IN THE SUPREME COURT
STATE OF MISSOURI

IN RE: **RITA KAY SANDERS** **3023 S. Kimbrough Ave.** **Springfield, MO 65807** **Missouri Bar No. 51565** **Respondent.**	**Supreme Court No.: SC96078**

RESPONDENT'S BRIEF

KEMPTON AND RUSSELL

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I

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

A. SHE VIOLATED RULE 4-8.4(c) BY MISREPRESENTING HERSELF AS HAVING AUTHORITY TO SEARCH A WOMAN AND SEIZE HER PROPERTY; AND

B. SHE VIOLATED RULE 4-8.4(d) BY ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE BY IMPROPERLY ASSERTING AUTHORITY TO SEARCH A WOMAN AND SEIZE HER PROPERTY.

Myra Cox is a bondswoman who had written a bond for Tommy Darnell. Mr. Darnell did not appear for Court. The Court ordered a forfeiture. Cox had to pay $7,500 to the Court and received a fugitive felony warrant for the arrest of Darnell. (A224) Ms. Cox prepared Wanted Posters for Darnell that included Cox's name and contact information. (A233) On May 25, 2012 Ms. Cox received a telephone call from a woman that Darnell was in an apartment in Branson. (A225) The woman gave the apartment number to Ms. Cox. Although she did not know it at the time, the woman who called Ms. Cox with the information about Mr. Darnell was Michelle Ocamb. (A225)

Ms. Cox shares an office building with Ms. Sanders. Ms. Cox told Respondent that she was going to Branson to pick up Darnell. Ms. Cox is legally blind and Respondent often assists her by driving her. (A227) Respondent said she would drive and

would take her car. At that point Ms. Cox called the Branson Police and told them about the fugitive in the apartment and gave the apartment number to the Branson Police. Respondent drove Ms. Cox to the apartment in Branson and when they arrived the Branson Police were already there. The fugitive was not there but it was verified that he had been there. Ms. Sanders stayed in the car at Branson. (A228)

Shortly after leaving the Branson apartment area Ms. Cox received another telephone call. This was again from the same lady. She indicated the cops got there and Tommy left. In a little bit she called again and advised that he was in the Lakeview Inn in Kimberling City but did not have a room number. (A230)

Respondent and Ms. Cox then drove to Kimberling City and drove to the Kimberling City Police Station. When they arrived at the police station there were some police standing outside and Ms. Cox advised them that she was seeking a fugitive. The Kimberling City Police asked, did the fugitive have any felonies (A231) and then the policemen then said we'll get him. The police put on their bulletproof jackets and told Ms. Cox that she should stay there at the police station and the police went off to arrest the fugitive. (A231) In a short period of time the police advised that Darnell had been there but that the manager said he was gone and was not there anymore.

At that time Respondent and Ms. Cox left and were almost back home when they received another call from the same lady. The lady said Darnell was in the Reeds Springs Motel, Room 9. Ms. Cox asked Ms. Sanders if she would mind running her over there to

the Reeds Springs Motel and Respondent indicated that she would be willing to do that and did in fact do so. (A231)

When they got to the motel and Ms. Cox saw what she thought was Mr. Darnell's truck, Ms. Cox called the Stone County call center and advised who she was and that she was looking for Tommy Darnell and that she thought he was in room 9 in the Reeds Springs Motel and further that she was going to see if she could find him. The call center advised that they would get hold of the chief in Reeds Springs. In a short time the call center calls back and says meet my officer over at city hall. They then drove to the city hall and waited for some period of time and then Chief Arin Hart showed up. Ms. Cox showed Chief Hart a wanted poster for Tommy Darnell and she showed him the felony warrant for Mr. Darnell's arrest. (A233) Ms. Cox testified that while they were at the Reeds Springs City Hall Chief Hart told Respondent to back him up. He said my officer is busy I don't have a backup I need you. (A235) She testified that several times Chief Hart told Respondent to back him up even though Ms. Cox had told him several times that Respondent could not back him up. (A242)

When they were at the Reeds Springs City Hall Chief Hart said that he was in charge in Reeds Springs and that he would serve the warrant in his jurisdiction. (A145) He had no backup. He told Respondent that as a former policeman who was armed that she would be his backup. At that time they then left for the motel in Reeds Springs. (A145, 153) Respondent testified that at the Reeds Springs City Hall the Chief told her "well you're a former officer. You can back me up." Ms. Cox at that time told the Chief

that she was the bondsman and that Ms. Sanders could not be the backup and the Chief stated “no I’m the Chief of Police of Reeds Springs. This is my city. If there’s a man here that has a capias fugitive warrant, I have an obligation to go get him. She’s a former officer. She’s got a gun, she can back me up.” (A145)

They then left for the Reeds Springs Motel and when they got to the motel the Chief came to the driver’s door and said to Respondent “are you going to come?” Respondent advised “I didn’t see the car so I thought maybe we weren’t going to do anything.” The Chief then stated “no we’ve still got to go in and see if he’s there.” Ms. Sanders responded “okay”. Respondent put on her pistol and at that point Chief Hart stated “okay. You’re armed? You’re ready?” And Ms. Sanders said I guess so (A146) and at that point they went to the door and Chief Hart began to knock on the door announcing Reeds Springs Police. After the door was not opened Ms. Cox went down to the manager who came back and opened the door to room 9. (A148) Chief Hart then said to Ms. Sanders “you got my back?” Answer “Yes.” Chief Hart said “don’t let me get shot” Respondent replied “okay”. (A148)

At that time all three of them went in. Chief Hart went in first with a drawn pistol then Respondent with a drawn pistol and then Ms. Cox. This was a one room motel room with a bathroom and two beds. (A156) Michelle Ocamb was in the bed, naked, with a sheet drawn over her. (A157) Her hands were out of view. She was told to show her hands and did not comply. The Chief checked the bathroom and Mr. Darnell was not

there. At that point Ms. Ocamb showed her hands and Chief Hart and Respondent holstered their pistols. (A158)

Ms. Cox asked Ms. Ocamb for Darnell's phone number. Ms. Ocamb said she did not know it, but it was in her phone. She said her phone was in her purse. (A159) Ms. Ocamb started to reach for her purse. (A159) Ms. Sanders says "if you don't mind I'll get the phone out of your purse." Ms. Ocamb stated "whatever". Sanders thought a gun might be in the purse. When Ms. Ocamb replied "whatever" Ms. Sanders took that as a consent to search the purse and Sanders dumped the purse on the bed. (A160) There were no weapons but a phone was in there. Ms. Ocamb said that phone was broken. (A160) A brown pouch was in the purse. Ms. Sanders thought the other phone could be in the pouch and dumped it out. (A161) At no time did Ms. Ocamb object in any way to the search of the purse or any items inside the purse.

While Respondent was going through the items from the purse Chief Hart asked Ms. Ocamb what her name was. She refused to tell Chief Hart her name. Chief Hart told Respondent to get Ms. Ocamb's ID out of the wallet which Ms. Sanders did. (A162, 177, 211, 248, 249)

The brown pouch contained drugs and drug paraphernalia. Chief Hart said to Ms. Ocamb "you could get arrested for this." Ms. Ocamb says "bingo". (A247) She never objected to either the search of the purse or the pouch.

The Disciplinary Hearing Panel found that Respondent could have reasonably believed she had authority to provide coverage for Chief Hart as he cleared the motel room at Reeds Springs. Under the circumstances that existed Ms. Sanders reasonably believed that she had been requested by Chief Hart to be his backup in executing the arrest warrant for Tommy Darnell. All of Respondents actions that are complained of by the Informant took place in the presence of Chief Hart. Chief Hart admitted that he told Rita Sanders to get his back when they entered the motel room.

At the disciplinary hearing one of the Panel members indicated that he would like to see some law on when the posse comitatus status or the status pursuant to Section 105.210 ended.

Unfortunately Counsel for Respondent has found no cases which set forth any Rule concerning that issue. It would appear that each case would turn on its own facts. Since Chief Hart was the person who essentially deputized Respondent he clearly would have been able to have terminated that status. He did not do that while they were at the Reeds Springs Motel.

Perhaps the best indicator of what the status of Ms. Sanders was and what her role was comes from the conduct of Chief Hart. The things that Chief Hart said at the preliminary hearing and at the motion to suppress were inconsistent which Counsel for Informant admits at page 10 of his Brief, but his actions in requiring Respondent to write a supplemental report show what he actually believed her status was.

Nine days after the events at the Reeds Springs Motel, Chief Hart called Respondent and told her he wanted her to file a supplemental police report, not a witness statement. (A163, 164)

As was alluded to by Ms. Ocamb's attorney at the motion to suppress, the term supplemental report means a report written by a member of the police. (A405, 406) Respondent also indicated a supplemental report is one written by an officer involved in the event. (A164) After nine days of having a chance to analyze what Respondent's role was after the Chief requested her to be his backup in the arrest of Tommy Darnell, Chief Hart recognized that she was there at his request and was acting as a police officer pursuant to his direction to be his backup.

Informant contends that Respondent's authority to act ended when the fugitive was not found in the motel room, but cites no case so holding. Chief Hart admits he was in charge and was the person who made the decision to make her his backup. It is submitted that she continued to act as his backup until he terminated that status.

Nine days after leaving the Reeds Springs Motel he was still directing her on what to do when he told her to write a supplemental police report. If the Chief believed that she was not there acting as his backup, why did he ask her to write a supplemental police report? At the Ocamb suppression hearing the Chief was asked by Ms. Ocamb's attorney whether he had filed a report and whether he had asked Respondent to file a report. He was aware that she was not an active police officer when she made this report. The Chief admitted that normally they take witness statements from witnesses, not supplemental

police reports, and that Respondent filed a supplemental report at his request which Chief Hart incorporated in his report. (A405, 406)

Respondent was appointed by Chief Hart to be his backup in the execution of the arrest warrant for Tommy Darnell, not just to have his back when they entered the Reeds Springs Motel room. (A145) The Chief testified it was his responsibility to execute the arrest warrant and that he was in charge at the motel and was also in charge of executing the warrant. (A145, 154, 428, 429)

When it was discovered that Darnell was not in the motel room it became necessary to determine the whereabouts of Darnell. Myra Cox spoke with Ms. Ocamb about where Darnell was and inquired about whether Ms. Ocamb had Darnell's phone number. Ms. Ocamb indicated she did not know his phone number but stated it was in her phone. She also stated the phone was in her purse. When Ms. Ocamb started to reach for her purse Respondent stated "if you don't mind I'll get the phone out of your purse." Ms. Ocamb stated "whatever." (A159) By stating whatever and making no objection to Respondent starting to search her purse, Ms. Ocamb consented to a search of her purse. Up to this point no search had been made of Ms. Ocamb's purse for a weapon even though Ms. Ocamb was acting erratically. Darnell was known to be armed and had just left the motel room shortly before the Chief and his backup entered the room. Clearly Ms. Ocamb could have had a weapon in her purse. At that point a search for a weapon without a warrant was legal for the protection of the Chief, his backup and the bondswoman and was a consensual search.

A search that is conducted pursuant to valid consent is one of the recognized exceptions to the warrant requirement. *State v. Wood*, 218 S.W. 3d 596 l.c. 603. Further consent is freely and voluntarily given if, considering the totality of all the surrounding circumstances, an objective observer would conclude that the person giving consent made a free and unconstrained choice to do so. Ms. Ocamb was the one who said that the number was in the phone and that the phone was in the purse. She did not have to tell anybody where the phone was but elected to do so. After she gave her consent she did not object in any way to the search. Her response of "whatever" essentially is a statement to Ms. Sanders that is do whatever you want to do.

In the case of *United States of America v. Baney*, 2008 WL 695382 in the U.S. District Court Western District of Missouri the officers went to defendant's house and asked him if there were any other narcotics in the house. The defendant indicated there were none. The officer asked the defendant if he minded if they searched and the defendant said something to the effect "no, go ahead and do whatever you want to do." There was no withdrawal of the consent and there was no objection to the search at the time. A consensual search conducted without a search warrant does not violate the Fourth Amendment even though the search is not otherwise supported by probable cause or a reasonable suspicion of criminal activity. Further a protective search by an officer for weapons upon less than probable cause is not an unreasonable search. *State v. Middleton*, 43 S.W. 3d 881 (Mo. App. SD 2001). See also *State v. Garcia*, 930 S.W. 2d 469 (Mo. App SD 1996), *State v. Williams*, 832 S.W. 2d 10 (Mo. App. WD 1992).

Informant contends that Ms. Ocamb had an expectation of privacy in the motel room. That contention ignores the fact that Ms. Ocamb was a person who was Darnell's companion, and was the person who was calling Myra Cox and telling her where Darnell was. (A249) She knew she was with a fugitive and by calling his bondswoman knew that the police were likely to show up and try to arrest Mr. Darnell. By giving the information to Ms. Cox, Ms. Ocamb was inviting an intrusion into the room to execute the fugitive warrant. Pursuant to Section 105.240 RSMo a person executing a warrant could actually break into the room. Therefore Ms. Ocamb did not have an expectation of privacy in the motel room.

The room at Reeds Springs was in Ms. Ocamb's name. Mr. Darnell had been in that room according to the people next door. Ms. Ocamb was providing a place for Mr. Darnell to stay under her name, she stated he had had sex with her and probably would not come back. Because she was providing a place for Mr. Darnell, she was likely in violation of Section 575.030 RSMo, hindering prosecution which states " a person commits the crime of hindering prosecution if for purpose of preventing the apprehension, prosecution, conviction or punishment of another for conduct constituting a crime: (1) harbors or conceals such person;" *Blacks* Dictionary defines harboring as "the act of affording lodging, shelter or refuge to a person, especially a criminal or illegal alien." Hindering prosecution is a D felony if the conduct of the other person constitutes a felony. There was a felony warrant out for the arrest of Mr. Darnell therefore Ms.

Ocamb's conduct would have constituted a D felony. As a person who was harboring a fugitive felon Ms. Ocamb did not have an expectation of privacy in the room.

Respondent was requested several times by Chief Hart to serve as his backup in the execution of the felony capias warrant for Tommy Darnell at the City Hall and was again requested to do so at the Reeds Springs Motel.

Respondent's position is that she was either acting as a posse comitatus or under the provision of Section 105.210 RSMo. The Chief was authorized to execute a felony arrest warrant, which is a criminal process. He knew the subject of the capias warrant was armed and dangerous. The Chief had no backup. He called Respondent to his aid either as a posse comitatus or pursuant to Section 105.210 RSMo.

Regardless of whether Respondent was posse comitatus or was called to the Chief's aid pursuant to Section 105.210, she was clothed with the protection of law the same as the Sheriff or any other like officer. *State v. Parker*, 199 S.W. 2d 338 (MO 1947). Also pursuant to *State v. Parker*, Respondent was bound to assist him and to aid him. "…person so called upon are bound to aid and assist him". l.c. 339.

The Informant claims that the posse comitatus doctrine is not applicable because Chief Hart was a municipal officer and not a sheriff. Informant does not make any claim in his brief that Section 105.210 RSMo does not apply. The case of *State v. Johnson*, 245 S.W. 2d 43 (Mo. banc 1951) clearly states the posse comitatus doctrine is applicable to city policemen. Speaking of the arresting city officer the Court stated l.c. 48 "and he had

the further right to call witness Paul to help in taking the appellant and the property (the two automobiles) into custody." *State v. Parker* supra. Even if the posse comitatus doctrine does not apply the provisions of Section 105.210 RSMo clearly do. Section 105.210 provides that "in all cases where, by the common law or a statute of this State, any officer is authorized to execute any process, and may call to his aid all male inhabitants above the age of 21 years in the county in which the officer is authorized to act." The Chief was a person who was authorized to execute process. *Blacks Law Dictionary Eighth Edition* defines process as "a summons or writ to appear in Court." It defines criminal process as "a process such an arrest warrant that issues to compel a person to answer for a crime." That is exactly what we have here. The Chief was authorized to execute the process and undertook to do so. Whether Chief Hart's request to Ms. Sanders to be his backup was pursuant to the Statute or to the posse comitatus doctrine it would nonetheless be effective. Respondent did not believe she had any ability to fail to give aid to Chief Hart and Informant has cited no case which indicates she would have had the right to refuse to act.

In regard to whether the *Johnson* case is applicable in holding that a municipal policeman can summon someone to aid him as posse comitatus, the fact remains that the Court said it in 1951 and there has been no retreat from that position since that time.

Informant contends that the language in *Johnson* is unnecessary to the opinion and is not anything except dicta. A close reading of the case shows that it was necessary for the Court to address the issue because defendant's counsel had objected to conversations

that took place with anyone not in the defendant's presence. The instruction by the municipal police officer to the bystander to help the officer in taking the driver of the stolen car into custody and taking the stolen car into custody had to be dealt with. The Court said, l.c. 48, "Officer Juettemeyer had the right to make the arrest on reasonable suspicion without a warrant …and he had the further right to call witness Paul to help him in taking the appellant and the property (two automobiles) into custody. *State v. Parker*, 199 S.W. 2d 338 (MO 1947). It is submitted in the *Johnson* case the conduct of witness Bell who was called upon to aid the officer certainly was relevant to the issue of the arrest of the defendant and while it may not have been crucial to the opinion itself it clearly made sense to deal with that issue in the opinion.

Coming back to the issue of when did Respondent's authority to act as backup and in a police capacity for Chief Hart terminate? Informant says it terminated when the fugitive was not located in the motel. That ignores the direction of Chief Hart to Respondent to obtain Ms. Ocamb's identification from her wallet. That is a clear direction to search which Respondent did. Respondent believed at all times she was acting as the backup for Chief Hart and was not there just to get his back and be sure he wasn't shot. She was there to assist him in executing the criminal process.

In today's world the job is not over until the paperwork is done. In this case the paperwork was not done until nine days after the events at the Reeds Springs Motel, Chief Hart requested that Respondent write a supplemental police report. The only way she could write a supplemental police report was if she was acting as a policeman. She

believed that was in fact what she was doing and when she wrote the supplemental report she was writing that as a police officer summoned by Chief Hart to be his backup in the service of the capias warrant.

Long prior to 1951, this Court in *State v. Evans*, 61 S.W. 590 (MO 1901) had before it a situation where the defendant was in custody of officers and in trying to escape caused an officer's gun to discharge and a bullet to strike and kill one of the officers who had custody of the defendant. The question presented was whether this qualified as felony murder.

In *Evans* the Court stated l.c. 593 "…there are certain officers and ministers of public justice that virtute officii are empowered by law to arrest felons, or those suspected that are suspected of a felony, and that before conviction and also before indictment… and hence it is that these officers that are thus entrusted may without any other warrant, but from themselves, arrest felons and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office it is murder." The Court goes on "the officers that I herein principally intend are (1) justices of the peace; (2) sheriffs; (3) coroners; (4) constables; (5) watchmen; and when I mention these I also include all that come to their aid and assistance; <u>for every man in such cases is bound to be aiding and assisting these officers upon, their charge and summons</u> (emphasis added), in preserving the peace in apprehending of malefactors, especially felons." *2 Hale, P.C. 85, 86.* This Court has not retreated from *Evans* in over one hundred years nor from *Johnson* for well over fifty years.

The Informant alleges that Respondent violated Rule 4-8.4(c) by misrepresenting that she had authority to search Ms. Ocamb and to seize her property. Informant claims Respondent engaged in dishonesty, fraud, deceit and misrepresentation by so doing.

The Informant then contends that Respondent violated Rule 4-8.4(d) conduct prejudicial to the administration of justice, by improperly asserting authority to search Ms. Ocamb and to seize her property.

The testimony of Respondent and Myra Cox clearly shows that at the Reeds Springs City Hall, Chief Hart said he would serve the capias warrant for Tommy Darnell, because Chief Hart was the chief law enforcement officer in Reeds Springs, that he had no backup, he needed backup, and that because Respondent was a former law enforcement officer and was armed she would be his backup. (A145, 153, 235, 236, 241, 242) Chief Hart testified at Respondent's preliminary hearing that it was his duty to see that Darnell was arrested whether the bond agents were there or not and that he was supposed to get him. The Chief thought he needed some help but nobody would answer his call. He told Respondent to cover his back. He further testified he was in charge at the Reeds Springs Motel. (A427, 428, 429)

When Chief Hart requested Respondent to assist him, she had no option but to do so. At the Reeds Springs Motel, he was in charge and she was there in a posse comitatus status whether she was appointed as such by the Chief or because he had called her to his aid pursuant to Section 105.210 RSMo.

At the Reeds Springs Motel the Chief told Respondent to search Ms. Ocamb's wallet and to get her ID out. (A162, 177) This came about because Ms. Ocamb would not tell the Chief her name, even though she was with Darnell, and had been with him at least for the entire evening.

When Ms. Ocamb started to look in her purse for the phone, the purse had not been searched for weapons. Respondent was responsible for at least for seeing that the Chief didn't get shot in the back. In order to ensure the safety of those present Respondent said to Ms. Ocamb "ma'am if you don't mind I'll look through that." Ms. Ocamb replied "whatever." Only then did Respondent dump the purse out looking for a firearm for safety reasons and looking for the phone Myra Cox had been discussing Ms. Ocamb. (A160) Respondent did not misrepresent herself. She was Rita Sanders, attorney, former police officer, working under the direction and control of Chief Hart, and as such she had authority to do what she did. (A176) The property of Ms. Ocamb was seized by Chief Hart and taken into his custody. For all of the above reasons Respondent is not guilty of misrepresentation, dishonesty, fraud or deceit.

For the same reasons Respondent is not guilty of engaging in conduct prejudicial to the administration of justice. Informant relies on the Kansas case of *In re Hunsaker*, 217 P 3rd 962 (KS 2009). In *Hunsaker* the lawyer's son was a Colorado attorney who was charged with four counts of sexual assaults on a child and two counts of conspiracy to commit sexual assault on a child. The father was admitted in Colorado and in Kansas. The criminal charges against the son were pending in Larimer County, Colorado. The son

failed to appear for trial and went to Mexico, Guatemala and Costa Rica. The father deposited about $34,000 into his son's checking account. The son made ATM withdrawals from Mexico, Guatemala and Costa Rica in the amount of almost $19,000.

Hunsaker, Sr. reached a stipulation with the Colorado Bar for a 90 days suspension. The stipulation provided that the father engaged in conduct prejudicial to the administration of justice when he provided financial assistance to his son while the son was evading prosecution. The father's action resulted in the son being at large, which delayed the criminal proceeding against the son, and was thereby prejudicial to the administration of justice.

It is submitted that the conduct of the father was also criminal in that he hindered prosecution by providing his son with money, transportation or other means to aid him in avoiding apprehension.

In the present case the roles are different. Ms. Ocamb is providing assistance to Darnell. Respondent is aiding law enforcement i.e. Chief Hart in trying to apprehend Darnell.

This Court often looks for guidance to the ABA Standards for imposing attorney discipline. ABA Standard 6 deals with Violations of Duties Owed to the Legal System. Standard 6.1 deals with false statements, fraud and misrepresentation. Standard 6.11 says disbarment is appropriate when a lawyer, with intent to deceive the Court, submits a false document, makes a false statement or improperly withholds material information, and

causes serious injury to a party, or causes a significant or potentially adverse effect on the legal proceeding. There is no showing in this case of any intent to deceive any Court or of any conduct that caused significant or potentially significant or adverse effect on a legal proceeding.

Standard 6.12 provides that suspension is appropriate when a lawyer knows that false statements or documents are either being submitted or withheld from the Court, and takes no action.

Standard 6.13 provides reprimand is appropriate when a lawyer is negligent in either determining whether documents are false or in taking remedial action when material information is being withheld.

All of the Standards related to Standard 6 refer to a legal proceeding. There is nothing in this case that shows that any conduct of Respondent impacted any proceeding.

In the case of *In re Coleman*, 295 S.W. 3d 857, 868 (Mo. banc 2009) the Informant properly alleged that Coleman's conduct was prejudicial to the administration of justice because his conduct wasted judicial resources. Coleman filed a motion with the Court to enforce a prohibited agreement that purported to give him the right to settle his client's case without her permission. His conduct also negatively impacted the judicial process because at the time of the termination of his representation he failed to give his client information necessary for her to obtain new counsel which delayed the proceedings.

In order for there to be conduct prejudicial to the administration of justice there has to be an impact on a proceeding or on the judicial process. None has been demonstrated.

All of Respondent's conduct occurred under the charge of Chief Hart that Respondent be his backup. Chief Hart had the authority to direct her and did so when he told her to search Ms. Ocamb's wallet for ID. Chief Hart is the person who seized the property of Ms. Ocamb and who arrested Ms. Ocamb. The question remains, when did Respondent's position as backup or posse comitatus end? The Chief appointed her as backup. He would therefore have the ability to terminate that status. He did not do so. It could logically be argued that her status changed when the Chief seized the evidence, arrested Ms. Ocamb and left the Reeds Springs Motel. That is probably the right analysis, but the Chief's conduct in requesting that Respondent write a supplementary police report nine days after the event could be deemed a continuation of her status until the supplemental police report was filed. In either scenario Respondent was acting as posse comitatus or pursuant to Section 105.210 RSMo.

Informant understandably points out that in the supplemental report Respondent does not mention she was acting as posse comitatus or as backup to the Chief. At that point no one had contended that Respondent had done anything wrong. She had no reason to address the issue.

Once she was accused of misdoing she explained her position. This is not a made up story. It is verified by the Chief's admissions and particularly by his request to her to

write a supplemental police report. If she had not been acting in a police capacity she could not have written a supplemental police report.

Our Statutes today are consistent with the *Evans* case. Section 544.120 RSMo provides for pursuit of felons by "sheriffs, coroners and constables and all others who are required by such officers; and the offender may be arrested by any such officer or his assistants without warrant."

Section 544.230 RSMo provides that when a prisoner escapes from a person having custody of the prisoner the officer who had the prisoner in his charge has the power to require any person to aid him in securing and retaking the prisoner as sheriffs or other officers have in their own county and that a refusal to render such aid is an offense punishable in the same manner as for disobedience to a summons to assist in the execution of process.

In extradition cases every person who is empowered to make the arrest of the accused has the same authority to command assistance as peace officers have by law in the execution of any criminal process directed to them with like penalties against those who refuse their assistance. RSMo 548.091. Apparently the legislature, like this Court in *Evans* and *Johnson*, supra believes that peace officers, including municipal peace officers, have the power to require aid by whomever they believe necessary to carry out their duties.

Respondent came to the aid of Chief Hart as she was requested to do by Chief Hart to serve as his backup in the execution of the felony capias warrant. As such she was working under his authority and control. The Chief admitted he was in control at the Reeds Springs Motel scene. Every action complained of by the Informant was taken in the presence of Chief Hart. At no time did he tell her to do anything differently. In fact while she was conducting a search of Ms. Ocamb's purse either as a consensual search or as a search for weapons, the Chief asked Ms. Ocamb what her name was and she refused to answer. At that time the Chief directed Respondent to look in Ms. Ocamb's wallet and get her ID out. Respondent did what she was directed to do by Chief Hart. It shows that she was working under his control and direction, and that she therefore did not misrepresent herself and that she had the authority to do what she did.

ARGUMENT

II

RESPONDENT IS SUBJECT TO DISCIPLINE BECAUSE:

A. SHE VIOLATED RULE 4-1.15(a) BY DISBURSING FUNDS FROM HER TRUST ACCOUNT WITHOUT WAITING TO ASSURE THAT RECENTLY DEPOSITED FUNDS HAD BECOME AVAILABLE AND BY FAILING TO MAINTAIN ADEQUATE RECORDS OF CLIENT RECORDS;

B. SHE VIOLATED RULE 4-1.15(c) BY COMMINGLING CLIENT FUNDS WITH HER PERSONAL FUNDS IN THAT SHE ROUTINELY DEPOSITED INTO HER PERSONAL OPERATING ACCOUNT FUNDS GIVEN BY HER CLIENTS TO BE PAID OUT AS FINES AND COURT COSTS AND NOT YET EARNED FEES.

Respondent agrees that she is subject to discipline for her trust account practices, but states there have been no client complaints, no client harm, no missing money, and no misappropriation.

Respondent has a high volume traffic and criminal practice. She charges a fee of $75.00 for a traffic ticket plus a $20.00 processing fee for a total of $95.00. In some jurisdictions, particularly Springfield, the Court requires a payment of $39.50 on each ticket for costs. Clients routinely paid Respondent $134.50 to handle a Springfield ticket. That money was put into the operating account because Respondent believed she had

earned the $95 fee when she set the file up and sent out the letters to the appropriate authorities. (A207)

Respondent started practicing in 2000 and she had no trust account problems until 2012 when the bookkeeper she had retired. (A130) Up to that point she had been using QuickBooks. After the old bookkeeper retired Respondent hired a new bookkeeper who changed from QuickBooks to Sage. (A131) There were then problems with overdrafts. The first was caused by an accounting error, one was from a credit card transaction which was for $750 and should have been charged against the client's credit card and credited to the firm account, but the staff person hit the wrong button and instead of a charge against the card, it showed a credit to the card and a withdrawal to the firm. That was not caught and resulted in an overdraft.

On another occasion a deposit was supposed to be made by Friday but wasn't made until Monday which left insufficient funds to cover a previously written trust account check.

Respondent agrees that she comingled funds particularly where she received a check that was part unearned fee and part client funds for Court costs and fines, or depositions or investigation costs.

Respondent has now rehired her old bookkeeper, (A134, 203) returned to using QuickBooks, (A134) and now properly puts almost all funds into the trust account to be left there until spent for court costs, etc. and until fees are earned and moved to the

operating account. (A127) Respondent no longer moves client's funds for financial costs to the operating account but pays them directly from the trust account.

Respondent admits that with the volume of small business she does there are numerous opportunities to make mistakes. She also admits that dealing with credit card processing companies can complicate bookkeeping and cause errors. She welcomes and agrees to a mentoring program of the type described by Ms. Dillon in her testimony at the DHP.

ARGUMENT

III

RESPONDENT'S LICENSE SHOULD BE INDEFINITELY SUSPENDED. A STAYED SUSPENSION, WITH PROBATION, IS WITHIN THE RANGE OF APPROPRIATE SANCTIONS, UPON APPLICATION OF ABA SANCTION STANDARDS AND PREVIOUS SANCTION ANALYSIS BY THE COURT.

On October 25, 2016, the Disciplinary Hearing Panel filed its decision recommending a reprimand with conditions. On November 2, 2016, pursuant to Supreme Court Rule 5.19, the Informant and the Respondent filed their acceptance of the DHP decision.

Black's Law Dictionary, Eighth Edition, defines acceptance as "an offeree's assent to the terms of an offer in a manner authorized by the offeror so that a binding contract is formed."

The *American Heritage* dictionary, Second College Edition, definition 3a defines "accept" as "to regard as usual, proper or right" and in definition 3b as "to regard as true, believe in."

Webster's New International Unabridged Third Edition defines "accept" as "to receive with favor, to approve" or "to receive or admit and agree to."

On December 6, 2016 the Informant filed with the Court a "Statement of Acceptance of Disciplinary Hearing Panel Decision" advising that the case was ready for

decision by the Court in accordance with Rule 5.19(c) and praying for the Court to enter a final order of discipline "…in accordance with the Disciplinary Hearing Panel's decision."

The Court then issued an Order to Show Cause to both Informant and Respondent as to why an Order of discipline consisting of a stayed suspension and probation should not be entered. Both parties responded to the Order to Show Cause. The Informant suggested no reason why such a disciplinary should not be entered. Respondent opposed the issuance of such an order. The Court then issued an Order requiring the case to be briefed and argued.

To the best knowledge of Respondent there have been no claims that she has violated the Rules of Professional Conduct since the disciplinary hearing on August 11, 2016 or that she has in any way conducted herself improperly.

Contrary to the representations made by Informant that it accepts the decision of the Disciplinary Hearing Panel, Informant in its brief, now argues that instead of a reprimand with conditions the proper discipline is suspension with probation. This is a rejection of the decision of the Disciplinary Hearing Panel that Respondent has not committed acts that warrant suspension or disbarment and rejection of the other findings of the Disciplinary Hearing Panel including the finding that Respondent's authorities on the ability of a municipal officer to deputize or call to aid from bystanders are persuasive and that reprimand, not suspension is the appropriate discipline.

Our disciplinary system is a self-governing system that requires that it function in a manner that promotes confidence from the public and the Bar. Consistency is a goal of the system according to the ABA Standards. If the Informant can accept a decision of a

Disciplinary Hearing Panel and ask for discipline in accordance with that decision and then come before this Court and take a position that is contrary to what it accepted, the system will not have the confidence of either the Bar or the public. The Informant should be here advising the Court why it accepted the Disciplinary Hearing Panel decision and telling the Court that it supports that decision. To do otherwise makes impossible the ability of Respondents or their counsel to predict what an acceptance by the Informant means and will certainly raise doubts about other statements or representations. Since there have been no complaints about Respondent's conduct since the disciplinary hearing it causes the question to be asked "Why is the OCDC taking a position contrary to what it accepted?"

Both the Informant and Respondent cited to the Disciplinary Hearing Panel the case of *In re McBride*, 938 S.W. 2d 905 (Mo. banc 1997). His actions caused serious physical injury. In fact the injury was life threatening. Judge Covington, in her dissent, noted l.c. 910 that McBride intentionally fired at least two shots into another person's stomach. Unlike McBride, Respondent who is a range officer and firearms instructor, did not discharge her weapon and did not injure anyone. All felony charges against Respondent were dismissed by the Attorney General when the Attorney General was called upon to handle the case. In connection with the dismissal the Respondent entered a plea of guilty to the class B misdemeanor of peace disturbance by making a loud noise. She received an SIS and unsupervised probation which has now been completed. Misdemeanor peace disturbance by making a loud noise would not support a proceeding under Rule 5.21(a)(2) to subject a lawyer to discipline.

Respondent has had trust account issues. From 2000 to 2012 she had no issues. In 2012 her bookkeeper retired and the bookkeeper who replaced her changed systems from QuickBooks to Sage. Respondent now has her old bookkeeper back and is doings things properly and doing it with the QuickBooks program.

Part of Respondent's problems had to do with her belief that the $95.00 fee that she charged for municipal tickets had already been earned when received so she placed those fees in her operating account rather than her trust account. This amounted to comingling.

In the case of *In re Elliott*, 694 S.W. 2d 262 (Mo. banc 1985), Elliott, like Respondent, had inadequate trust account records. That led to a client not being promptly paid thus there was also client harm. Elliott was also found to have neglected clients and legal matters. The discipline was reprimand.

Respondent does not contend that McBride or Elliott are wrongfully decided. Respondent has had no client complaints and no client harm. There has been no misappropriation of funds. Respondent believes the DHP recommendation of reprimand with conditions is proper and should be adopted by this Court. Respondent acknowledges that having a mentor and being supervised by the OCDC should improve her trust practices.

The Panel that heard this matter was a well-qualified and experienced Panel. They were well prepared for the hearing. Their questioning of Respondent and Mrs. Cox was searching. While initially the Panel expressed reservations about the applicability of the posse comitatus doctrine they read the authorities and eventually found it applicable.

Respondent has been the subject of significant unfavorable publicity as a result of being charged with four felonies, she has suffered a significant decrease in her income

which caused her to lose her home, (A150) and she has suffered two stress related heart attacks. (A150) Reprimand with conditions relating to her trust account as proposed by Ms. Dillon and the Panel is the appropriate discipline and should be imposed.

CONCLUSION

As to Count I, Respondent acted at the request of Chief Hart to assist him in apprehending the fugitive Mr. Darnell. Pursuant to the provisions of the Statutes and the Common Law Respondent was clothed with the authority of a police officer. She did not shoot anyone and she did not discharge a firearm. The McBride case which is clearly more egregious then this case, resulted in a reprimand. This is a case in which there is no client involvement, no client complaint and no client harm. The Informant accepted the Hearing Panel's decision and requested the Court to enter discipline in accordance with that decision but now takes the apparent position that the DHP decision was incorrect. The Disciplinary Hearing Panel found no aggravating circumstances under Section 9.2 of the ABA Standards and particularly noted that she did not have a history or prior disciplinary offenses, a dishonest or selfish motive, multiple offenses, bad faith or submission of false evidence. The Panel noted under Section 9.3 of the ABA Standards that Respondent enjoys a good reputation, a record in absence of a dishonest or selfish motive, it has been over five years since the events of May 25, 2012, and there's been no indication of any similar type conduct. The Respondent has clearly established that she has learned her lesson and is remorseful for allowing herself to get into a difficult position. Reprimand with conditions relating to her trust account as proposed by Ms. Dillon and the Panel is the appropriate discipline and should be imposed particularly

since it has been accepted by both parties. Clearly a reprimand with conditions is an appropriate sanction in this case to protect the public, maintain the integrity of the profession, promote confidence in the disciplinary system and to provide consistency in the discipline imposed.

RESPECTFULLY SUBMITED

/s/ Robert G. Russell

By: _____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 5th day of July 2017, the above was sent to Informant and Informant's counsel via the Missouri Supreme Court e-filing system pursuant to Rule 103.08:

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/s/ Robert G. Russell

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(c);

3. Contains 8335 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/ Robert G. Russell
Robert G. Russell