SC96939

IN THE SUPREME COURT OF MISSOURI

EN BANC

In re:

ERIC G. ZAHND

Missouri Bar No. 47196

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) AND THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (MACDL)

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NACDL AND MACDL

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries - and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The Missouri Association of Criminal Defense Lawyers is dedicated to protecting the rights of the criminally accused through a strong and cohesive criminal defense bar. MACDL strives to improve the quality of justice in Missouri by seeking to ensure fairness and equality before the law. To achieve this important purpose, MACDL participates in legislative matters, works with the judiciary to make advances in serving the people who come to court, and provides continuing legal education to practitioners to improve their skills.

This case raises a matter of interest to NACDL and MACDL in that many criminal cases involve the submission of sentencing letters to the Court. Some are victim impact statements. Others are letters in support of a defendant submitted by family, friends and others in the community. Both victims and people with knowledge of the defendant may also be live witnesses testifying at a sentencing. These letters and witnesses are a very

important part of the sentencing process because they help the trial judge understand the defendant to be sentenced in a more comprehensive and cohesive manner, rather than just the facts of the offense.

The criminal defense attorneys of NACDL and MACDL believe that how the writers of sentencing letters and witnesses are treated by the criminal justice system, by the bar as a whole, and most importantly by prosecutors, will have a wide-ranging impact:

- upon the rights of criminal defendants,
- upon the public's trust in the justice system where the Prosecutor, serving as a representative of the State, has a unique and pivotal role to see justice done for all, (not just a victim), and
- upon the practical functioning of our state's criminal trial-level courts at sentencing.

ARGUMENT

I.

In the criminal justice system, non-party participants and letter writers, as well as other witnesses deserve a certain level of protection to be free from prosecutorial use of abusive process, free from coercive threats and intimidation, and free from gratuitous retaliation for refusal to accede to those prosecutorial threats and intimidation. In this case, Respondent Eric G. Zahnd holds a special place of trust as a prosecutor. He countenanced and participated in abusive process, coercive threats and reprisal for failure to capitulate to his threats.

NACDL and MACDL take no position regarding the appropriate level of sanction, but suggest that a finding of ethical violation of Rules 4-4.4(a), 4-5.1(c) and 4-8.4 is appropriate in this circumstance to both discipline Respondent Zahnd, and also to deter other attorneys, especially prosecutors, from engaging in similar conduct going forward in order to protect future non-party witnesses and letter writers from fear of such abuses; which in turn, protects defendants' rights to due process and fair proceedings. Discipline in this case is necessary to accomplish the goals of the disciplinary process to protect the public and maintain the integrity of the legal profession. *In re McMillin,* 521 S.W.3d 604, 610 (Mo. banc 2017).

A. Argument

Our criminal justice system cannot operate without the trust, cooperation and support of the public in both the judiciary and in its attorneys as officers of the court. Witnesses and any participants in the system should not be discouraged from participation. Prosecutorial conduct that diminishes trust and respect in the system, and that creates fear, diminishes that participation.

This is not a case of theoretical damage to our system. Respondent Zahnd expressed his desire to deter sentencing letters on behalf of defendants in sex crimes because he believes the letters harm the victim. (R. 462 at Tr. 516-517; R. 447 at Tr. 456; R. 457 at Tr. 496; R. 464 at Tr. 520-522). Respondent was successful. Ms. Bohl withdrew her letter in the case at issue. (R. 490 at Tr. 628-630). Also, at least three of the letter writers in this case have conveyed they would not be a witness again based on their treatment by the prosecution: Mrs. Nash, Mr. Blankenship and Ms. Ambler provided information that they would not write sentencing letters again. Regrettably, it is likely others who read the newspaper articles based on the press release have been deterred from ever providing a sentencing letter

This is precisely why Respondent Zahnd's conduct cannot be permitted to be repeated by other prosecutors. It has undermined our system and discouraged participation by witnesses going forward. Respondent Zahnd should be found in violation of the rules of ethics.

While there is nothing wrong with discussing the evidence with witnesses to determine if, after seeing further evidence, the witness might have a different opinion,

that is not what happened in this case. Rather, the Prosecutors attempted to leverage the witnesses to withdraw their letters of support, and threatened to embarrass them in the press if they did not withdraw their sentencing letters by publicizing their names in a false light as supporters of pedophilia and placing their names in the newspaper as supporters of child molestation.

While there is nothing wrong with issuing a press release that relays facts that are actually in the criminal record, that is not what happened in this case. Here, the Prosecutors issued a press release with the purpose of retaliation for not capitulating to the prosecution's threats, which contained facts beyond the criminal record, and recharacterized background information into sinister support for pedophilia.

1. A Prosecutor's Special Place of Trust and the Need for Witness Protection. Bar and Professional Organizations' Standards for Conduct of Prosecutors

The Missouri Rules of Professional Conduct expressly recognize a prosecutor has a special role in the justice system. *Rule 4-3.8*. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." *Id.* at com. 1; *accord*, *State v. Banks*, 215 S.W.3d 118, 119 (Mo. banc 2007).

> [A] prosecuting attorney is a quasi-judicial officer, an arm of the state [who must] assure a fair trial and avoid impropriety in any prosecution. Equally important is the duty to avoid any appearance of impropriety. The **preservation of the public trust in both the**

scrupulous administration of justice and in the integrity of the bar is paramount.

State ex rel. Winkler v. Goldman, 485 S.W.3d 783, 791 (Mo. App. E.D. 2016) (internal quotations and citations omitted) (emphasis added). "The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants." *American Bar Association*, Criminal Justice Standards for the Prosecution Function (4th Ed.), Standard 3-1.2(B).

The American Bar Association recognizes certain prosecutorial obligations in dealing with witnesses. "In communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons." *Id.* at Standard 3.34(b). "The prosecutor or the prosecutor's agents … should not act to intimidate or unduly influence any witness." *Id.* at Standard 3.34(c). "The prosecutor should not use means that have no substantial purpose other than to embarrass, delay, or burden…" *Id.* at Standard 3.34(d).

Furthermore, the National District Attorneys Association (NDAA) has published its *National Prosecution Standards* (3d ed.), which is consistent with the foregoing. "The prosecutor, working with other law enforcement agencies, should assign a high priority to the investigation and prosecution of any type of witness intimidation, harassment, coercion, or retaliation..." *Id.* at 2-10.9. "The prosecutor should honor the legal rights of

victims and other persons authorized by law to address the court." *Id.* at 5-4.4. "A prosecutor should conduct the examination [(*i.e.*, or interview)] of all witnesses fairly and with due regard for their reasonable privacy." *Id. at 6-6.1.*

In addition, DHP level amicus, the Missouri Association of Prosecuting Attorneys (MAPA), wrote a 2016 position paper on the importance of protecting witnesses' privacy and of protecting witnesses from abuses:

> We must address the chilling effect, especially in the current climate, created by disclosing personal information, including the home addresses of … witnesses.
>
> ….
>
> Fear of retaliation is prevalent and self-perpetuating. When … witnesses don't come forward for fear of retaliation, justice cannot be secured. … [It] undermines the community's confidence in the system and further entrenches the belief that witnesses cannot be protected.
>
> ….
>
> [W]itness involvement in the criminal process should not come with an additional cost of losing privacy.

http://www.prosecutors.mo.gov/files/Position%20Paper%20on%20Witness%20Intimidation.pdf.

While MAPA may have been speaking of protecting witness from third-parties, their warnings are just as apt in the need from protection from intimidation perpetrated by prosecutors themselves. Witness involvement in the criminal process should not come with an additional cost of losing privacy. Fear of retaliation from a prosecutor can prevent witnesses from coming forward, from speaking with lawyers, from providing testimony. Such retaliation undermines the community's confidence in the system and further entrenches the belief that witnesses cannot be protected, which detracts from participation in the process as a whole. *See*, NDAA, *National Prosecution Standards* at Commentary ("If the criminal justice system is to retain credibility with the public, it must furnish a tribunal into which people can come to give information without the fear of being harassed or having their privacy unduly invaded. Our system requires that all witnesses, those brought in by both the prosecution and defense, be treated fairly").

2. Sentencing Letters in General

In determining an appropriate sentence, a sentencing court is statutorily required to consider both:

(a) The nature and circumstances of the offense; and

(b) The history and character of the defendant.

R.S.Mo. §537.036.1; *State v. Cline*, 452 S.W.2d 190, 195 (Mo. banc 1970).

Missouri allows hearsay evidence at sentencing to a court, (not a jury), especially as it relates to the (positive or negative) history and character of a defendant. *Childs v.*

State, 440 S.W.3d 580, 585 (Mo.App. E.D. 2014); *Martin v. State*, 291 S.W.3d 846, 850 (Mo.App. W.D. 2009).

Although courts of record seem to rarely discuss sentencing letters, it is common practice that letters are submitted to a sentencing judge. Sometimes victims of crime, or their relatives, submit letters on how the crime has impacted them. *E.g.*, *Roberts v. State*, 356 S.W.3d 196, 201 (Mo.App. W.D. 2011).

Other times, people who know a defendant provide letters detailing background information about a defendant's life, that are otherwise divorced from details about the crime itself. *State v. Bello*, 2014 WL 8277412 (Mo.Cir. Platte March 10, 2014) (Retired Judge Abe Shafer noting in a 24.035 hearing how, "… the excellent bound notebook of support letters [were] presented at sentencing, that were read by the court); *Eichelberger v. State*, 134 S.W.3d 790, 793 (Mo.App. W.D. 2004) (letter submitted and considered by court prior to rendering sentence); *accord*, *State v. Taylor*, 466 S.W.3d 521, 535 (Mo. banc 2015) (letter submitted by a reverend on defendant's behalf, and read by court, prior to sentencing).

A sentencing court, on a case-by-case basis, is required to look beyond the crime itself, and also consider factors relating to the defendant as a whole. *State v. Collins*, 290 S.W.3d 736, 746 (Mo.App. E.D. 2009). Sentencing letters and witnesses are a very important part of the sentencing process because they help the trial judge understand the defendant in a more comprehensive and cohesive manner. In *U.S. v. Thunderhawk*, 799 F.3d 1203, 1210 (8th Cir. 2015), the Eighth Circuit remarked on the impact of the sentencing letters upon the sentencing court, noting that the sentencing letters in support

of defendant, among other factors, warranted giving a sentence at the low end of the permissible range.

The above is consistent with the American Bar Association's Criminal Justice Standards for the Prosecution Function. "The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities." Standard 3-7.2(c). "The prosecutor should assist the court in obtaining complete and accurate information for use in sentencing…" Standard 3-7.3(a). "The prosecutor should disclose to the defense and to the court, at or before the sentencing proceeding, all information that tends to mitigate the sentence and is known to the prosecutor…" Standard 3-7.3(b).

3. Mr. Zahnd's conduct and the conduct he countenanced of his subordinates violates the above standards, and undermines confidence in our justice system as a whole.

a. The Sentencing Letters in the Paden Case

While there were several sentencing letters submitted there were two upon which the Office of Chief Disciplinary Counsel brought charges, *Amici* for the purpose of brevity, and for the purest sense of the violation, will only discuss Mr. Hagg.

Mr. Hagg submitted a letter to the sentencing Court, which stated:

> We have known Darren Paden all his life and watched him grow up.

> He has been involved in community activities with his church, school, and our volunteer fire department. He assumed leadership roles in the fire department and helped it grow to a very respected service in our community.
>
> He, along with his family, has contributed greatly over the years to this community.
>
> Thank you for your time.

(R. 554). The letter merely provides some background information on past good acts of character by Mr. Paden. This is consistent with the Missouri law cited above about providing a full picture of a defendant for sentencing purposes.

It does not state disbelief of the victim. It does not question that Mr. Paden committed the crime. It does not state any support for pedophilia or child molestation.

b. Respondent Zahnd was never afraid that the sentencing letters would impact the judge's sentencing.

Respondent Zahnd asserts that he was afraid that the letters would result in a lesser sentence for Mr. Paden. Contrary to that assertion, the victim advocate, who was part of the conversations surrounding the letters and the subpoenas, testified that Respondent Zahnd had no doubt that Judge Van Amburg would see the case as the prosecution did, and would give no consideration to the letters. (R. 498 at Tr. 661-662). Respondent Zahnd's real concern stated to the victim advocate was that people were supporting Mr. Paden, when he felt like they should be supporting the victim. (*Id.*)

To Respondent Zahnd, it was a zero sum proposition. (R. 471 at Tr. 553). Either the letter writers were for Mr. Paden and against the victim or *vice versa*. (*Id.*) Respondent Zahnd did not want the Court to have a full and complete picture of Defendant Paden. Respondent Zahnd fails to see that one can provide background information on a criminal defendant's prior good character and still have empathy for a victim.

After the fact, Respondent Zahnd purports that a different judge, Judge Hull, sentenced a different defendant, Swanepoel, too lightly where sentencing letters were submitted; thus, he was afraid that Judge Van Amburg would also sentence Mr. Paden too lightly. (R. 389 at Tr. 358-360). First, this assertion is contradicted by the above testimony – Respondent Zahnd had no real fear of a lesser sentence in the *Paden* matter. Second, this assertion is further belied by the testimony of Judge Hull. Judge Hull testified that the Swanepoel case was based on a plea where the prosecution agreed not to argue against the sentencing request made by the defendant. (R. 435 at Tr. 408-409). The sentencing letters in that case had no impact upon the sentence Judge Hull imposed on Mr. Swanapool. (R. 389 at Tr. 359-360).

c. Respondent Zahnd caused subpoenas to be issued to the letter writers that were abusive and/or questionable and were issued in a concerted scheme with the ulterior objective to obtain private audiences with the letter writers in order to confront them out-of-court into retracting their letters.[1]

It is one thing to subpoena a non-party witness to a hearing in order to testify. It is another altogether to subpoena that witness with the purpose to obtain a private audience to threaten that party with public embarrassment and humiliation in order to intimidate them into withdrawing a sentencing letter providing information about the defendant to the Court.

"A subpoena is "a writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply."" *Division of Labor Standards, Department of Labor and Indus. Relations v. Chester Bross Const. Co.*, 42 S.W.3d 637, 640 (Mo.App. E.D. 2001) (quoting, *Black's Law Dictionary* 1440 (7th Ed. 999)). Also a subpoena is "process," such as when that term is used within the phrase "abuse of process." *Brown v. Mullarkey*, 632 S.W.2d 507, 510 (Mo.App. E.D. 1982).

It is proper to issue a subpoena to bring a person to a deposition, hearing or trial. (depositions), *Mo. R. Crim. P.* 25.14, 25.15(a); *Mo. R. Civ. P.* 57.09; (hearing/trial), *Mo. R. Crim. P.* 26.02. These are the only proper purposes for use of a subpoena. A

[1] While all of this may not have been charged conduct for discipline in and of itself, it is relevant conduct that puts the charged disciplinable conduct into context.

subpoena should not be used by an attorney to seek a private audience in his office with a witness. The purpose of the subpoena is set forth in what it commands; *i.e.*, to attend and give testimony: "… [it] shall command each person to ***attend and give testimony*** at the time and place specified therein." *Rule* 26.02(a) (emphasis added). In similar vein to Rule 26.02(a), Missouri Revised Statute §491.100 permits a subpoena issuer to **either** command the appearance at a certain time and place to attend and give testimony ***OR*** advise the witness of whom to contact to direct appearance:

> shall command each person to whom it is directed **to attend and give testimony** at a time and place therein specified **or** shall otherwise advise the witness of the name and telephone number of a person who can direct the witness of the time and place his appearance is required.

R.S.Mo. §491.100 (emphasis added). It does not permit the issuer to command appearance at a certain time and place, and also command the witness to contact counsel.

Although an OSCA form was utilized in this case, (R. 436 at Tr. 412:20-413:6), that form presupposes that one completing the same has the requisite legal knowledge of the above cited Rules and Statute in order to properly complete that form in conformity with those laws regarding the subpoena's permissible uses. Merely checking any box on an applicable form is not proper. *See*, *State v. Douglass*, SC95719, 2018 WL 830306 (Mo. banc February 13, 2018) (A police officer checking boxes that were not permitted to be checked under the circumstance on a court approved application for search warrant form). This is more compelling in the instant matter as an attorney – authorized to

practice law – completed the model subpoena as opposed to a police officer, who has not passed the bar. (R. 436 at Tr. 412:20-413:6). In other words, just because OSCA creates a form does not mean that one can check any single box, or combination of multiple boxes, not permitted by the law in the circumstances presented.

The elements of a civil action for abuse of process are:

(1) … an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process;

(2) … an improper purpose in exercising such illegal, perverted or improper use of process; and

(3) damage resulted.

Arbors at Sugar Creek Homeowners Association v. Jefferson Bank & Trust Co., Inc., 464 S.W.3d 177, 188 (Mo. banc 2015). The first two elements distilled are: 1) was there an ulterior purpose; 2) and was that ulterior purpose willfully conducted? *Moffett v. Commerce Trust Co.*, 283 S.W.2d 591, 599 (Mo. banc 1955); *Impey v. Hart*, 471 S.W.3d 776, 780 (Mo.App. S.D., 2015) (*quoting, Jenkins v. Revolution Helicopter Corp.*, 925 S.W.2d 939, 945 (Mo.App. 1996). ("The essence of a claim for abuse of process is the use of process for some collateral purpose")).

Mr. Paden's sentencing hearing was scheduled for October 9, 2015 at 11:00 a.m. (R. 557). On October 1, 2015, the Prosecutor's Office had a subpoena served on Jerry Hagg. (*Id.*) The subpoena commanded Mr. Hagg to appear at Division II of the Platte County Courthouse at 9:00 a.m. (*Id.*) Despite the subpoena advising Mr. Hagg when and where he was required to appear, the subpoena, in violation of §491.100, also

"commanded" Mr. Hagg "to contact Chris Seufert, [Assistant Prosecuting Attorney] at 816-858-3476 who will advise of the time and place of appearance." (*Id.*)

The subpoenas at issue were abusive, or at least highly questionable with indicia of abuse, based on: 1) Respondent Zahnd and Mr. Gibson's express stated ulterior purpose of bringing the witness into the prosecutor's office for confrontation; 2) commanding witnesses to appear at a time when no hearing was scheduled as doing so is beyond the legitimate purpose of a subpoena to compel attendance to give testimony, and where a private audience is not giving testimony; and 3) commanding the witnesses to call Mr. Seufert to obtain the time and location of appearance, where the subpoena already provides time and location, where the inclusion of the contact Mr. Seufert language was to attempt to effectuate the ulterior purpose of obtaining private audiences with the witnesses at the Prosecutor's Office in order to confront them. (Although witnesses called the Prosecutor's Office and then "voluntarily" spoke to him, but for the subpoena and the power of his office, that was unlikely to occur).

There was no hearing at 9:00, the time listed in the subpoena. The hearing was for two hours later at 11:00. Why does one subpoena witness for a time prior to hearing if not to have time to speak with them outside of Court? Moreover, why does the subpoena command the witness to contact Mr. Seufert, where the subpoena already commands the time and location of the witness' appearance?

The question is readily answered from the testimony at the hearing. They admitted they used the subpoenas for an improper purpose not authorized by statute or rule. The subpoenas were issued with the purpose to get the letter writers to the Prosecutor's Office

so that they could be confronted into recanting their letters. (R. 436-437 at Tr. 414-415; R. 500 at Tr. 667)). Mr. Zahnd testified he wanted to get the letter writers in private so that he could confront them. (R. 436-437 Tr. 414-415). In the words of First Assistant Prosecuting Attorney Mark Gibson discussing bringing the witnesses into the Prosecutor's office to confront them in an out-of-court process to see if they would change their opinions:

> I believe the plan was we would **subpoena them in** and really speak to them. I mean, one of our primary concerns was that it was apparent from the letters that many of them were laboring under a misapprehension of the facts. We wanted to at least give them the opportunity to see the truth, confront them with both the interrogation, the apology letter, the confession, the other information that we had, just to see if that changed their opinions; and if so, you know, given the new information, given the truth, **would they stand by the letters that they had submitted to the Court and would they still wish them to be considered.**

(R. 500 at Tr. 667: 9-24) (emphasis added). Mr. Gibson's testimony both demonstrates the Respondent Zhand's ulterior motive for use of the subpoena, and the prosecution's willful use of the subpoena to accomplish that end.

d. The meeting in the office with threats and intimidation by the Prosecutor's Office.

Based on the subpoena, Mr. Hagg contacted the Prosecutor's Office. As a result, the Mr. Hagg and his counsel, Retired Judge Abe Shafer, went to a meeting with Assistant Prosecuting Attorney Seufert at the Prosecutor's Office. Mr. Hagg and Judge Shafer provide:

> As we were leaving the office, Mr. Seufert pointed his finger at me again and said in a loud voice that if I did not withdraw the letter, my name would be placed in the office press release, which was already written and that all was left to do was fill in the names of the people supporting child molestation.

(R. 306 at Tr. 26:15-23). Placing one's name in the paper as supporting child molestation would be embarrassing and humiliating. Moreover, the prosecution made the statement and requested a *quid pro quo* – withdraw the letter or else.

This is coercion via a threat. **"Coercion"** [is] a threat, however communicated: …. (d) To expose any person to hatred, contempt or ridicule; or (e) To harm the credit or business reputation of any person. *R.S.Mo.* §570.010.4(d)-(e). "…[C]oercion includes, but is not necessarily limited to, conduct which would have constituted extortion and blackmail. *R.S.Mo.* §570.030, *comments to 1973 code*. Furthermore, a person is guilty of witness tampering if he uses threats, (*i.e.*, coercion), to a putative witness that he or she withhold "information." *R.S.Mo.* §575.270.1. The witness tampering statute goes beyond testimony at trial, but also includes the mere withholding of information.

Respondent Zahnd's office attempted to coerce Mr. Hagg into recanting his letter with threatening to publish his name as a supporter of child molestation. Although the prosecutors may not have not spoken the words "in order to expose you, (the letter writers), to hatred, contempt or ridicule," the badge of intent, nevertheless, hangs upon the words used in their threat. Moreover, the actual publication, placing Mr. Hagg's business connections into the press release, where that information was not part of letter or the facts in the *Paden* case, is an after the fact demonstration that the threat of the press release and then the issuance of the press release were intended to harm the personal and business reputation of Mr. Hagg.

Imagine if a defense attorney did the same to a prosecution witnesses. He would be subject to far more than an attorney disciplinary complaint.

e. The line of demarcation of whose name was included into the press release versus whose name was not.

The Press Release was the *coup de gras* reprisal for those who refused to capitulate to the Prosecutor's threats. Presiding Hearing Panel Member, Keith Cutler, quickly grasped the grist of the matter. He directly asked Mr. Seufert, "I'm trying to find out is that the demarcating line between those who got in the press release and those who were omitted from the press release?" (R. 491 at Tr. 634:16-19). Mr. Seufert responded, "…the people who were omitted [from the press release] were the people who expressed some sympathy for or kindness for the victim or who wrote a letter [sympathy for the victim]." (R. 492 at Tr. 635:7-10); (R. 490 at Tr. 628-630) (Ms. Bohl's name was not

published as she recanted and wrote a letter of sympathy). Those who wrote generally about defendant's past character were not so fortunate.

The line of demarcation of who was included versus who was not is entirely consistent with the express terms of the Prosecutor's threats to Mr. Hagg that if he did not withdraw his letter his name would be added to an already written press release naming him a "supporter of child molestation."

f. The Press Release was a mischaracterization of events and information that was not part of the *Paden* case.

As set forth above, Mr. Hagg's letter was innocuous background information.

There is a world of difference between writing a letter providing background character information about a defendant and the characterization of being a "supporter of pedophilia" or "supporting a pedophile." Mr. Hagg's letter states nothing about supporting pedophilia. It does not question that Mr. Paden is guilty, and it does not in any way attack the victim. Moreover, the letter states nothing about Mr. Hagg's occupation, (retired bank president), and is sent from a home address, not a business address. Mr. Zahnd testified although he believed facts from the public sphere, (beyond the *Paden* case), about Mr. Hagg, he conducted internet research to confirm those beliefs before placing them into the press release. (R. 447 at Tr. 457:11-21) ("But before I placed any of those affiliations in the news release, I personally Googled them on my computer to see if it was public information").

Despite the foregoing, the Prosecutor recharacterized Mr. Hagg's letter. His Office's Press release states:

> A Dearborn man who sexually abused a girl over the period of a decade, beginning when she was five or six years old, has been sentenced to 50 years in prison. Darren L. Paden, 52, received the sentence on October 30 after pleading guilty to two counts of first degree statutory sodomy in August.
>
> But Platte County Prosecuting Attorney Eric Zahnd said something was different-and deeply troubling- about the case: **the number of community members who continued to disbelieve the young girl, even though the defendant admitted his guilt within the first couple of hours of his police interview and then pleaded guilty.**
>
> "There are certainly a few good people in this community who have offered support to this young victim," Zahnd said. **"It is shocking, however, that many continue to support a defendant whose guilt was never in doubt. If it takes a village to raise a child, what is a child to do when the village turns its back and supports a confessed child molester?"**
>
> ….
>
> Those writing letters or testifying on behalf of Paden included:
>
> . . .

> **Donna Nash, Former Platte County Collector**
>
> **Karlton Nash, Nash Gas**
>
> **Jerry Hagg, Former President, Platte Valley Bank**
>
> . . ..
>
> Zahnd said, "**It is said that we can be judged by how we treat the least of those among us. It breaks my heart to see pillars of this community – a former county official, a bank president, . . . appear to choose the side of a child molester over the child he repeatedly abused."**
>
> Judge James Van Amburg sentenced Paden to 25 years each on two counts of first degree statutory sodomy involving a victim under age 12. By law, those sentences must be run consecutively, resulting in a 50-year prison sentence.

(R. 657-659).

Mr. Hagg, and others like him, should be afforded a basic level of protection from abuse and harassment. Mr. Hagg and others like him will be discouraged from participating in the criminal justice system if Respondent's conduct is countenanced.

Mr. Hagg as a former bank president is likely a man of some means. He was accompanied to the Prosecutor's Office by counsel. He did not did not capitulate to the prosecutorial threats.

What if he were not a retired bank president? What if this happened to a person of more limited economic means? What if this happened to a witness, who is a minority?

Are those witnesses more likely to be intimidated by prosecutorial threats? Does a defendant lose his access to sentencing witnesses because they fear the legal system as represented by the state prosecutor? Does a defendant lose any input to counsel from these witnesses, (or at sentencing to show the full picture of his person), not just the facts of the crime? Recent issues across the State, and even nationwide, resulted in this Court investing time and energy into exploring such divisive issues through the Missouri Supreme Court Commission on Racial and Ethnic Fairness,[2] and as a matter of policy should be considered when viewing the Prosecutor's conduct.

Regardless of any of the above, witnesses have the right to be free from intimidation and threats from anyone, including by counsel for the state or a defendant. With the special role of prosecutors, and with the power with which they are imbued by the nature of their office, witness intimidation and threats from a prosecutor are even more troubling.

4. First Amendment Issues

Amici are not arguing that press coverage of a criminal case, in and of itself would be improper. Mr. Hagg's letter was in the public record. (R. 324 at Tr. 99-100). The letter was not readily available to the general public via the internet, but a person could have to traveled to the courthouse and requested a copy from the clerk. (*Id.*; R 222). Had a member of the press done so, they would have had the fairly innocuous information from Mr. Hagg's letter, which provides some basic background on Mr. Paden:

[2] https://www.courts.mo.gov/file.jsp?id=121054

> We have known Darren Paden all his life and watched him grow up.
>
> He has been involved in community activities with his church, school, and our volunteer fire department. He assumed leadership roles in the fire department and helped it grow to a very respected service in our community.
>
> He, along with his family, has contributed greatly over the years to this community.
>
> Thank you for your time.

(R. 554). That member of the press ***would not*** have had the additional information that Mr. Zahnd pulled from public sphere, beyond the confines of criminal record in the *Paden* case, and packaged into his own press release. (R. 447 at Tr. 547:11-21; R. 711-732. The reporter ***would not*** have had Mr. Zahnd's characterization of Mr. Hagg as supporter of a pedophile and with it pedophilia. (R. 544). Amicus Missouri Press Association's assertion that: "Reporters turn to prosecuting attorneys, especially, to help them understand actions in criminal trials," is the primary basis claimed in the brief as why the Prosecution should be permitted to issue press releases. If the reporter cannot understand the plain words of Mr. Hagg's letter, perhaps the reporter should look for a different line of work, and not look to the prosecutor to sensationalize a story for him by characterizing otherwise innocuous facts into something more ominous. Respondent Zahnd's press release has nothing to do with the first amendment and freedom of the

press. The Press was free to obtain the publically available information, interpret it, and write a story based on the facts.

Moreover, "… it is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. State of New Hampshire*, 62 S.Ct. 766, 769, 315 U.S. 568, 571 (1942); *State v. Metzinger*, 456 S.W.3d 84, 95 (Mo.App. E.D. 2015).

In this case, Respondent Zahnd's statements to the press were made with the purpose of reprisal against the witnesses for not capitulating and withdrawing their respective sentencing letters. Retaliation and reprisal are not protected speech. Further, when the publication was coupled with the threat of withdraw your letter or we will publish your name as a supporter of pedophilia, it is a coercive threat, which has zero expectation of protection. *Hanch v. K. F. C. Nat. Management Corp.*, 615 S.W.2d 28, 35 (Mo. banc 1981) (*discussing, N. L. R. B. v. Gissell Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969)) (The Court held that statements containing threats of reprisal or force or promise of benefit are not protected first amendment speech); *State v. Koetting*, 616 S.W.2d 822, 824 (Mo. banc 1981) (statute prohibiting threats was valid as a threat is not protected speech); *State v. McGirk*, 999 S.W.2d 298, 302 (Mo.App. W.D. 1999) (threats aimed at a judicial officer were not entitled to protection as free speech).

Also, tampering with a witness by making intimidating statements is not protected speech. *United States v. Colhoff*, 833 F.3d 980, 985 (8th Cir. 2016).

Just as a threat itself is not protected speech, neither should be the statements given to the press in retaliation for the witnesses' refusal to capitulate to the prosecutor's

demands. *U.S. v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012) (neither the threat to destroy the victim's reputation if she did not pay $100,000, nor the after-the-fact carrying out of the threat and destroying her reputation, were protected speech). Merely because Respondent Zahnd carried through with his coercive threat does not afford it more protection than the unprotected threat and witness intimidation itself.

Respondent Zahnd's press release was the reprisal for Mr. Hagg and the other letter writers' failure to accede to the prosecution's threats. As such, there is no first amendment protection for Respondent Zahnd's statements to the press. Respondent and other *amici* wish this Court to divorce the press release from the other relevant conduct – that it was made as reprisal to coercive threats and in tampering with witness. NACDL and MACDL respectfully request the Court view the press release in the full context of the case, and that it was done in retaliation – as reprisal to witnesses who refused to withdraw letters they submitted to the Court demonstrating a fuller picture of defendant Paden as is permitted under Missouri law.

B. Conclusion

From viewing the entire scheme, and each step in the course of conduct, of abusing the subpoena process to ultimately gain the attendance of witnesses at his office, to threatening the witnesses to withdraw their letters of support or have their name published as a supporter of pedophilia, to gathering additional information about the witnesses beyond the case and packaging it for the press, to ultimately publishing the witnesses' names, occupations, and mischaracterizing their letters, Mr. Zahnd struck foul

blows. He abused process to intimidate witnesses through coercion, and then retaliated when the witnesses did not capitulate.

If the criminal justice system is to retain credibility with the public, it must furnish a tribunal into which people can come to give information without the fear of being harassed or having their privacy unduly invaded. Our system requires that all witnesses, those brought in by both the prosecution and defense, be treated fairly.

Mr. Hagg deserved more. The public and our legal system deserved better. The rule of law was entitled to more respect. The letter writers and all witnesses deserve better. Our system depends upon public trust. The damage to our system requires that some level of ethical violation be found in this case to discourage other prosecutors, defense lawyers and even all other members of the bar, from engaging in abuse, threats, intimidation and reprisal.

Respectfully Submitted by:

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned states upon that on the 8TH Day of March 2018, a copy of Amici Curiae NACDL and MACDL was submitted for filing through the use of Missouri's electronic filing service and was served by electronic mail upon all counsel of record, and further certifies that the above brief complies with the limitations contained in Rule 84.06(b), and contains 6358 words, excluding the cover, certification, and table of authorities as determined by Microsoft Word software.