guerra to find an attorney in the Camden County or Hickory County area so that he could make an orderly transfer of his still pending legal matters.

L. Post Release Problems with Probation and Pending Litigation

Additionally, shortly after he was released, Mr. Guerra called with yet another rather urgent problem in that his parole officer has insisted that as requirement of his conditional release he actively participate in a Missouri Sexual Offender Program (MOSOP) in Camdenton and that he register as a sex offender with the Sheriff of Hickory County. He was told that if he did not immediately do both of these things, his conditional release would be terminated and he would be returned to prison. This, of course, raised the same issue that Mr. Fleming thought had been resolved with the Department of Corrections while Mr. Guerra was

incarcerated, and given Mr. Guerra's extreme agitation over this Mr. Fleming feared that he would cause a disruption that would put him back in prison.

Consequently, hoping to resolve the problem informally, Mr. Fleming wrote a very lengthy letter to both the parole officer and the MOSOP director extensively outlining the facts and law relative to this issue, **Exhibit 17**. (**App. 1315**.) Mr. Fleming followed up that letter with another letter to the parole officer the next day contesting the additional requirement that Mr. Guerra subject himself to a polygraph examination as part of the MOSOP program. (**Exhibit 18, App. 1323.**)

Copies of both of these letters were sent to Mr. Guerra together with a copy of the leading U.S. Supreme Court case on polygraph requirements for parolees (which was not favorable to him) (**Exhibit 19, App. 1390**). Again, there were no attorney's fees charged for these letters or the research which proceeded them.

When these letters proved to have no effect, Mr. Guerra became even more upset and demanded that Mr. Fleming take action to resolve the matter in the Cole County Circuit Court since they had done the necessary research and necessary preparation for such an action while Guerra was incarcerated.

Mr. Fleming agreed to meet Mr. Guerra at the Cole County Courthouse in Jefferson City on May 30, 2008 where they had the Petition which Mr. Fleming had prepared, signed, notarized and filed. (**App. 1292**.) Since Mr. Guerra had brought no money with him to Jefferson City, Mr. Fleming even advanced the

filing fee and sheriff's fees for this new lawsuit and immediately delivered a courtesy copy of the Petition to the Attorney General's office. Again, Mr. Guerra was not charged a fee for this trip nor did he reimburse the filing fee or sheriff's fees.

In the meantime, the attorney general and other attorneys defending the federal civil rights case (Public Safety Concepts) insisted on moving forward with discovery now that Mr. Guerra was no longer incarcerated. Accordingly, Mr. Guerra's deposition was scheduled at the Attorney General's office for September 16, 2008 before Mr. Fleming learned that Mr. Guerra had submitted his complaint to the OCDC. Nevertheless, Mr. Fleming appeared with Mr. Guerra at that deposition knowing full well that he would not be compensated for any services to Mr. Guerra after November 2007, including his trip to Camdenton and several trips to Jefferson City.

M. Termination of Representation Effective November 8, 2008 and Summary Judgment Entered Six Months Later

On October 6, 2008 Mr. Fleming wrote Guerra a letter referenced "Deposition and Termination of Representation" with which he enclosed a copy of Guerra's September 16, 2008 deposition with instructions as to how to handle the "errata" sheet, together with the court reporter's bill of $274.90. The letter stated specifically:

> Secondly, I have to advise you that, in accordance with the terms of the engagement agreement you signed on March 30, 2007 (page 4), **I am going to move to withdraw as your attorney on all pending matters effective November 6, 2008 (thirty-one (31) days from the date of this letter)**. I am advised that your complaint against me creates an automatic conflict of interest such that I can no longer represent you, so I really have no choice about this.
>
> **I urge you to promptly engage a successor attorney in Missouri, as you have done in California, and advise me of the name and address of that attorney so that I can arrange for an orderly transition of your files. (Ex. 20, Rec. 1670.)**

Another copy of that notification letter was sent to Guerra on October 10, 2008 with a copy of both the first and second letters going to Marc Lapp, the OCDC's special representative. Guerra acknowledged that he had received these letters and had been advised by Fleming previously that he should get another lawyer. (**App. 146**.)

On November 3, 2008, a month **after** Mr. Fleming notified Mr. Guerra of his intent to withdraw several defendants in the Public Safety Concepts case filed motions for summary judgment asserting, inter alia, the frivolousness of his allegations. The memorandum in support of those motions argued, in part, as follows:

> Plaintiff filed this suit against the above-named Defendants, alleging that they violated his rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments, in addition to alleging claims of negligence, assault and battery, defective product liability, psychological malpractice, and medical negligence, all of which arose from his participation in, and subsequent termination from, MOSOP. This Court previously ruled that Plaintiff's claims under 42 U.S.C. §1997e(a), 42 U.S.C. §1985(3), and 42 U.S.C. § 1981, his claim of a liberty interest in parole, and his ADA claim, in addition to his common law product liability claim (alleging MOSOP constituted an unreasonably dangerous product), were all legally frivolous and failed to state a claim on which relief may be granted. This

Court also ruled that MOSOP is not an unconstitutional program. (Memo filed in Public Safety Concepts case, Document 153, Filed 11/3/08).

These motions and memoranda were forwarded on to Guerra, who apparently had not retained substitute counsel and did not respond.

The lawsuit was eventually dismissed on April 14, 2009, **six months after Fleming had notified Guerra that he was terminating his representation "on all pending matters effective November 6, 2008."** (*See* docket entries, **App. 940**.) Guerra obviously had sufficient time after he received the October 6, 2008 notification from Fleming to obtain substitute counsel, but simply refused to do so.

N. Services Not Billed or Paid

Both before and after Mr. Guerra signed an engagement letter, Mr. Fleming provided him time and services well beyond that for which he had paid, and Mr. Fleming has made no attempt to collect further fees from Mr. Guerra.

Mr. Fleming visited with Mr. Guerra, communicated with him and assisted him for almost two years without asking for any fee beyond a $1,500 flat retainer while he attempted to work out the problems Mr. Guerra seemed to constantly have with the Department of Corrections. During that time, and during 2007 after Mr. Guerra signed the engagement letter, Mr. Fleming had several conversations with caseworkers and was able to help convince the DOC consistent with the letter

he had written on May 18, 2006, that Mr. Guerra should not be denied early release because he had been unable (or unwilling) to successfully complete a MOSOP program. He had also been able to dislodge the first distribution from his father's estate which had been held up for several years.

Thereafter, a good deal of Mr. Fleming's time was spent assuring that Mr. Guerra would receive a second distribution of almost $100,000 from that estate and also assuring that his real estate closing occurred despite the very difficult circumstances created by his incarceration. However, as indicated, the chairman of the panel sustained objections of the Informant and refused to receive as exhibits Fleming's files relating to the Guerra probate estate or his files relating to the real estate transaction. (**App. 195**.)

When Mr. Fleming did receive Mr. Guerra's first estate distribution and began charging him an hourly rate, he did not charge him for the almost daily phone calls from Mr. Guerra. He did not charge him mileage or travel expenses for the numerous trips he made to Bowling Green. He also absorbed almost all of postage, copying and FedEx charges which he incurred in connection with this matter, and which at times were quite substantial (although Westlaw charges totaling $773.39 were made directly to the law firm).

As noted, Mr. Fleming stopped deducting his attorney's fees from Mr. Guerra's trust account after November, 2007 based on his assurance to Mr. Guerra

that he would have $100,000 after attorney's fees, and payments for the house, farm and equipment had been made, as well as reimbursements to others who had loaned Guerra money.

A review of the trust account transactions **(Ex. 11, Rec. 1727)** indicates Mr. Fleming was paid a total of $44,800 from the trust account of which $2500 was used to provide Mr. Guerra a cashier check ($1,000) and cash ($1,500) with which he could pay his living expenses before he could obtain a birth certificate and/or driver's license after he had been released. These funds were delivered to Mr. Guerra in Camdenton the day after Guerra was released. (**App. 944-945**.)

Mr. Fleming was reimbursed costs which he incurred on his behalf at the real estate closing totaling $650. **The total attorney's fees paid by Mr. Guerra were, therefore, $41,650 in addition to the initial flat retainer $1,500.**

O. <u>Fleming's Explanations</u>

Mr. Fleming asserts that, although he made certain misrepresentations to Mr. Guerra, as are documented by recorded phone calls, his intent was to act in the best interest of Mr. Guerra despite Mr. Guerra's protestations.

Mr. Fleming asserts, and Mr. Guerra confirms, that **Mr. Guerra was the first person held as a sexual offender who was released without completing the MOSOP program**. (**App. 151**.) He further asserts that in his judgment there was no possibility of Mr. Guerra being released on regular parole and that his only hope

of being released before his maximum discharge date was to qualify for conditional release. (**App. 197**.) He also asserts that in his judgment until Mr. Guerra was actually released it would not have been in Mr. Guerra's interest to continue to aggressively pursue the Civil Rights litigation which Mr. Guerra had initiated with the objective of embarrassing the DOC and MOSOP since the DOC could prevent Mr. Guerra from being released on his conditional release date by merely asserting that Mr. Guerra had not complied with all rules and regulations of the DOC or that he had not completed MOSOP. (**App. 198**.)

While Mr. Fleming has acknowledged that his misrepresentations to Mr. Guerra about the status of his litigation were violations of professional standards, he asserts that he achieved four very significant objectives for Mr. Guerra.

(1) **He obtained his conditional release in March, 2008 rather than Mr. Guerra being required to serve the remaining three years of his sentence until 2011**, and he did this despite the fact that previously no inmate serving a sentence for a sex offense had been granted conditional release without satisfactorily completing MOSOP, and despite Mr. Guerra's long record of infractions while he was incarcerated.

(2) **He was able to dislodge and obtain for Mr. Guerra over $315,000 from his father's estate** which Mr. Guerra had not been able to obtain during the

three years prior to engaging Mr. Fleming, including a second distribution of $98,063.91 in late October 2007.

(3) **He was able to purchase for Mr. Guerra a house, farm, truck and household furnishings so that he could immediately set up a home upon his release** and was able to do this in a "Contract for Deed" transaction so that there would be no public record of his ownership of these assets prior to his release from prison.

(4) **He was able to provide for Mr. Guerra about $100,000 to start a business immediately upon his release in March, 2008.**

At the hearing Mr. Fleming summarized the situation as follows:

> MR. FLEMING: In this case had we made more of a rumble on these lawsuits which accuse various members of the Department of Corrections on various untoward acts all we would have done was to aggravate the Department of Corrections.
>
> They certainly would have been aggravated when it came time for them to decide whether to ask that his conditional release date be extended and I am, I'm frankly very surprised that he snuck in under the wire on that. Not only because they, for the first time, did not

require him to complete MOSOP but also because as you'd see if you had reviewed the grievances he filed he was constantly in trouble, always in trouble. He was in solitary confinement for much of his term at the prison. Any one of those things that resulted in his being disciplined could have resulted in his conditional release date being extended if the Department of Corrections chose to do so.

I did not think it was in his interest to make a big deal out of his treatment in MOSOP. I was not candid with him and I will admit I probably said some things I shouldn't have said but my interest was his interest. Once it became apparent that the Parole Board, or not the parole board, but the Department of Corrections was not going to petition to extend his conditional release date then my focus changed. My focus changed on what would be good for him and what would be good for him is number one that he be released when he was scheduled to be released on conditional release and number two, that he have some grounding. He had been in prison for

more than 10 years, he had no grounding whatsoever, his family was out in California.

I thought it was very much in his interest that he have a farm and a house and an ability to start his new life. When I went to visit with the real estate lady and the prior owners of the property I took special care in noting that he would need friends in that area to help him and they said that they would help, they would help to try to get him reacclimated, they knew that he was in prison. And I thought that was a good thing to do.

***

I did that for Mr. Guerra because I honestly believed that what he needed was a fresh start. I probably handled his case wrong, I understand that, but ultimately he came out okay and I have to say I feel good about that. Mr. Guerra I don't think would have been satisfied with anything even if we had, even if we had taken the Public Safety Concepts case and done the whole routine of interrogatories, depositions and all that sort of stuff. Number one he wouldn't have been happy with what was

going on, number two this wasn't a case for a monetary judgment, I mean can you imagine trying a case before a jury with a plaintiff who has done 15 years in prison for videotaping 17 year old boys masturbating? That doesn't carry a lot of jury sympathy. (**App. 197, 198, Vol. 1**.)

3. FACTS REGARDING LOUIS YOUNGER

Since Mr. Younger was not produced as a witness at the hearing and since there was very little testimony or evidence presented as to the allegations of his complaint the following findings are based on the depositions of Mr. Younger, the deposition of Mr. Fleming and the matters set out and exhibits attached to the responses Mr. Fleming submitted to the OCDC with his letters of February 4, 2011 and March 7, 2011 which are contained in the OCDC files submitted to this panel.

In 1996 Mr. Younger was found guilty, after a two and a half week trial, of conspiracy to distribute methamphetamine and was sentenced to life imprisonment by Federal Judge Carol Jackson based primarily on her findings as to the very large quantities of drugs involved (10 to 30 kilograms). Mr. Fleming represented Mr. Younger at that trial as an assistant federal public defender.

A principal point of contention at that trial was the testimony of Government witness, Stephanie Nickell, that in 1995 she had witnessed Mr. Younger and a co-defendant shoot and then decapitate Danny Craig, a drug customer and possible witness. However, neither Mr. Craig nor his body had been found at the time of Mr. Younger's trial. This background is summarized in a 27 page draft of a post conviction pleading prepared and researched by Fleming during 2005, prior to his visit at the U.S. prison in Terre Haute, Indiana on November 18, 2005 which is **attached hereto as Appendix A**.

Although state murder charges had been dismissed against Mr. Younger since Craig's body had not been found, Ms. Nickell's testimony was shocking and devastating at his federal drug conspiracy trial and Mr. Younger continued to assert that while he may have been a drug dealer, he was not a murderer and had no idea what happened to Danny Craig. He was of course, concerned, that if and when Mr. Craig's body was found he would again be charged with the murder, based on what Ms. Nickell had reported. He also contended that her testimony was false in other respects including the drug quantities involved and descriptions of his violent behavior (Younger Depo, App. 1053, 1054), although there was substantial other testimony and evidence at his trial to support the drug quantities and violence allegations.

The shocking testimony at Younger's trial is summarized in the Statement of Facts submitted by the Government in the direct appeal and the opinion of the Eighth Circuit Court of Appeals which related facts indicating that the drug conspiracy involved 10 to 30 kilograms of methamphetamine which drug quantity the Court applied to the federal sentencing guidelines to impose life sentences on Younger and his co-defendant Brian Dierling (*see* **Ex. 5-6, Rec. 2495-2529**). It is important to note that these sentences were based on **drug quantity** and not on the alleged murder of Mr. Craig. Although state murder charges were filed against Younger and Dierling, they were later dismissed in the absence of Craig's body.

However, what many believed to be bones that were the remains of Danny Craig were found in March, 2000, four years after Mr. Younger's trial, at a location far distant from where Ms. Nickell's had placed the murder and with the head apparently still connected to the body. Mr. Younger and his sister Kathleen Jardine, thereafter, embarked on a crusade to prove that Stephanie Nickell had lied at his trial and to attempt to obtain a new trial or sentencing hearing for Mr. Younger.

Through attorney Will Bunch he had pursued a post conviction motion during 1999 and 2000 in both the District Court (4:99cv705CEJ) and the Court of Appeals, but this effort was not successful as indicated by the memorandum and order issued by Judge Jackson on April 18, 2002. (**App. 1402**.) The Court of Appeals denied him any relief in August 2002. Ms. Jardine, in the meantime, continued to collect information on the probable discovery of Danny Craig's remains and the various stories surrounding his disappearance.

Ms. Jardine then contacted Mr. Fleming in 2004, since he had represented Mr. Younger at his trial and had been familiar with the facts of the case, although the case had been tried eight years previously. Mr. Fleming told Ms. Jardine that he would be pleased to do what he could, but that what she really needed was an experienced investigator and he recommended that she hire Joseph Bramer, a retired federal special agent who was assisted by William Runge, another retired

federal agent. Ms. Jardine hired Mr. Bramer in November, 2004 and during the following months Mr. Fleming spent 30 to 40 hours reviewing many reports and transcripts produced before and during Mr. Young's two and a half week trial and worked very closely with Mr. Bramer in developing the strategy for his investigation and in consulting with him as the investigation progressed.

Mr. Fleming submitted to the OCDC the records he obtained from Mr. Bramer since at the time he was advised of Mr. Younger's complaint he had already returned his files to Mr. Younger via a Mr. Watson, who Mr. Younger had authorized to pick up the files at Mr. Fleming's office. **Exhibits 5 and 6 (Rec. 2495-2529)** will indicate the intensity of the trial and the complexity of the record which Mr. Fleming was required to review. These were submitted to the panel and appear in the record as **Exhibit 10** (**Rec. 2570-2632**).

The Bramer records which Mr. Fleming submitted to the OCDC by letter of March 7, 2011 included a schedule Mr. Fleming and Mr. Bramer developed as to the participants in the case and possible interviews to be conducted, outlines of the questions to be asked these witnesses (**Ex. 9, Rec. 2568**), and reports of interviews of a number of the witnesses (**Ex. 8, 10, 11, 12, 13, 14, Rec. 2559-2632**). These witnesses included Stephanie Nickell (whose married name was then March), law enforcement officers and the prosecuting attorney in Putnam County Missouri and Cory Lewis who was there living in Houston, Texas (Ex. 8). Also included was a

statement of the time Mr. Bramer devoted to particular segments of the investigation, including multiple conferences with Mr. Fleming (**Ex. 15, Rec. 2601**). It was necessary for Mr. Fleming to obtain and review several hundred pages of police reports and investigative reports from the Public Defender's Office as well as the trial transcripts and information regarding discovery of the body as a prelude to his conferences with Mr. Bramer.

Mr. Fleming states that his objective was to have Mr. Bramer persuade Stephanie Nickell, once they found her, to admit that she lied at the trial and to obtain a statement from her to that effect. Despite two interviews, the last being in February 2005, Mr. Bramer was not successful in obtaining such a statement, but did obtain a great deal of information from other witnesses tending to show that her statements at trial were drug induced falsehoods, as well as her own admissions to her drug use. (*See* **Ex 12, Rec. 2584**.) Mr. Bramer wrote to Mr. Younger on February 6, 2005 advising him of the progress of the investigation (Ex. 16), and Mr. Fleming had periodic phone conferences with both Mr. Younger and his sister Kathleen.

The results of Mr. Bramer's investigation were shared with the sheriff and prosecutor in Putnam County, Missouri, to forestall any inclination to charge Mr. Younger with the Danny Craig homicide, which Mr. Younger admitted he was

"terrified" would occur after Craig's body was found. (Younger depo, **App. 1053, 1054**.)

Mr. Fleming states that once the investigation had been completed and no sufficiently important "new evidence" had been found his task was to find a legal avenue to set aside the life sentence in order to present the material he did have to the court. That involved extensively researching the law that had developed based on the Supreme Court's then very recent landmark opinion in **Blakely v. Washington**, 124 S.Ct. 2531 (2004) as outlined in the memo "Application" which he had prepared in draft form and which he attached to his February 4, 2011 letter. (**Ex. 7, Rec. 2530-2558**.) The holding and ramifications of the **Blakely** decision will be discussed in the argument portion of this brief, **but the 27 page "Application" researched and prepared by Fleming was submitted to the panel as Exhibit 7 and is attached to this brief as Appendix A.**

However, the only way back into court would have been a retroactive application of the **Blakely** decision which pertained to sentencing procedures and required that sentencing factors, including drug quantity, be pled in the indictment and proven to the jury beyond a reasonable doubt which had not been done in Younger's case. However, despite constant review of recent decisions during the first nine months of 2005 no appellate decisions could be found which would support the application of the **Blakely** decision retroactively and Mr. Fleming

made arrangements to visit with Younger at prison to discuss this state of affairs with him.

It is undisputed that Mr. Fleming traveled to the U.S. Prison in Terre Haute, Indiana on November 18, 2005 to visit with Mr. Younger and discuss these prospects with him. (Younger depo, **App. 1041**.)

Mr. Fleming asserts that during the months prior to that visit he researched and prepared the 28 page draft of a pleading entitled "Application for Order Allowing Petitioner Movant to File a Successive §2255 Motion" (**Ex. 7, Rec. 2530-2558**) and that he discussed this draft "Application" with Mr. Younger during that visit, but said that it should not be filed until there was stronger case authority for applying the **Blakely** decision retroactively (Younger depo, **App. 1066**). In his deposition Mr. Younger agrees that Mr. Fleming visited with him and told him he was not prepared to file anything yet, but denies that he was shown a copy of the possible pleading Mr. Fleming had drafted. He also stated that Mr. Fleming told him that if he wanted to file a pleading **pro se** he could do so although he recommended against that. Nevertheless, Mr. Younger filed a **pro se** Petition on his own in the Court of Appeals on January 24, 2006.

Mr. Fleming states that he was unaware that Mr. Younger had planned to do that since he believed that such a petition was then premature, but Mr. Younger apparently had become impatient and decided to move on his own. The

Government responded to that Petition on February 24, 2006 and the Court denied the Petition on April 20, 2006 (Court of Appeals Case No. 06-1299) (Ex. 15). Mr. Fleming states that at that point there was nowhere to go with the **Blakely** argument, at least not until the courts determined to apply that decision retroactively, which he says was and is still a possibility. This will be discussed in the argument portion of this brief.

Mr. Fleming asserts that the time devoted to review, investigation, research and writing for Mr. Younger consumed well over 80 hours of his time during 2004 and 2005, (although he was not billing Mr. Younger or his sister on an hourly basis). This time included reviewing the trial transcripts and reports and developing a plan for the investigation, closely working with Mr. Bramer during his investigation and research and preparation of the "Application" which he submitted to the OCDC as Exhibit 7. Of course, it also included a day and a half of time to travel to Terre Haute to visit with Mr. Younger, a visit which Mr. Younger does not dispute.

Mr. Fleming acknowledges that he did not visit with Mr. Younger after he was transferred to Greenville although he spoke with him occasionally when Younger would call. He was unable to give him the positive information he wanted since no appellate opinion applied **Blakely** retroactively. Such visits would have probably been helpful from a client relations standpoint, but there was

little or nothing Mr. Fleming could do for Mr. Younger from a legal standpoint, once the courts had denied his **pro se** motion, although Mr. Fleming continued to follow the constant stream of court decisions addressing **Blakely v. Washington**, in the hope that an avenue would open to allow Mr. Younger access to the Court to contest his sentence. However, beginning in January 2010 Mr. Younger told Mr. Fleming that he no longer wanted to visit with him, but he did want his files returned and he later wrote Mr. Fleming directing him to turn the files over to his friend Mr. Watson, which Mr. Fleming immediately did.

After Mr. Fleming delivered Mr. Younger's files to Mr. Watson, Mr. Younger called Mr. Fleming to say that he wanted at least a partial refund of what he had paid. Both Mr. Younger and Mr. Fleming have agreed to submit the issue of a refund to a fee dispute committee and have asked for direction of the OCDC as to how to do this in light of the pending disciplinary complaint, but the OCDC has not responded. (**App. 1652-53**.)

Mr. Fleming states that the reasons he did not immediately ship Mr. Younger's voluminous files to him at the Greeville Prison are set out in his January 15, 2010 letter to Mr. Younger (Ex. 1), wherein he proposed copying and sending him whatever portions of the files he needed and said that he would deliver all of the files to someone he would designate. Mr. Fleming waited for further instructions from Mr. Younger and had several conversations with him again

expressing his concerns about shipping such a large volume of very important and sensitive documents to a prison. Mr. Fleming delivered the files to Mr. Watson shortly after he received Mr. Younger's June 11, 2010 letter directing him to do so and immediately after he was contacted by Mr. Watson, who was the first and only "Designee" named by Mr. Younger. He confirmed by letter of June 24, 2010 that he had delivered the files that day (Ex. 3). He asserts that he is confident that he handled the return of Mr. Younger's files in an appropriate fashion given the irreplaceable nature of many of these documents, the sheer volume of the documents he wanted returned, and the unavailability and/or unreliability of storage facilities at prisons, as he has learned over 40 years of criminal practice. His concern was solely with the integrity of the files and the interest of Mr. Younger and he certainly did not intend to cause Mr. Younger any distress about this.

In his deposition Mr. Younger testified that **he did not know of anything that Mr. Fleming did or did not do which would have changed the circumstances he is now confronting.** (Younger depo, **App. 1057**.) He acknowledged that Mr. Fleming did not tell him that he would file the pleading which he had prepared in rough draft form or any other pleading until some court had applied the decision in **Blakely v. Washington**, **supra**, retroactive. That would allow him to assert that the facts that the Court found to impose a life

sentence in his criminal case had not been pled in the indictment or presented to the jury, as is now the law which is applied in cases tried after the **Blakely** decision. Mr. Younger agrees with this analysis. (Younger depo, **App. 1066, 1070**.)

Most importantly, Mr. Younger testified that **he regards his dispute with Mr. Fleming to be over the fee charged and his demand for a partial refund**, and Mr. Fleming states, as he did in his letter of August 22, 2011 to the OCDC, that he also regards it as a fee dispute and is willing to abide by whatever decision a fee dispute committee may make. (Younger depo, **App. 1060, 1068, 1069**.)

Obviously, the OCDC preferred to prosecute this matter as a disciplinary matter rather than allowing disposition by a fee dispute committee.

4. FACTS REGARDING MICHAEL McVEIGH

It is undisputed that Complainant Michael McVeigh filed a lawsuit against Respondent in the Circuit Court for the City of St. Louis, alleging substantially the same allegations he made in his disciplinary complaint. (Case No. 1022-AC03765)

That lawsuit was fully tried before Honorable Theresa Counts Burke. Both Complainant McVeigh and Respondent Fleming testified at that trial and, on July 17, 2012 the Court issued its Judgment and Order in which the Court made **17 findings of fact** and ultimately found that

> 16. After agreeing to represent plaintiff in the Circuit Court litigation Defendant expended 20.7 hours of time.
>
> 17. The value of time expended by Defendant in representing Plaintiff after the agreement was reached was $4,140.00.

Conclusions of Law

> "Defendant (Fleming) is entitled to retain the sum of $4,140.00 of the $5,000 deposited by Plaintiff (McVeigh) for legal fees. Defendant (Fleming) is not entitled to recover monies for the 10.2 hours Defendant expended prior to acceptance of representation on March

> 1, 2010. Therefore, Defendant is required to return to the Plaintiff the sum of $860.00 from the attorney fee deposit made." (**App. 1666-1671**.)

The Court, however, did not dispute that this 10.2 hours was in fact expended on McVeigh's behalf.

It is respectfully suggested that the findings of fact entered by the Circuit Court should have been incorporated into the Findings of Fact to be issued by the Disciplinary Panel and for that purpose a copy of the Court's Order and Judgment is submitted herewith as **Exhibit F** and appears at **page 1666** of the **Appendix**.

Respondent Fleming stated at the hearing that he has been and remains ready and willing to refund $860.00, plus statutory interest, to McVeigh, but that McVeigh has not been willing to accept this payment in settlement of his claim but instead filed an appeal of the Court's decision.

As to the return of the single file of hard copy documents provided by McVeigh to Mr. Fleming, the Circuit Court ordered the following resolution:

> With regard to the hard copy documents originally supplied to Defendant by Plaintiff, the Court orders as follows: Within ten (10) days of the date of this order, Plaintiff and Defendant's Counsel shall select a mutually agreed date and time for Plaintiff to come to Defendant's

Counsel's office (or a mutually agreeable alternate location). At that time and location, Defendant shall make available to Plaintiff all documents in his possession that were provided to Defendant by Plaintiff either in hard copy form or on compact disc. Plaintiff shall review all such documents and identify which documents were the documents provided by him to Defendant in hard copy form.

***

Upon Plaintiff's completion of the identification of the documents, Defendant shall make, or cause to be made, copies of the identified documents and make those copies available for pick up by Plaintiff at Defendant's Counsel's Office (or a mutually agreeable alternate location) within 48 hours. Defendant shall advance the costs for the copying of the identified documents. However, at the time of pick up of the documents by Plaintiff, Plaintiff shall pay to Defendant's counsel 4¢ per page copied, said charge representing one-half of the estimated duplication costs. Upon payment of the 4¢ per

> page duplication cost, the copies must be immediately provided to Plaintiff. The additional cost of duplication in excess of 4¢ per page shall be borne by Defendant. (**App. 1670-71**.)

Mr. Fleming stated that, in accordance with the Court's order, the two boxes of documents have remained at his attorneys' office, but that McVeigh has made no effort to inspect or copy the documents he wants returned and McVeigh stated at the hearing that he felt no obligation to do this.

On McVeigh's appeal the Court of Appeals for the Eastern District of Missouri (E.D. 98891) **affirmed the lower court's judgment in all respects as to damages or money owed**, but held that Fleming could not charge McVeigh 4¢ per copy for the documents he selected as being part of the original hard copy file stating as follows: (Slip opinion, pg. 4)

> Accordingly, we reverse the section of the trial court's judgment ordering McVeigh to pay Fleming 4 cents per copy and remand the case to the trial court with the instruction to strike the aforementioned language from its judgment.
>
> We have reviewed McVeigh's remaining points on appeal. Because a written opinion would serve no

jurisprudential purpose, those points are discussed in an unpublished memorandum, provided only to the parties, and denied pursuant to Rule 84.16(b). (**Ex. 41**.)

Most notably however, the Court of Appeals agreed with the Circuit Court that a contract for a $200 hourly fee for the first fifty hours of service had been formed when McVeigh met Fleming at the courthouse and tendered his check for $5,000 to him (Slip op. p. 6, Ex. 41). Fleming's time devoted to McVeigh's matter during the several days thereafter was properly charged and amounted to $4,140.00 (**Ex. 41**).

However, the courts held that Fleming could not charge McVeigh for the 10.2 hours which he had expended reviewing the files and discussing the lawsuit with McVeigh **prior to** the agreement reached at the courthouse on March 1, 2010 even though they found that such time had, in fact, been devoted to McVeigh. Fleming accepted that analysis and did not appeal the order to refund $860.00 to McVeigh.

At the disciplinary hearing Mr. Fleming handed McVeigh a file of less than 50 documents which he said he believed were the hard copy documents which he had extracted from the two bankers boxes and stated that he would absorb the $3.00 to $4.00 cost to copy those documents. However, McVeigh refused to accept those documents and again refused to examine and extract the documents

held at the attorney's office. (**App. 169**.) He also refused to accept a payment from Fleming of $860.00 plus interest and demanded reimbursement of $5,000 plus court costs (**App. 170**).

At the hearing Mr. Fleming acknowledged, as he had in his response to McVeigh's complaint, that he erred when he did not deposit McVeigh's $5,000 payment into an IOLTA account rather than his regular business account, but stated that at the time he received the fee he believed that it would have been more than consumed by his hourly fees for the work he had done and was continuing to do for McVeigh during the week in which the fee was received, which his billing records reflected to be 30.9 hours ($6,180.00). However, this included the time devoted to reviewing McVeigh's files **prior** to receiving his check on March 1, 2010. Fleming was obviously in error by assuming that he could charge McVeigh for that time.

Moreover, Fleming noted that in his correspondence to McVeigh he had offered several times to refer McVeigh's complaint and demand for a refund to a fee dispute committee, but that McVeigh refused this offer preferring to embarrass Mr. Fleming by a lawsuit which he could alleged breach of fiduciary duty and other toxic allegations.

Mr. Fleming acknowledged that he violated the Rules of Professional Conduct when he deposited the $5,000 fee that McVeigh paid him into a regular

business account rather than an IOLTA account where it should have remained for two or three days until he billed McVeigh, but as the Circuit Court found in its Judgment and Order, "Plaintiff presented no evidence of any damages he sustained as a result of Defendant's deposit of the check into a regular business account instead of a client trust IOLTA account." (Order, pg. 3.) (**App. 1668**.)

5. BACKGROUND OF LAWRENCE J. FLEMING

Mr. Fleming is now 71 years old. He has been licensed to practice law in Missouri, Illinois, and the District of Columbia for more than 45 years. He has been admitted to practice and handled cases in federal courts in the Eastern District of Missouri, Western District of Missouri, Southern District of Illinois, Northern District of Illinois, Northern District of Indiana, and the Southern District of Florida and the Courts of Appeals for the Fifth, Sixth, Seventh, and Eighth Circuits as well as the United States Court of Appeals for the Armed Forces and the United States Court of Appeals for the Federal Circuit in Washington, D.C. (**Ex. 38, Rec. 2695**.) He has presented the panel with a list of about 147 reported cases from 1872-2009 in which he has been an attorney of record who briefed the cases, most of them appellate decisions and has invited the panel and/or this court to review any of those opinions to assess his competency as an attorney (**Ex. 39, Rec. 2696**).

Mr. Fleming has served as an attorney with the United States Department of Justice working with the Civil Rights Division in Mississippi and Louisiana during a very dangerous period in 1967, as a Navy JAG Officer serving with the United States Marines, as an adjunct associate professor of law at St. Louis University Law School and as a frequent contributor and speaker at CLE programs on criminal law (**Ex. 38, Rec. 2695**). He has been published in several legal journals. He has also consistently agreed to represent indigent clients in both federal and

state courts, and served for seven years as an assistant federal public defender in Southern Illinois.

He has been named to Best Lawyers in America and has received a President's Commendation for his service to National Association of Criminal Defense Lawyers. He has also received a commendation from Martindale-Hubble for receiving the highest possible peer review ratings (AV) for 30 consecutive years in legal ability and ethical standards. (**Ex. 38, Rec. 2695**.)

However, as pointed out by the Chief Disciplinary Counsel he has been disciplined four times over the past 45 years, with three informal admonitions and one stayed six month suspension with probation for one year imposed in 2011 (on average, one disciplinary action for every 10 years of practice).

While he is currently still on the probation imposed in 2011, since the probation cannot be terminated while there are charges pending, **none of the matters referred to in the complaints now before the Court occurred while he has been on probation and the Chief Disciplinary Counsel testified that for the past three years he has complied in all respects with the terms of his probation, including supervision by the OCDC and periodic reports**. (**App. 80**.) He is not on the OCDC's special watch list of approximately 80 lawyers called "frequent complaint recipient program" and there are no plans for putting him on that list. (**App. 81**.) Consequently, there was no occasion during the long

periods that these matters were under investigation that the OCDC sought to meet with Mr. Fleming to discuss any of the complainants. (**App. 82**.) Fleming argues that he had been afforded such a meeting he might have been able to explain the law he sought to apply in the Guerra case and particularly in the Younger case (as set out in Appendix A).

POINTS RELIED ON

I. THE INFORMANT'S BRIEF FAILS TO RECOGNIZE THE POSITION OF GUERRA RELATIVE TO HIS ENTITLEMENT TO CONDITIONAL RELEASE IF THE DEPARTMENT OF CORRECTIONS DID NOT FILE A REQUEST TO EXTEND HIS CONDITIONAL RELEASE DATE AND THE POSSIBILITY THAT SUCH PETITION WOULD BE FILED UPON HIS CONTINUED PROVOCATION THROUGH HIS LITIGATION.

Thompson v. Missouri Board of Parole, 929 F.2d 396 (8th Cir. 1991)

Depauw v. Luebbers, 285 S.W.3d 805 (Mo.App. 2009)

Spencer v. State, 334 S.W.3d 559 (Mo.App. 2010)

Kelly v. Gammon, 903 S.W.2d 248 (Mo.App. 1995)

Westcott v. State, 2012 W.L. 6948 (Mo. App. 2012)

II. INFORMANT'S BRIEF RELATIVE TO LOUIS YOUNGER FAILS TO RECOGNIZE THE SIGNIFICANCE OF THE U.S. SUPREME COURT'S OPINION IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 S.Ct. 2531, DECIDED JUNE 24, 2004, TO THE CASE OF LOUIS YOUNGER, AND WHY IT WAS NECESSARY TO AWAIT A RULING THAT THIS DECISION SHOULD BE APPLIED RETROACTIVELY.

Blakely v. Washington, 124 S.Ct. 2531 (2004)

Alleyne v. United States, 133 S.Ct. 2151 (2013)

United States v. Price, 400 F.3d 844, 846 (10th Cir. 2005)

McReynolds v. United States, 397 F.3d 479, 480-81 (7th Cir. 2005)

Allen v. Reed, 427 F.3d 767, 775 (10th Cir. 2005)

III. THIS COURT SHOULD RECOGNIZE THE EXTREME DISADVANTAGE PLACED UPON RESPONDENT BY THE DELAY IN THE INVESTIGATION, PARTICULARLY OF THE COMPLAINTS OF TIM GUERRA AND LOUIS YOUNGER AND THE LACK OF AN OBJECTIVE ANALYSIS BY THE OCDC INVESTIGATOR, AND THAT INVESTIGATOR'S LACK OF FAMILIARITY WITH THE LAW PERTAINING TO CONDITIONAL RELEASE IN MISSOURI AND POST CONVICTION REMEDIES IN THE FEDERAL COURTS SUCH THAT A SPECIAL MASTER WHO IS FAMILIAR WITH STATE AND FEDERAL CRIMINAL PROCEDURE AND PRACTICE SHOULD BE APPOINTED TO REVIEW AND REPORT ON THESE MATTERS.

ARGUMENT

I. THE INFORMANT'S BRIEF FAILS TO RECOGNIZE THE POSITION OF GUERRA RELATIVE TO HIS ENTITLEMENT TO CONDITIONAL RELEASE IF THE DEPARTMENT OF CORRECTIONS DID NOT FILE A REQUEST TO EXTEND HIS CONDITIONAL RELEASE DATE AND THE POSSIBILITY THAT SUCH PETITION WOULD BE FILED UPON HIS CONTINUED PROVOCATION THROUGH HIS LITIGATION.

Guerra's hope for release on his conditional release date, as opposed to ordinary parole, was entirely dependent on whether the DOC elected to file a request that his conditional release be extended as it had threatened to do. (**Ex. 23, App. 194**.)

The time of release is set by statute unless the release date is extended by the application of very specific procedural rules and based upon findings of specific violations of prison regulations.

Sections 558.011.4 and 558.011.5 R.S.Mo. sets out these procedures as follows:

> 4. (1) A sentence of imprisonment for a term of years for felonies *** shall consist of a prison term and a conditional release term. The conditional release term of

any term imposed under section 557.036, RSMo, shall be:

4. (1) A sentence of imprisonment for a term of years for felonies *** shall consist of a prison term and a conditional release term. The conditional release term of any term imposed under section 557.036, RSMo, shall be:

***

(b) Three years for terms between nine and fifteen years.

***

5. The date of conditional release from the prison term may be extended up to a maximum of the entire sentence of imprisonment by the board of probation and parole. **The director of any division of the department of corrections except the board of probation and parole may file with the board of probation and parole a petition to extend the conditional release date when an offender fails to follow the rules and regulations of the division or commits an act in violation of such rules.** Within ten working days of receipt of the petition

> to extend the conditional release date, the board of probation and parole shall convene a hearing on the petition. The offender shall be present and may call witnesses in his or her behalf and cross-examine witnesses appearing against the offender. The hearing shall be conducted as provided in section 217.670, RSMo. (Emphasis supplied.)

Although the Parole Board is at liberty to release an offender on parole at any time during his sentence, it cannot extend his statutorily set conditional release date without a specific request from the DOC. This distinction was recognized by the Western District Court of Appeals in **Westcott v. State**, 2012 W.L. 6948 (Mo. App. March 6, 2012) Fn. 5.

> "'Conditional release' and 'parole' are neither identical nor interchangeable terms, although 'conditional release' is akin to parole.'" **Cooper v. Holden**, 189 S.W.3d 614, 617 (Mo.App.W.D.2006). **"The operation of conditional release is specifically dictated by statute, while parole is almost entirely left to the discretion of the Parole Board." Edgar v. Mo. Bd. Of Probation and Parole**, 307 S.W.3d 718, 721

> (Mo.App.W.D.2010) (citing **Cooper**, 189 S.W.3d at 618). Both involve mechanisms by which an inmate can be released from prison. However, "[w]ith the exceptions of the mandatory minimum sentences set forth in statutes or 14 CSR 80-2.010, offenders can be paroled virtually any time during their sentence." **Cooper**, 189 S.W.3d at 618.

This distinction between discretionary parole and largely non-discretionary conditional release has also been recognized by the federal courts. For example, in **Thompson v. Missouri Board of Parole**, 929 F.2d 396 (8th Cir. 1991) the Federal Court of Appeals explained how conditional release provisions, as opposed to parole, are "non-discretionary:"

> In contrast, Missouri's conditional release scheme mandates that a prisoner serve a substantial portion of his sentence. Mo.An.Stat. §558.011.4 (Vernon Supp. 1991). **Once that portion is served and assuming good behavior, the statute mandates conditional release**, and further mandates discharge from conditional release after a fixed term. **Id.** Thus, conditional release is at once better and worse for the prisoner than parole. The

> prisoner under conditional release must serve the bulk of his term before there is any likelihood of return to society, but **the prisoner also can count on a fixed schedule for release**.
>
> The inherent differences between parole and conditional release provide the explanation for their different discharge policies. Missouri has opted to switch from a pure discretionary parole policy to a determinate, largely non-discretionary system. (Emphasis supplied.)
>
> **Id.** at 400, 401 N.10

Given Guerra's background, including his prior conviction and the overall circumstances of his offenses (which occurred over an eight month period in three different counties), it was very unlikely that the Parole Board would grant him regular parole which is discretionary, but he was **entitled** to conditional release unless the DOC followed the statutory procedure set out in Section 558.011.5, **supra**, by filing a petition to extend his conditional release based upon Guerra's violation of DOC rules.

One of those rules was the all sexual offenders must complete MOSOP and the failure to complete MOSOP has been held to be a sufficient basis for an extension of an offender's conditional release date **Depauw v. Luebbers**, 285

S.W.3d 805, 807 (Mo.App. W.D. 2009); **Spencer v. State**, 334 S.W.3d 559, 569n8 (Mo.App. W.D. 2010).

Moreover, Section 589.040.2 R.S.Mo. 1990 provides that "all persons imprisoned by the Department of Corrections for sexual assault offenses shall be required to successfully complete the program developed pursuant to subsection 1 of this section "and Missouri Courts have interpreted this statute to "require all inmates to complete MOSOP in order to be considered for parole." **Kelly v. Gammon**, 903 S.W.2d 248 (Mo.App. W.D. 1995).

Consequently, Guerra was not in a strong position in arguing that he was entitled to conditional release even after the DOC relented on the requirement that he complete MOSOP since it was questionable whether his offense was a "sexual offense." First, that situation could easily change and secondly there were numerous other infractions that could have been used by the DOC to petition that his conditional release date be extended. He was literally at the mercy of the DOC.

In fact, the Parole Board did change its position on the sexual offender/MOSOP issue after Guerra was released when he was required to enroll in a MOSOP program and register as a sex offender despite the fact that he had been released without completing the program. This change in position motivated Guerra and Fleming to draft and file the declaratory judgment case in Cole County after Guerra was released.

To aggressively pursue his Public Safety Concepts lawsuit alleging civil rights violations and accusing DOC officials of negligence, assault and battery, defective product liability, psychological malpractice and medical negligence, all of which arose from his participation in, and subsequent termination from, MOSOP would obviously not have set well with the DOC and may have pushed them to petition for an elimination of his conditional release date.

Fleming's decision not to pursue that lawsuit after he notified Guerra that he was terminating his representation was not unreasonable and he should not be held responsible for the dismissal of that lawsuit six months **after** he terminated his representation by letter to Guerra.

II. INFORMANT'S BRIEF RELATIVE TO LOUIS YOUNGER FAILS TO RECOGNIZE THE SIGNIFICANCE OF THE U.S. SUPREME COURT'S OPINION IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 S.Ct. 2531, DECIDED JUNE 24, 2004, TO THE CASE OF LOUIS YOUNGER, AND WHY IT WAS NECESSARY TO AWAIT A RULING THAT THIS DECISION SHOULD BE APPLIED RETROACTIVELY.

The Informant's Brief seems to imply that Fleming accepted a total of Ten Thousand Dollars ($10,000) from Mr. Younger and/or his sister on the false premise that a resentencing could be obtained based on (1) the discovery of new evidence or (2) the retroactive application of the watershed case of **Blakely v. Washington**, 124 S.Ct. 2531 (2004) which had been decided in June, 2004 about six months before Mr. Jardine contacted Fleming.

The work that Fleming did thereafter reviewing the trial transcripts and reports from the two and a half week trial in 1996 and directing and conferring with Investigator Joseph Bramer are well documented in Mr. Bramer's reports Ex. 8-14 (Rec. 2559-2632), but his work on drafting a potential new motion, based upon the **Blakely** decision as well as upon evidence withheld by the Government (**Ex. 7, Rec. 2530-2558**) are contested since Mr. Younger denied that he had been presented with a copy of that draft. (Younger depo, **App. 1066.**) Informant implies there was no hope that a new sentencing could be obtained in this manner because

Blakely would not be applied retroactively to cases which had already completed the appeal process.

The Hearing Panel did not read or consider the 27 page memorandum presented as Exhibit 7, but it is attached hereto as **Appendix A** for this Court's consideration. In order to demonstrate just how complex this issue was (and still is) Respondent attaches hereto (as **Appendix B**) a Washington post report published July 13, 2004 quoting judges and legal scholars as to the impact that was anticipated from the **Blakely** decision.

The bottom line was that **Blakely** required that sentencing factors such as drug quantities that substantially increase a defendant's sentence must be pled in the indictment and proven to a jury beyond a reasonable doubt, and Mr. Fleming was justifiably hopeful that it would be applied retroactively as he specifically argued in the memo he prepared. (*See* **Ex. 7, Rec. 2551, Appendix A**.)

Unfortunately, the appellate decisions pronounced during the year following the **Blakely** decision did not support the argument for retroactive application of **Blakely**. *See e.g.* **United States v. Price**, 400 F.3d 844, 846 (10th Cir. 2005); **McReynolds v. United States**, 397 F.3d 479, 480-81 (7th Cir. 2005); **Allen v. Reed**, 427 F.3d 767, 775 (10th Cir. 2005); **Shardt v. Payne**, 414 F.3d 1025 (9th Cir. 2005); and **In Re Dean**, 375 F.3d 1287 (11th Cir. 2004). *See also* **The New Sentencing Conundrum**, 105 Colum. L. Rev. 1082, 1091-92 (2005) and **Is**

Blakely v. Washington Retroactive? Cardoso Law Review, Vol. 27.1, p. 423 (2005), (arguing very strongly that **Blakely** should be made retroactive.)

Without at least some Appellate authority supporting the retroactivity argument it was, of course, very unlikely that any lower court would recognize the points made in the draft memo prepared by Fleming and attached hereto as **Appendix A**. The only alternative was, therefore, to await some positive development, which is what Fleming advised Younger.

However, more recent Supreme Court opinions give some additional hope to inmates like Mr. Younger, including **Alleyne v. United States**, 133 S.Ct. 2151 (decided January 14, 2013) and a grant of certiorari in **Burton v. Stewart**, 549 U.S. 147 (2006) to "determine whether our decision in **Blakely v. Washington** announced a new rule" and, if so, "whether it applies retroactively on collateral review." This question was briefed extensively, but ultimately the Supreme Court held subject matter jurisdiction to have been lacking.

In **Alleyne v. United States**, 133 S.Ct. 2151, 570 U.S. 183 (2013), Justice Thomas, overruling prior precedent, stated in the majority opinion:

> **Harris** drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in **Apprendi v. New**

> **Jersey**, 530 U.S. 466 (2000), and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *See* **id**., at 483, n. 10, 490. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, **Harris** is overruled.
>
> **Alleyne**, 570 U.S. ____ (2013) (Slip. Opinion, p. 1)

Since Mr. Younger's sentence was increased to life based primarily upon drug quantities found by the judge, and not by the jury, beyond a reasonable doubt, his sentence would have to be reconsidered if **Alleyne,** which specifically applies to federal sentencing, is applied retroactively.

Consequently, Fleming's recommendation that Younger await court authority for applying the **Blakely** decision retroactively was not a sham but sound legal advice.

III. THIS COURT SHOULD RECOGNIZE THE EXTREME DISADVANTAGE PLACED UPON RESPONDENT BY THE DELAY IN THE INVESTIGATION, PARTICULARLY OF THE COMPLAINTS OF TIM GUERRA AND LOUIS YOUNGER AND THE LACK OF AN OBJECTIVE ANALYSIS BY THE OCDC INVESTIGATOR, AND THAT INVESTIGATOR'S LACK OF FAMILIARITY WITH THE LAW PERTAINING TO CONDITIONAL RELEASE IN MISSOURI AND POST CONVICTION REMEDIES IN THE FEDERAL COURTS SUCH THAT A SPECIAL MASTER WHO IS FAMILIAR WITH STATE AND FEDERAL CRIMINAL PROCEDURE AND PRACTICE SHOULD BE APPOINTED TO REVIEW AND REPORT ON THESE MATTERS.

It must be again noted that due to the unexplained delay in the investigation of the complaints of Mr. Guerra, which occurred more than six years ago, and the complaints of Mr. Younger, which occurred more than seven years ago, Mr. Fleming was required to try to recall conversations and activities which had long been buried in his memory bank.

It was also apparent that the OCDC investigator was not familiar with the rather intricate procedures which applied to parole and post conviction matters. Finally, it is apparent that a decision was made to seek very severe disciplinary action against Mr. Fleming as long ago as September 20, 2011 (18 months prior to

the filing of an information in their case) and that, in a chocking display of partiality this decision was communicated in a letter to Mr. Younger, but was not communicated to Fleming.

In fact, Mr. Pratzel acknowledged during his testimony that since Mr. Fleming was placed on probation in 2011 (3 years ago), he has not been guilty of any misconduct and has complied in all respects with the terms of that probation. (**App. 81**.) He is not on the OCDC's special watch list and there are no plans for placing him on that list. Most importantly throughout the very long periods that these matters were under investigation to explain what law he had attempted to apply to both the Guerra case and the Younger case. (**App. 82**.)

The OCDC also rejected any attempts by Fleming and Younger to refer his complaints to a fee dispute resolution committee, just as Michael McVeigh had rejected Fleming's repeated offers to him to refer his dispute to mediation. The obvious intent of the OCDC was to prosecute Fleming for ethical violations rather than to resolve the issues between the parties.

In this brief, Respondent Fleming has consumed a great number of his allotted pages to describing the facts according to his recollections and based on the extraordinary volume of exhibits presented at the hearing.

In light of these facts, he again asserts that the OCDC investigator simply did not understand what he was trying to do with regard to both Guerra and

Younger. He also asserts that recognition should be given to the largely favorable opinions of both the Circuit Court and the Court of Appeals in the McVeigh case, particularly since it was McVeigh's choice to take his disputes to those forums.

Contrary to what the Informant argues. Fleming has not denied his fault with regard to misrepresentations he made to Guerra, although he denies that he made any misrepresentations to Younger or McVeigh.

Finally, Fleming argues that he should be given at least some recognition for the history of his practice of more than 45 years and the significant contributions he has made as set out at Section 5 of the Statement of Facts (Brief p. 66) and, of course, he implores this Court to do so.

CONCLUSION

Based on the foregoing factual analysis Respondent respectfully submits that while some form of discipline is warranted, the recommendation for disbarment is grossly excessive. Fleming, therefore, suggests that this Court refer this matter to a special master who, hopefully, has some experience with criminal practice, particularly post conviction matters, for that master's recommendations as to an appropriate disposition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2014, a true and correct copy of the foregoing was served upon Respondent's counsel via the electronic filing system pursuant to Rule 103.08:

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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 55.03, and has been scanned for viruses and is virus free;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 18,006 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. Consists of less than 90 pages in accordance with Rule 84.06(e)(8).

/s/Lawrence J. Fleming

APPENDIX