IN THE SUPREME COURT OF MISSOURI
EN BANC

IN RE:	)	
	)	
DUSTIN W. DUNFIELD	)	**Supreme Court No. SC96255**
P.O. Box 306	)	
Nevada, Missouri 64772	)	
	)	
Missouri Bar No. 63473	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

Dustin W. Dunfield
Bar Number #63473
Attorney at Law
PO Box 306
Nevada, Missouri 64772
Telephone: (417)667-5858
E-Mail: dunfieldlaw@gmail.com
RESPONDENT ACTING PRO SE

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CASE SUMMARY

Respondent agrees with Informant in that this is an honesty case. In 1996, Respondent was charged with felony statutory rape and a plea was entered. Respondent always believed that he was not guilty and as of 2014 still did not fully comprehend the possible consequences of the 1996 plea hearing. On August 16, 2016, in Vernon County Case Number 16VE-CV00423 the Court agreed with Respondent and the 1996 plea was found to be "not willingly and voluntarily made and the trial courts 1996 finding of guilty was erroneous and unlawful." **Informant's App. 519.** (Respondent in an effort to avoid confusion adopts Informant's Appendix in its entirety, and incorporates it by reference as if it were attached to Respondent's Brief). The Court further found "the 1996 finding and suspended imposition of sentence are set aside, held to have no force or effect, and cannot be the basis of any future prosecution of the Respondent for failure to register as a sex offender." ***Id.***

Respondent is in agreement with Informant's Case Summary beginning at Paragraph 1, Sentence 2 through the entirety of Paragraph 2.

On review in this Court, Informant challenges only the DHP's recommended discipline, requesting that Respondent be indefinitely suspended without probation with no leave to apply for reinstatement for at least one year, while Respondent at this time challenges all counts and alleged violations, requesting that Respondent be found not guilty of any violations.

STATEMENT OF FACTS

Background

Dustin Dunfield ("Respondent") was licensed to practice in Missouri in April 2011 and holds a Missouri license (bar number) of 63473. **App. 262.** Respondent maintains a solo private practice in Nevada, Vernon County, Missouri. ***Id.*** Respondent has no previous discipline. ***Id.***

Chronological Order of Events

A. Respondents 1996 Criminal Charges

In 1996, Respondent was charged with statutory rape in the second degree, a Class C felony, in the case styled *State of Missouri v. Dustin Dunfield,* Cedar County Case Nos. CR396-3FX, CR396-0003 or 28RO39600003 (hereinafter *"Dunfield Criminal Case.")* ***Id.*** Section 566.034 RSMo. makes it a Class C felony for a person twenty-one (21) years of age or older to have sexual intercourse with a person who is less than seventeen (17) years of age. Respondent has maintained his innocence since the date of the charges to the present and has never voluntarily, knowingly or intelligently admitted guilt because he was not guilty.

On December 18, 1996, the above-entitled cause came on for plea agreement hearing before the Honorable Joseph Phillips, Judge, in the General Division of the Cedar County Circuit Court at Stockton, Missouri on a change of venue from Vernon County,

Missouri.[1] **App. 294.** The State of Missouri was represented by Vernon County Prosecuting Attorney, Neal Quitno; the Respondent was present in person and represented by his public defender, Lorna Huber. **App. 295.**

At that time Respondent had just turned twenty-two (22) years of age only fifteen (15) days earlier and was disabled and frightened due to a severe spinal cord injury which had caused him permanent and lifelong disabilities causing him to be in an improper state of mind to make a reasoned decision. Shortly before said plea hearing Respondent was contacted by his public defender and informed that she had reached a plea agreement with the State in which Respondent would plead guilty to the Class C felony of statutory rape. **App. 34.** In return Respondent would receive a two (2) year suspended imposition of sentence unsupervised probation and would not have to be placed on the sex offender registry. ***Id.*** Respondent's counsel explained this to mean that Respondent upon completion of his probation would have a clean record and no conviction as if this charge had never happened, that he would not have to register on the sex offender registry, and that he could legally answer in the negative to any question in regards to this charge in the future. ***Id.***

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[1] The transcript of the plea hearing shows the date of the plea as December 13, 1996. **App. 294.** However, the trial court's docket sheet and other evidence show the date of the plea as December 18, 1996. **App. 280; 290; 292.** To avoid confusion Respondent will simply use "December 1996" as the date of the plea.

While at the Courthouse, on December 18, 1996, shortly before the plea hearing, Respondent was requested by his attorney to fill out a form, entitled, "To Defendants Who Plan to Enter a Guilty Plea", (herein after "Plea Form"). **App. 283-288.** Said form contained 50 questions advising Respondent of the consequences of entering a guilty plea. ***Id.***

Question #46 of the Plea Form which reads in full, "State in your own words just what you say happened." ***Id.*** Respondent believed that Question #46 was his opportunity to tell the Judge his side of the story, in spite of the advice given to him so far by his attorney. Respondent answered Question #46 as follows, "I had sex with Christina Fetch before my 21st birthday in Vernon County on a few occasions, but we were scared she was pregnant so we did not have sex again until we left the county on the way to Texas. I was 21, but it was not in Vernon County. It was outside of San Antonio, Texas." ***Id.*** By making this statement Respondent believed he had denied any guilt of the charges and, additionally, questioned the jurisdiction of this Court. During the Plea Hearing Judge Phillips further inquired into Respondent's denial of guilt, including but not limited to the following exchanges:

> THE COURT: And you said in your own words just what happened. I understand, basically statutory rape. Do you want to fill me in on the details a little bit?
>
> THE DEFENDANT: Well–
>
> MS. HUBER: Well, just give the facts that–
>
> THE DEFENDANT: Well–
>
> MS. HUBER: --that make you guilty of the charge.

THE DEFENDANT: Okay.

MS. HUBER: Your age and her age and –

THE DEFENDANT: She was 16 years old, and originally I was 20 when we started dating. And we did have sex, but we both got scared that she was pregnant at one time, so we didn't have sex for a while. And then her mom—

THE COURT: So you had sex with her several times?

THE DEFENDANT: Yes, sir.

THE COURT: And you understood she – or you knew her age?

THE DEFENDANT: Yes, sir. But we didn't have sex for a while, and then – we didn't have sex again until after my birthday, but it was in Joplin and then in Texas.

THE COURT: Well, you – This charge is a change of venue out of Vernon County, I believe. And you did have sex with her in Vernon County?

THE DEFENDANT: Before I was 21.

App. 299, Lines ("L.") 2 to 22.

Judge Phillips then ask the Prosecuting Attorney, Neal Quitno, for clarification of the law as follows:

THE COURT: Does that lower the offense if he – What's the distinction on his age?

MR. QUITNO: It's now the law –

THE COURT: I understand the wife's – or girl's age being –

MR. QUITNO: It's now the law that if she's 16 it's not a crime unless he's 21 or older. It changed from two years ago, so we have to be able to prove or have evidence that we'd bring out at trial that he was, in fact, 21. The evidence –

THE COURT: And she was – she was under 17?

MR. QUITNO: She was 16. They were dating, this was consensual, and it was right around his birthday. We –

App. 300, L. 3 to 12.

Judge Phillips then proceeds to inquire further into the state of the law at that time, as follows:

THE COURT: Are you saying the sex they had when he was 20 and she was 16 was not a crime?

MR. QUITNO: The law now does not make that a crime. It is a crime for someone 17 and older to have sex with people certain ages younger than that, but they make a distinction now with a 16-year-old. It's – It's the law. You know, we prosecutors don't make it, obviously. We just are bound to enforce it.

THE COURT: Okay. The wisdom of the legislature in that particular statute is not can't hear, but –

MR. QUITNO: I think they're – you know, I don't know if you're really asking for this on the record, but I think they're concerned about the 17- and 18-year-old boy, usually and a 16-year-old girlfriend in high school, right or wrong, having sexual intercourse and that being a Class C felony. So they bumped the age up for that of the victim –

THE COURT: Is that some sort of a crime or not, or is that no crime at all?

MR. QUITNO: No crime at all, my understanding. Isn't it, Ms. –

MS. HUBER: That's right. No crime at all.

App. 300, L. 20 to 301, L. 10.

At this point the Court, the prosecutor, and the Respondent's attorney have come to the consensus that the law does not make it a crime for a 20 year-old and a 16 year-old to have consensual sex, and therefore, what the Respondent has stated took place is legal.

The Court then proceeds to enter an Alford Plea without explaining what an Alford Plea is to Respondent. **App. 302-306.** Respondent was received a two year suspended imposition of sentence ("SIS") and was placed on two years unsupervised probation. **App. 290; 305-306.** By all accounts, Respondent completed the terms and conditions of his probation, which did not include placing his name on the Sex Offender Registry, without incident.

B. Respondent's Law School Application

In January 2007, Respondent applied to the University Of Arkansas School Of Law. **App. 522-30.** On the application, Respondent honestly answered "yes" in response to the question of whether he had been charged or convicted of any felony. **App. 523.** Partially due to this honest disclosure, Respondent was later admitted and graduated from the law school in December 2009. **App. 544.**

C. Respondent's Arkansas Bar Application

Respondent applied for admission to the Arkansas Bar in 2010. In January 2010, Respondent received a letter from Christopher Thomas, Executive Secretary of the

Arkansas State Board of Law Examiners, acknowledging Respondent's honesty in disclosing the 1996 Criminal Case. **App. 532.** Respondent did not pass the Arkansas Bar Examination and therefore did not have to have a character and fitness hearing with the Arkansas State Board of Law Examiners to further discuss the 1996 Criminal Case.

D. Respondent's Missouri Bar Application

In April 2010, Respondent applied for Admission to the Missouri Bar. **App. 537-64.** Respondent again showed his honesty by disclosing his statutory rape SIS on the application. **App. 555.** In 2011, Respondent was admitted to the Missouri Bar. **App. 262.**

E. Respondent's Candidacy for Vernon County Prosecuting Attorney

On or about February 28, 2014, Respondent completed and filed a "Candidate Declaration Form" with the Vernon County Missouri Clerk's Office declaring himself to be a candidate for Vernon County Prosecuting Attorney. **App. 270; 265.** On said "Candidate Declaration Form," Respondent declared that he Has "not been convicted of or found guilty of or pled guilty to a felony under the laws of the state of Missouri." **App. 266; 270.** Respondent further swore and/or affirmed that "the information contained in the foregoing declaration of candidacy is, to the best of my knowledge, true." ***Id.***

On August 12, 2014, Lynn Ewing III, an opposing candidate for Vernon County Prosecuting Attorney, filed a petition challenging Respondent's candidacy in the Circuit Court of Vernon County Missouri in the case styled *Lynn M. Ewing III v. Dustin W. Dunfield,* Vernon County Case No. 14VE-CV00467 (hereinafter "*Ewing v. Dunfield*"). **App. 266; 503-06.** The Case was assigned to Newton County Circuit Judge Timothy

Perigo. **App. 500.** On August 18, 2014, Respondent filed an answer to the Petition. **App. 266; 508-09.**

On August 29, 2014, a hearing was held before Judge Perigo in Cedar County, Missouri. ***See, e.g.*, Transcript at 324.497.** Prior to testifying, Respondent was advised of his right against self-incrimination which he did not invoke because he was being honest and had nothing to hide. **App. 411, L. 16 to 413, L 21.** During the course of testimony, Respondent testified that he had a nearly photographic or eidetic memory stating "I remember almost everything that's ever happened in my life" and "You tell me something once, I remember it forever. I may forget a name, but I remember everything else." **App. 442, L. 20-23; 443, L. 7-9.** With respect to his 1996 plea, Respondent argued that:

> I was never given my fair day in court. I was the only person in the courtroom that day who was not – who did not have a law license. And everyone in the courtroom, the record will reflect, was more confused about what was going on than I was…Yet this plea agreement still took place, even though I never admitted guilt. I specifically stated facts to the contrary.
>
> **App. 330, L. 23 to 331 L. 9.**

Respondent further testified that neither Judge Phillips nor his public defender understood the law and that his public defender provided ineffective assistance of counsel. **App. 433, L. 19 to 21; 449, L. 15 to L. 16.** During cross examination at the August 2014 hearing, Respondent testified that:

Q: Okay. And are you telling the Court you still - - are you still trying to maintain to this Court you didn't understand you were found guilty?

A: I didn't understand that I was found guilty.

…

Q: All right. So if I understand correctly, you're saying to this Court you honestly don't believe you've ever pled guilty?

A: I honestly don't believe that I have ever pled guilty.

Q: You don't believe the judge found you guilty?

A: I don't believe the judge found me guilty.

App. 477, L. 9-13; 480, L. 14 to L. 22.

With respect to statements made on his Candidate Declaration Form, Respondent testified in the August 2014 hearing that:

I signed an affidavit in regards to those issues, stating that I was qualified to run - - that to my knowledge, I was qualified to run for elective office…What I said is that I haven't knowingly been convicted, found guilty, or pled guilty. As far as I knew and as far as I know today, there's no doubt that an SIS probation is not a conviction, but that been established over time.

App. 458, L. 4 to L.24.

In the middle of making these statements, Judge Perigo again advised Respondent of his right against self-incrimination which, again he did not invoke because he was being honest and had nothing to hide. **App. 458, L. 25 to 460, L. 18.**

Respondent also testified that he had "contacted the Ethics counsel [Missouri Ethics Commission] in regards to everything that's going on and have been informed that they don't believe I'm in the wrong." **App. 457, L. 11-13.** During cross-examination, Respondent testified that the Ethics Commission did not issue him a written opinion and that the name of the person with whom he spoke was "written down at home, but I do not have it with me right now." ***See*** **App. 482, L. 1 to 13.**

On September 3, 2014, Judge Perigo entered a "Judgment on the Pleadings" finding that "contestee Dunfield was found guilty of the [sic] statutory rape in the second degree on December 13, 1996." **App. 266; 511-12.** Judge Perigo declared that since Respondent had been found guilty of a felony in the State of Missouri, Respondent was an ineligible candidate for Vernon County Prosecuting Attorney. **App. 512.** Judge Perigo further ordered the Vernon County Clerk to remove Respondent's name from the November 4, 2014 ballot. **App. 266-67; 512.** Respondent, believing it to be in the best interest of his family and the people of Vernon County, did not appeal the Judgment on the Pleadings. **App. 267.**

F. Respondent's Actions to Set Aside His 1996 Criminal Case and Not Have to Register on the Sex Offender Registry

On or about July 23, 2014, Respondent filed a petition in the Circuit Court of Cedar County, Missouri seeking a Court Order to exempt him or remove his name from the state sex offender registry in the case styled *In re Dustin Dunfield*, Case No. 14CD-CV00261. **App. 263.** On or about the same time, Respondent filed a motion to set aside

his plea of guilty in the 1996 *Dunfield Criminal Case*. ***Id.*** A first Amended Petition in the *In re Dustin Dunfield* case was filed on August 7, 2014. **App. 263; 314-15.**

Shortly after filing his Petition, Dunfield was contacted by a reporter from the *Nevada Daily Mail*. Dunfield told the reporter that: "I was never convicted, I never pleaded guilty to and was never found guilty of a felony." **App. 570.** Respondent accused Vernon County Prosecutor Lynn M. Ewing III of creating a political scandal stating: "He is under the belief that I was convicted or pleaded guilty or found guilty of a felony in the state of Missouri. And he's wrong." **App. 571.**

The *In re Dunfield* case and the motion to set aside Respondent's guilty plea were also assigned to Judge Perigo, who heard these matters at the same August 29, 2014 hearing in Cedar County, Missouri. **App. 263.** Following the hearing, Judge Perigo denied Respondent's Petition to exempt him or remove his name from the sexual offender registry and also denied his motion to set aside his guilty pleas in the *Dunfield Criminal Case*. **App. 264.** Judge Perigo further made an August 29, 2014 docket entry in the *In re Dunfield* case "advising" Respondent to register as a sex offender within three business days in Vernon County. ***See*** **App. At 264; 310.** However, as the stated in the DHP Decision, "on August 16, 2016, on the Petition of Respondent filed in the case described above… and after a hearing in the Circuit Court of Cedar County entered a judgment finding that: (a) The original plea of guilty… "was not knowingly, willingly, and voluntarily made", and (b) Set aside all orders, including the finding of guilty and set aside the judgment of guilty in the case described…above." **App. 574.** Further the DHP found that, "Respondent attempted to register with his local Sheriff and was refused

registration" and "the advice to register was not requested in the pleadings and did not constitute an Order of the Court by the words employed and were not within the pleaded issues for decision." **App. 575.**

G. Disciplinary Proceedings

On June 25, 2015, Informant, the Office of Chief Disciplinary Counsel ("OCDC") filed a two count Information against Respondent. **App. 3-28.** In Count I, Informant charged Respondent with misconduct violations of Rule 4-8.4I and (d) for filing his Candidate Declaration Form and falsely and/or dishonestly declaring, swearing and or affirming that he had "not been convicted of or found guilty of or pled guilty to a felony under the laws of Missouri." **App. 5.** In Count II, Informant charged Respondent with a violation of Rules 4-3.4I[2] and misconduct prejudicial to the administration of justice under 4-8.4(d) by failing to register as a sex offender as required by Judge Perigo's August 29, 2014 docket entry. **App. 5-7.**

In the Information, Informant made the following allegations in both Counts:

> 6. In December 1996, in the Circuit Court of Cedar County, Missouri, Respondent pled guilty to the charge of statutory rape in the second degree…
>
> 20. As discussed above, in December 1996, in the Circuit Court of Cedar County, Missouri, Respondent pled guilty to the charge of statutory rape in the second degree…

[2] Missouri Rule of Professional Conduct 4-3.4(c) provides in relevant part that: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal…"

App. 4;6

In his Answer to the Information, Respondent inadvertently admitted both of these allegations. **App. 29: 31.** Prior to the DHP hearing, Informant and Respondent prepared a "Joint Stipulation of Facts." ***See, e.g.,*** **App. At 262-68.** Respondent did not stipulate, however, that he pled guilty to statutory rape in 1996. ***See id.***

On December 2, 2016, this matter proceeded to a DHP hearing before the Honorable Donald E. Bonacker, Presiding Officer, and panel members Deana Scott and Lynn Stark.[3] **App. 573.** At the start of the DHP hearing, Informant dismissed the alleged Rule 4-3.4I violation in Count II of the Information. **App. 65, L. 24 to 66, L. 6.** Respondent then moved to amend paragraphs 6 and 20 of his Answer to change his inadvertent admissions to denials. ***See*** **App. 66, L. 25 to 28, L. 13.** Informant objected and the motion to amend was denied. **App. 68, L. 14 to 69, L.3.**

Prior to his testimony before the DHP, Respondent was again advised of his right against self-incrimination which, for the third time he did not invoke because he was being honest and had nothing to hide. **App. 69, L4 to 24.** Respondent was then questioned about his 1996 case, leading to the following exchange:

> Q: All right. Mr. Dunfield, with respect to final adjudication of the criminal charge that occurred in 1996, I'm going to ask you a couple of questions, and, if you

[3] The large gap in time between the filing of the Information in June 2015 and the DHP hearing in December 2016 occurred because Respondent requested time to collaterally attack his 1996 guilty plea.

would like, I'd ask for you to answer them with yes-or-no responses, and during your case-in-chief you'll get an opportunity to explain in narrative format. But for now, "yes" or "no," okay?

A: Okay

Q: All right. In December of 1996, did you plead guilty to the charge of statutory rape in the Circuit Court of Cedar County, Missouri?

A: I didn't believe that I did.

Q: I asked you for a yes-or-no answer.

A: No.

…

Q: In December, 1996, were you found guilty of the charge of statutory rape by the Circuit Court of Cedar County, Missouri; yes or no?

A: Yes. And if I could, the question before that I said "no" to, I believe that at this time - - well, I'd like - - I'll get into it later - -

…

Q: Well, I'd like a firm either "yes" or "no" Which is it? Because I don't want to hear a "yes" now and then hear a "no" later during your case-in-chief.

So the question again was, in December, 1996, did you plead guilty to the charge of statutory rape in the Circuit Court of Cedar County, Missouri?

A: I think the Court's found that I have, at this point.

Q: No, my question was, did you?

A: I never felt that I did, so that was - -

Q: So the answer is "no"?

A: That would be "no."

App. 75, L.3 to 76, L. 16.

Respondent was then questioned at length about the details of the 1996 case, including references to the hearing transcript, the docket sheet, the Plea Form and other documents. Eventually, at the conclusion of this line of questioning, Respondent stated: "Today, after seeing everything, and over the last couple of years, everything that's transpired, I would say that I did plead guilty on that day." **App. 83, L. 21 to 84, L.6.** This was another honest answer from the Respondent even though, as stated previously, the 1996 judgment and plea had been set aside and vacated.

During his case-in-chief, Respondent testified that he previously attested to his innocence during the plea hearing, including raising questions about improper venue and making statements that showed that he had not committed statutory rape. ***See*** **App. 96, L. 24 to 97, L. 23.** With respect to his affirmations on his Candidate Declaration Form that he had not been convicted of or found guilty or pled guilty to a felony, Respondent honestly testified that he was under the belief that he could answer that question in the negative because he had "never been convicted, which I believe is accurate with an SIS." **App. 99, L. 17 to L. 20.** Respondent also attempted to offer the statement of Judge Charles Curless who told Respondent that because he received a SIS probation, he could answer that question on the Candidate Declaration Form with a "no." **App. 98, L. 23 to 99, L. 10.** Counsel for Informant objected on hearsay grounds to his testimony and after hearing the testimony as an offer of proof, Judge Bonacker rejected it. ***Id.*** Responded

would like to point out, since this is an "honesty case" that the Informant is being dishonest when he states that the judge was unnamed. Judge Curless's name was disclosed to the Informant in Respondent's Answer to Informant's two count Information when respondent answered as follows:

> 11. … In addition, Respondent spoke at length in regards to his past and his potential candidacy for Vernon County Prosecuting Attorney with Barton County Missouri Associate Judge Charles Curless, who was at the time a member of the Missouri Bar Board of Governors. After said conversation, Judge Curless was of the opinion that because Respondent had received a Suspended Imposition of Sentence and had successfully completed the probationary period Respondent was eligible to run for office and could legally answer the affidavit in the negative based on the 1996 case being a closed record pursuant to 610.105.1 RSMo…Based on all of this, Respondent did not believe his answer to the Candidate Declaration Form was false and/or dishonest, and accordingly Respondent believed he was eligible to run for Vernon County Prosecuting Attorney. **App. 30.**

Respondent and Informant also spoke about Judge Curless in a phone conversation prior to the Disciplinary hearing and whether or not he would be called as a witness, at which time Informant disclosed to Respondent that a partner in his law practice knew Judge Curless personally, the point being that Informant knew exactly who this supposed unnamed Judge was because he was named by Respondent.

During cross-examination, Respondent was questioned about why he did not collaterally attack his guilty plea if he knew he was innocent. Respondent testified that in 1997 he hired a private attorney, Nick Swischer, who does a "great deal" of criminal defense work. Respondent said he told the attorney he was not guilty, and the private attorney offered no assistance in setting aside his guilty plea. **App. 113, L. 2 to 114, L.1.** Additionally, at this hearing it was shown that Respondent honestly disclosed the 1996 criminal case to the University of Arkansas School of Law, the Arkansas Board of Law Examiners, and the Missouri Board of Law Examiners. **App. 521-530 at 530. App. 531-533, and App. 536-564 at 555.**

With respect to his Candidate Declaration Form, Respondent was asked what legal authorities he relied upon in his belief that he could answer the question of whether he had been convicted of or found guilty to a felony in the negative. Respondent honestly testified that he believed the closed record provisions of Section 610.105.1 and 610.110 RSMo., respectively, allowed him to answer "no."[4] **App. 124, L.20 to 126, L. 4.** When

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[4] Section 610.105.1 RSMo. provides in relevant part:

> If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accussed is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records…"

Section 610.110 RSMo. provides that:

asked if he researched the statutes to see if they specifically applied to candidate declaration forms, Respondent again honestly testified that he just assumed they did. **App. 126, L. 9 to L. 24.** Informant did cite several cases in his closing but none that Respondent believes are controlling in this instance, and Informant offered no statute directly on point to show that Respondent was incorrect in his belief. **App. 136, L. 1 to 142, L. 15.** Since this case has been investigated by the Missouri State Highway Patrol and the Missouri Attorney General's Office and no charges have ever been brought against Respondent it seems to be a reasonable and belief on the part of Respondent.

H. DHP Decision

On December 28, 2016, the DHP entered it Decision. **App. 573-76.** The DHP found that "on December 18, 1996, respondent was found guilty of the felony of Statutory Rape in the Second Degree, upon his plea of guilty in Cedar County, Missouri Circuit Court, Case #CR396-3FX or #CR 396-00003, wherein the imposition of sentence was suspended. Sentence was never imposed." **App. 574.** Further, the DHP found that "on August 16, 2016, on the Petition of Respondent filed in the case described above… and after a hearing in the Circuit Court of Cedar County entered a judgment finding that: (a)

> No person as to whom such records have become closed records shall thereafter, under any provision of law, be held to be guilty of perjury or otherwise of giving a false statement by reason of his failure to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose…"

The original plea of guilty… "was not knowingly, willingly, and voluntarily made", and (b) Set aside all orders, including the finding of guilty and set aside the judgment of guilty in the case described…above." ***Id.*** With Respect to Count I, the DHP found that "Respondent violated Rule 4-8.4(c) by stating under oath that he had not been found guilty of a felony in his Candidate Declaration Form, which he signed under oath on February 28, 2014…" **App. 575.** The panel made no findings with respect to the alleged Rule 4-8.4(d) violation in Count I. With respect to Count II, the DHP found that Respondent did not violate Rule 3-8.4 [sic] as alleged in Count II of the Information and recommended that Count II be dismissed.[5] The DHP recommended that Respondent be suspended from the practice of law for six months, with execution of the suspension stayed, and Respondent placed on probation for a period of two (2) years. **App. 576.**

On January 18, 2017, the OCDC filed its notice of rejection of the DHP Decision. **App. 577.** In this review, Informant challenges only the DHP's recommended discipline, requesting instead that Respondent be suspended from the practice of law indefinitely, with no leave to apply for reinstatement for at least one year. Respondent did not file a notice of rejection of the DHP Decision because he was ready to put this behind him and move on for both himself and his family. However, in light of the Informants decision to challenge the DHP recommendation, Respondent challenges the recommended discipline

[5] Respectfully, Respondent believes that the DHP's reference to Rule 3-8.4 was a scrivener's error ant that the correct reference is Rule 4-8.4 which was charged in the Information.

also, requesting instead that all alleged violations be dismissed because as the Informant states in the very first sentence of its brief, "This is a case of honesty." In paragraph 9 of its decision the DHP found the statement made by the Respondent on his Candidate Declaration Form to be false. **App. 574.** However, nowhere in the DHP's decision was Respondent found to be dishonest. To the contrary, the DHP found that, "the Respondent is believed to be credible as a witness before the panel." **App. 575.**

POINTS RELIED ON

I.

RESPONDENT DID NOT VIOLATE RULE 4-8.4(c) BY FALSELY DECLARING ON HIS CANDIDATE DECLARATIONFORM FOR VERNON COUNTY PROSECUTING ATTORNEY THAT HE HAD BEEN FOUND GUILTY TO A FELONY UNDER THE LAWS OF MISSOURI WHEN, IN FACT, HE PLED GUILTY TO AND WAS FOUND GUILTY OFFELONY STATUTORY RAPE IN THE CIRCUIT COURT OF CEDAR COUNTY MISSOURI IN DECEMBER 1996.

Missouri Supreme Court Rule 4-8.4

Section 115.306 RSMo.

II.

RESPONDENT HAS ONLY EVER HAD ONE EXPLANATION OF WHETHER OR NOT HE PLED GUILTY IN 1996 UP TO AND INCLUDING AT THE TIME OF THE DHP HEARING CONSTITUTING NO ADDITIONAL VIOLATION OF RULE 4-8.4(c), OR IN THE ALTERNATIVE, NO AGGRIVATION OF THE UNDERLYING RULE 4-8.4(c) VIOLATION SET FORTH IN INFORMANTS POINT I.

Missouri Supreme Court Rule 4-8.4

In re Crews, 159 S.W.3d 355, 360 (Mo. banc 2005).

III.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRIVATING AND MITIGAGTING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE FOR ANY PERIOD.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

In re Cary and Danis, 89 S.W.3d 477 (Mo. banc 2002)

In re Eisenstein, 485 S.W.3d 759 (Mo. banc 2016)

Matter of Cupples, 952 S.W.2d 226 (Mo. banc 1997)

ARGUMENT

I.

RESPONDENT DID NOT VIOLATE RULE 4-8.4(c) BY FALSELY DECLARING ON HIS CANDIDATE DECLARATIONFORM FOR VERNON COUNTY PROSECUTING ATTORNEY THAT HE HAD BEEN FOUND GUILTY TO A FELONY UNDER THE LAWS OF MISSOURI WHEN, IN FACT, HE PLED GUILTY TO AND WAS FOUND GUILTY OFFELONY STATUTORY RAPE IN THE CIRCUIT COURT OF CEDAR COUNTY MISSOURI IN DECEMBER 1996.

Misconduct under Rule 4-8.4(c)

Rule 4-8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In 2014, Section 115.350 RSMo. provided that "No person shall qualify as a candidate for elective public office in the State of Missouri who has been convicted of or found guilty of or pled guilty to a felony under the laws of this state."[6] In this case, the facts establish that in the 1996

[6] Section 115.350 RSMo. was repealed in 2015 and replaced by Section 115.306 RSMo. which similarly states that "[n]o person shall qualify as a candidate for elective public office in the state of Missouri who has been found guilty of or pled guilty to a felony or misdemeanor under the federal laws of the United States of America or to a felony under the laws of this state…"

Criminal Case the State violated the terms of the plea agreement, newly found evidence was discovered coinciding with Respondent's statements of not having committed the crime alleged, the appropriateness of venue was never addressed, the original trial judge, Judge Joseph Phillips, and the State both conceded that the Respondent's original guilty plea was erroneous and not knowingly, willingly and voluntarily made, and Judge Thomas Pyle, the judge on the Motion to Vacate or Set Aside Judgment opined that there appeared to be a violation of the equal protection guarantees of the US and Missouri Constitutions and the remedies clause of the Missouri Constitution. **App. 517-520.** Based on all of this Judge James R. Bickel found that a manifest justice had occurred and ordered that Respondent's plea of December 18, 1996 for the Class C Felony offense of statutory rape in the 2nd degree was not willingly and voluntarily made, that the trial courts finding of guilt was erroneous and unlawful, and entered judgment that the subsequent suspension of imposition of sentence be set aside, held to have no force or effect, and cannot be the basis of any future prosecution of Respondent for failure to register as a sex offender. ***Id.*** Further, the Court found that Respondent does not have to register as a sex offender, and the finding and ruling of the trial Court of December 18, 1996 aforesaid is vacated, invalidated and held for naught. ***Id.*** It seems to Respondent that if Informant's and OCDC's concern is honesty that they would at least be honest is disclosing this fact in their argument to this Court. In 2014, Respondent completed a candidate Declaration Form for Vernon County Prosecuting Attorney wherein he swore and affirmed, under oath, as he honestly believed to be true based on his discussions with Judge Charles Curless and the Missouri Ethics Commission, that he had not been

convicted of or pled guilty to or found guilty of a felony under the laws of the state of Missouri. **App. 265-66;270.** An accurate and honest reading of the DHP decision is not that the Respondent was dishonest; but that he was a credible witness and that the information of the Candidate Declaration Form was false. **App. 575.** Respondent can make an incorrect statement unintentionally that is false without being dishonest.

Respondent's arguments that he did not knowingly make a false statement when he completed his Candidate Declaration Form are far from bizarre and unpersuasive at the Informant states. Former Cedar County Judge Joseph Phillips, current Cedar County Judge Thomas Pyle, Cedar County Prosecuting Attorney Ty Gaither, and former 28th Judicial Circuit Judge James R. Bickel as well as the DHP all found the Respondent to be credible and persuasive as evidenced in their rulings. ***Id.***; **See also App. 517-520.** Informant was to continue to point the Court to Respondent's testimony in regards to a judge who advised him he could answer the question of whether he had been convicted to or found guilty on the declaration form as evidence of dishonesty because it was ruled on by the DHP as hearsay. **App. 98, L. 23 to 99, L. 10.** Respondent agrees that it was ruled as hearsay, but it was not ruled on as being dishonest. Informant, if he is honest, knows that Respondent disclosed to him the name of Judge Curless and made Informant aware that he had no intention of interfering with Judge Curless's schedule by calling him as a witness. Informant then wants to use the fact that Respondent's discussion with the Missouri Ethics Commission not being documented in some form of writing and his lack of knowledge as to Section 105.955.16(1) RSMo. as proof of dishonesty. **App. 131, L. 4 to L. 24; 482, L. 1 to L. 13.** Since when has being respectful to a judge and/or being

ignorant as to a specific statute constituted dishonesty? It only constitutes respect and ignorance of which I readily admit guilt.

Informant next argues that Respondent's reliance on Sections 610.105 and 610.110 RSMo. are also unavailing because Respondent testified that he relied on both statutes at the time he completed his Candidate Declaration Form, yet failed to cite either statute in his Answer to the Petition challenging his candidacy filed by Lynn Ewing, III. **App. 128, L. 7 to 129, L. 13.** Informant further argues this point is valid because Respondent failed to raise either statute at the August 29, 2014 hearing in front of Judge Perigo and did not appeal Judge Perigo's judgment citing either statute. **App. 129, L. 14 to 130, L. 2; 458, L. 24.** Finally, Informant argues this point one last time because Respondent testified that he "assumed" both statutes applied to statements made on a Candidate Declaration Form, but provided no case law or statutory authority to that effect. **App. 126, L. 9 to L. 24.** Respondent did honestly rely on these statutes which form the basis of his conversation with Judge Charles Curless as pointed out in his Respondent to the Information. **App. 30.** Respondent did not cite these statutes in his Answer to the Petition challenging his candidacy as Informant correctly points out, but that is not proof of dishonesty. It just proves that these statutes were not cited in an Answer filed by Respondent that had to be prepared in a very short amount of time. The same is true for the hearing in front of Judge Perigo. Respondent admits that he had little time to prepare and did not do the greatest job of representing himself, but once against that does not make Respondent dishonest. Finally, just because Respondent assumed something, whether correct or incorrect, that does not make him dishonest. Neither does providing no

case law or statutory authority or not appealing Judge Perigo's judgment. As Respondent testified to at the DHP hearing he was ready to move on this entire event for numerous reasons including, but not limited to the availability of another candidate to take his place and the wishes of his family. **App. 158, L. 21 to 159, L. 10; 160, L. 16 to 161, L. 1.**

Accordingly, for all the reasons set forth above, this Court should reverse the DHP's finding that Respondent violated Rule 4-8.4(c) by stating under oath that he had not been found guilty of a felony in his Candidate Declaration Form.

II.

RESPONDENT HAS ONLY EVER HAD ONE EXPLANATION OF WHETHER OR NOT HE PLED GUILTY IN 1996 UP TO AND INCLUDING AT THE TIME OF THE DHP HEARING CONSTITUTING NO ADDITIONAL VIOLATION OF RULE 4-8.4(c), OR IN THE ALTERNATIVE, NO AGGRIVATION OF THE UNDERLYING RULE 4-8.4(c) VIOLATION SET FORTH IN INFORMANTS POINT I.

Although not formally charged in the Information, Informant, underhandedly and dishonestly, is attempting to submit that Respondent has had changing and differing explanations of whether or not he pled guilty in 1996, even though Respondent has never done so. This does not constitute an additional violation of Rule 4-8.4(c), or in the alternative, aggravate the underlying 4-8.4(c) violation incorrectly found by the DHP.

Informant correctly argues that this Court has found that an attorney who offers multiple or different explanations for his misconduct also violates Rule 4-8.4(c). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). In Crews, an attorney failed to respond to or defend a motion for summary judgment that was filed against his clients and offered different and varied explanations for his failures to his clients, the OCDC and at the disciplinary hearing. *Id.* The attorney offered similar inconsistencies regarding his failure to properly appeal his clients' case. *See id*. at 358. This Court found that the "multiple and differing explanations Respondent provided to Plaintiffs, the court and the DHP with regard to his failure to defend against the summary judgment motion and prepare an

acceptable brief for the court of appeals supports the determination that he violated Rule 4-8.4(c)." *Id.* at 360.

At the hearing, counsel for the Informant did in fact discuss *Crews* as the basis for an enhancement of a Rule 4-8.4(c) violation. **App. 155, L. 22 to 156, L. 13.** However, unlike in *Crews*, Respondent has not offered multiple or differing explanations of whether or not he pled guilty in 1996, therefore he has done nothing to constitute further dishonest statements or misrepresentations in violation of Rule 4-8.4(c), or at least aggravate the underlying Rule 4-8.4(c) charge of lying on the Candidate Declaration Form, as Informant states. Respondent did not lie on the Candidate Declaration Form nor has he offered multiple or differing explanations of whether or not he pled guilty in 1996. Respondent did testify that he has a nearly photographic memory. Respondent did testify that he remembers almost everything that's happened in his life.. **App. 442, L. 20-23.** The evidence from the December 1996 hearing does not clearly show that Respondent pled guilty and understood he was pleading guilty at the time, which is precisely one of the numerous reasons that the 1996 judgment and plea was set aside on August 16, 2016 by Judge James R. Bickel, after the original trial judge, Judge Joseph Phillips, and the State both conceded that the Respondent's original guilty plea was erroneous and not knowingly, willingly and voluntarily made. **App. 517-520.** In 2007, Respondent honestly disclosed that he had been charged with or convicted of a felony in his application for admissions to the University of Arkansas School of Law. **App. 523, 530.** Nowhere in that application did Respondent say that he was guilty. Respondent always believed that he was guilty and that the plea was unknowingly and involuntary and explained the situation

to the law school administration in person just as he has to the DHP and the courts in all of the hearings that have resulted. In 2010, Respondent was once again honest in his disclosure to both the Arkansas and Missouri Boards of Law Examiners. **App. 532, 555.** Informant states that in July 2014, Respondent told the *Nevada Daily Mail* newspaper that he was never convicted, never pleaded guilty to and was never found guilty of a felony. **App. 571.** Informant, being dishonest once again, fails to disclose to the Court in its brief that Respondent, at the DHP hearing denied ever making this statement because he never spoke to anyone from the *Nevada Daily Mail* in regards to this article due to them not returning his call. **App. 84, L. 10 to 85, L. 2.** Respondent later testified, under oath, in a hearing in front of Judge Perigo on August 29, 2014, that he honestly didn't believe that he had ever pled guilty or been found guilty. **App. 480, L. 14-20.** In his Answer to the Information filed on July 16, 2015, Respondent inadvertently answered that he had pled guilty. **App. 29; 31.** Prior to the DHP hearing in December, the parties prepared a stipulation of facts, but when Respondent realized that he had made an honest mistake he attempted to correct his error of an admission to a denial at the hearing. **App. 66, L. 25 to 68, L. 13.** Informant calls Respondent's inability to respond with a simple "yes" or "no" answer at the DHP hearing about his plea and finding of guilt as being equivocal and evasive. **App. 75, L. 3 to 76, L. 16.** Respondent was not being equivocal or evasive. The facts surround the 1996 Criminal Case are very difficult questions of law and therefore are not always capable of being responded to with a simple "yes" or "no" answer. Respondent honestly answered that he never felt that he had pled guilty but, at the time of the DHP hearing believed that the Court had found that he had pled guilty. ***Id.***

Therefore, Respondent admitted this very early in the DHP hearing not "only after being walked through all the information surrounding his plea, including his testimony, the Guilty Plea Form, the docket sheet and other information…" as the Informant dishonestly states in his brief. Further, nowhere in the DHP's decision was Respondent found to be dishonest by those present at the hearing. To the contrary, the DHP found that, "the Respondent is believed to be credible as a witness before the panel." **App. 575.**

Accordingly, for all of these reasons, this Court should find that Respondent has not had multiple and/or differing accounts of whether or not he pled guilty in 1996 and therefore he has done nothing to constitute an additional violation of Rule 4-8.4(c), and nothing in the alternative to aggravate or enhance the underlying Rule 4-8.4(c) violation incorrectly found by the DHP.

III.

UPON APPLICATION OF THE ABA SANCTION STANDARDS, INCLUDING AGGRIVATING AND MITIGAGTING FACTORS, AND PRIOR DECISIONS OF THIS COURT, THE COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE FOR ANY PERIOD.

Respondent's conduct of honesty, even if viewed as an unknowing false statement on his Candidate Declaration Form, under oath, is not a violation of Rule 4-8.4(c), his consistent explanation of whether or not he pled guilty, also not a violation of Rule 4-8.4(c), as well as consideration of the lack of any aggravating and mitigating factors does not warrant the imposition of serious discipline in this case. Respondent respectfully submits that he should receive no punishment and no suspension from the practice of law because he did not violate any rules.

Standard

Sanction analysis commonly derives from several sources: parties' recommendations and stipulations; hearing panel recommendations; applicable rules, e.g. Rule 5.225 (the probation role); application of the ABA Standards for Imposing Lawyer Sanctions (1991 ed.); consideration of previous Missouri Supreme Court decisions for consistency; and other jurisdictions' decisions. In deciding what sanctions to recommend the OCDC states that they routinely consider all of these sources, whether they are reaching a stipulation or whether in more adversarial settings. As importantly, the OCDC states that they attempt to consider the Court's many unreported decisions made in stipulated and contested

cases. Using all sources the OCDC states that the analysis is then applied to each new case, and considered along with any aggravating or mitigating factors. The OCDC then states that it is their goal to recommend sanctions in accord with those apparent standards and to justify or explain any deviations from the standards.

Analysis

As stated at the onset Respondent agrees with Informant that this is an honesty case. Respondent has always been honest. This Court has specifically noted that: "Honesty is, perhaps, the most essential quality for a lawyer." *Matter of Cupples*, 952 S.W.2d 226, 238 (Mo. banc 1997) (Covington, J. concurring in part and dissenting in part). ABA Standards 6.1 and 6.12 provide that the suspension is appropriate when the case involves conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit or misrepresentation to the court. *In re Eisenstein*, 485 S.W.3d 759, 763 (Mo. banc 2016) (citing *In re Madison*, 282 S.W.3d 350, 361 (Mo. banc 2009)). *See also Cupples*, 952 S.W.2d at 237 (listing cases)("[t]his Court disciplines dishonest conduct by disbarment or suspension"). (Covington, J. concurring in part and dissenting in part).

In this case, the DHP recommended that Respondent receive a six-month suspension from the practice of law, with said suspension stayed in for respondent to be placed on probation for two years. **App. 576.** The OCDC respectfully rejects this recommendation and submits that Respondent's conduct justifies not just a six-month, but a one-year suspension from the practice of law, without probation. Respondent respectfully rejects the DHP recommendation as well as the OCDC request will and submits that

Respondent's conduct justifies no suspension or reprimand of any kind as he is been honest always.

Informant cites that recently, in *Eisenstein*, a lawyer was suspended for six months for dishonestly obtaining evidence through improper means and failing to disclose it to opposing counsel. *Eisenstein*, 485 S.W. at 763-64. Judge Fischer respectfully dissented, noting that a six month suspension was the baseline discipline under the ABA Standards, and stating he would've suspended the attorney for a year based on the lack of mitigating factors and presence of several aggravating factors. *Id.* at 764-66 (Fischer, J. dissenting). This court has in the past suspended attorneys for a year based on dishonest conduct. *See, e.g. In re Crews*, 159 S.W.3d 355 (mo. banc 2005) (discussed above in Point II) and *In re Cary and Danis*, 89 S.W.3d 477 (Mo. banc 2002) (withholding evidence of making false statements warranted a one year suspension from the practice of law for two attorneys.)

Here, Respondent never made a dishonest statement. He made an honest statement of what he believed to be true that just happened to be a false statement. The Missouri General Assembly has decided that as a matter of public policy, those who have been convicted of or found guilty of or pled guilty to a felony are ineligible to run for certain public offices, including the Office of Prosecuting Attorney. *See* former Section 115.350 and Section 115.306 RSMo. Respondent after discussion with Judge Charles Curless, a phone call to the Missouri Ethics Commission, and in reliance of Sections 610.105 and 610.110 RSMo., stated under oath, what he honestly believed he could do at the time, that he had not pled guilty to a felony under the laws of Missouri. In doing so, respondent told the truth, and did not commit an additional current, as the Informant states in its brief

period. *See* Section 115.405.1 RSMo. (" Any person making a sworn statement, affidavit or declaration of candidacy required by this subchapter who swears falsely or sign such document knowing the statements therein are untrue Be deemed guilty of a class I election offense."). Respondent did not make any statement knowing it to be false. The Informant has informed the Respondent that the Missouri State Highway Patrol and the Missouri Attorney General's Office both investigated Respondent in regards to the allegations set forth in this case neither proceeded with any criminal charges, therefore one can only logically conclude that they agree with the DHP Panel that the Respondent is credible as a witness which they would have only done if they believed him to be honest.

OCDC once the court to consider also that the position for which Respondent was applying it – Prosecuting Attorney of Vernon County – is the chief law enforcement officer for a County of roughly 21,000 Missourians.[7] Had he been elected, Respondent would have been charged with prosecuting criminal offenses possibly resulting in significant deprivations of liberty for those convicted or found guilty, including, but not limited to, the death penalty. Those criminal defendants, the victims, as well as County citizens deserve nothing less than total honesty from a prosecuting attorney, which is exactly what they got from Respondent who when he became aware that he may not be

[7] United States Census Bureau – Quick Facts – Vernon County, Missouri, *available at* https://www.census.gov/quick facts/table/PST045216/29217,00 (last visited April 9, 2017) (estimating Vernon County's population at 20,723 as of July 1, 2016).

eligible for the position of Vernon County Prosecuting Attorney decided not to appeal Judge Perigo's decision.

The Informant requests that this Court consider what he calls Respondent's misconduct and guilty plea had been discovered after election in the burden on state agencies, the judicial system, and the citizens of Vernon County. However, none of these things took place. Respondent did not take part in any misconduct. He made an honest mistake which he promptly corrected upon learning of his mistake. The Informant is doing nothing more than speculating as to what may or could have happened but did not happen as well as purporting to know what is in another individuals heart and mind by claiming that Respondent acted dishonestly throughout this process even though Respondent has not acted dishonestly. The Informant then uses as an illustration the highly publicized disbarment of former Durham County North Carolina Prosecuting Attorney Mike Nifong for dishonest conduct during the Duke Lacrosse rape investigation in 2006, the follows it up by saying that such concerns are not merely theoretical, but real. *See e.g.*, Just and Block, *10 Years Later, The Duke Lacrosse Rape Case Still Stings*, Huffington Post (March 11, 2016), available at http://www.huffingtonpost.com/entry/duke-lacrosse-rape-espn-30-for-30_us_56e07e33e4b065e2e3d486f7 (last visited April 9, 2017) (citing eight 2013 study identifying more than two dozen cases were courts set aside convictions due to prosecutorial misconduct). This is a ridiculous comparison because it not only calls for speculation that Respondent would have been elected but also that if elected Respondent

would have been dishonest in his conduct by falsely accusing individuals of crimes they had not committed.

Finally, as discussed in Point II, above, the Informant would like the Court to consider what he calls the issue of Respondent's multiple and differing explanations of his guilty plea over the past 20 years even though Respondent's singular explanation of his guilty plea over the past 20 years is not multiple and differing. To the contrary Respondent's explanation has always been consistent.

Aggravating Circumstances

ABA Standard 9.22 sets forth factors which may be considered aggravating circumstances. The Informant argues that Respondent's aggravating factors include:

a) **Dishonest court Selfish Motive.** Respondent lied on his Candidate Declaration Form in an effort to benefit himself by being elected Prosecuting Attorney of Vernon County.

b) **Refusal to Acknowledge Wrongful Nature of Conduct.** Respondent has neither conceded that he committed any ethical violations nor taken any responsibility for his behavior. He is at times in the recent past, under oath, blame the judge in his public defender for not knowing the law and/or providing him with ineffective assistance of counsel resulting in his 1996 guilty plea. **App. 433, L. 19 to 21; 449, L. 15 to L. 16.**

Respondent would like to address each of these allegations, as set forth below:

a) First, Respondent did not lie on his Candidate Declaration Form in an effort to benefit himself by being elected Prosecuting Attorney of Vernon County. Again,

Respondent made and honest mistake on his Candidate Declaration Form and when he learned of this mistake no longer continued to seek the office of Prosecuting Attorney of Vernon County even though his local Republican Committee wanted him to remain on the ticket. Respondent selflessly withdrew from the race for the betterment of the people of Vernon County and his family. Respondent actively sought others to take his place on the ballot before any potential deadlines to make sure that the people of Vernon County had a legal and viable candidate for whom to vote.

b) Second, Respondent has not conceded that he committed any ethical violations nor taken any responsibility for said violations because he has not committed any ethical violations. For there to have been an ethical violation Respondent would have had to knowingly made a dishonest statement. He has never done so. Further, Respondent has at times in the recent past, under oath, stated that the judge and his public defender did not correctly apply the law and/or providing him with ineffective assistance of counsel resulting in his 1996 guilty plea. It was found by Judge James R. Bickel that Judge Joseph Phillips conceded that Respondent's plea was erroneous and not knowingly, willingly and voluntarily made. **App. 519.** Additionly, Respondent's public defender did not deny that she provided ineffective assistance of counsel when given the opportunity. **App. 404, L. 20 to to 405, L. 2**

Mitigating Circumstances

ABA Standard 9.32 sets forth factors which may be considered mitigating circumstances. Respondent's Mitigating factors include:

a) **Lack of Prior Discipline.**

Respondent has no previous discipline.

If Any Discipline Is Appropriate It Would Be Probation In This Case

Missouri Supreme Court Rule 5.225 sets the minimum standards for the use of probation in Missouri discipline cases. A lawyer is eligible for probation if (a) the lawyer is unlikely to harm the public and can be supervised; (b) continued practice by the lawyer would not harm the profession's reputation; and (c) the misconduct does not warrant disbarment. Rule 5.225.

Informant does not believe that probation is appropriate in this case. Respondent would agree with informant if Informant believed that no punishment was appropriate. However, Informant is asking for punishment, and Respondent believes that if punishment is necessary probation is appropriate. Respondent has not refused to accept any responsibility nor does he have a tendency to blame others leading to questions about whether he can be supervised. Respondent accepted that he made an honest mistake and decided not to appeal Judge Perigo's ruling for the betterment of all those involved. Asked for a tendency to blame others, as stated previously others have chosen to accept blame as has Respondent. Respondent is not completely aware of any conduct that he has taken part in that is not conducive to monitoring on probation, such as communications,

diligence or trust accounting issues as stated by Informant. Respondent has been cooperative with the Informant and the DHP Panel throughout this process.

If the Court collects to impose state suspension with probation, Respondent would welcome the opportunity to recommend probation terms and conditions.

CONCLUSION

Respondent respectfully recommends that Informant's Information be dismissed and Respondent not be disciplined. In the alternative Respondent respectfully requests that any suspension be stayed with probation being granted.

Respectfully submitted,

/s/ Dustin W. Dunfield
Dustin W. Dunfield
Bar Number #63473
Attorney at Law
PO Box 306
Nevada, Missouri 64772
Telephone: (417)667-5858
E-Mail: dunfieldlaw@gmail.com
RESPONDENT ACTING PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent to Informant's counsel, Kevin Rapp, via the Missouri Supreme Court electronic filing system on this 15th day of June, 2017, to:

Kevin J. Rapp
Special Representative, Region XV
2847 S. Ingram Mill Rd., A102
Springfield, MO 65810
Counsel for Informant

/s/ Dustin W. Dunfield
Dustin W. Dunfield

RULE 84.06(c) CERTIFICATION

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 10,254 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/ Dustin W. Dunfield
Dustin W. Dunfield