IN THE SUPREME COURT OF MISSOURI
STATE OF MISSOURI

IN RE:	)	
	)	
PETER G. BENDER	)	
	)	
1516 E. St. Louis St., Ste. A	)	
Springfield, MO 65802	)	Supreme Court No. SC99845
	)	
Missouri Bar No. 46976	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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SUPPLEMENTAL STATEMENT OF FACTS

Before the Matthew Johnson's preliminary hearing, B.C., B.C. had sent an email to the Greene County Prosecutor's office indicating that she would not appear if Assistant Prosecuting Attorney Aaron Wynn was not going to be there, but would "go to the next one because I can't do it if Aaron is not there." **R. at Vol. 3, p. 935**.

The State proceeded at Matthew Johnson's preliminary hearing on the theory of forfeiture by wrongdoing, adducing hearsay testimony of B.C. that put in issue the reason B.C. failed to appear for that hearing. **R. at Vol. 1, p. 185**. Assistant Prosecutor Wynn acknowledged there was nothing wrong with Respondent talking to B.C., about why she did not appear. **R. at Vol. 1, p. 191, 202-03**. Mr. Wynn opined that it was not inappropriate for Respondent to have ex parte communication with B.C., but that he should have talked to her on the phone instead of having her come to his office. **R. at Vol. 1, p. 231, 234**.

Mr. Wynne acknowledged that B.C. had gone to Respondent's office on May 7, 2019 of her own free will and B.C. so testified at her deposition. **R. at Vol. 1, p. 230, Vol. 2, p. 634**. She testified that she had not come to court once because she did not agree with the charges and at the time of the preliminary hearing because she thought the case was being continued. **R. at Vol. 2, p. 633**. she

testified that she was not scared of Respondent and did not need protection from him; She had not asked the prosecutors for protection from Respondent and the prosecutor's belief that she needed protection was not accurate. **R. at Vol. 2, p. 635**.

B.C. testified at her deposition that she knew that Peter Respondent did not represent her and that she never thought that he did. **R. at Vol. 2, p. 632, 634**. She testified that her pride had got her to tell him that she was not afraid of Matthew Johnson. **R. at Vol. 2, p. 637**. After he had talked to B.C. Respondent dictated a statement and asked B.C. if the statement was accurate or not; and B.C. disagreed with at least one statement. **R. at Vol. 2, p. 635, 636**. B.C. was not pressured to sign the affidavit. **R. at Vol. 2, p. 635**.

If B.C.'s failure to appear at the preliminary hearing was not due to the conduct of Matthew Johnson, then the doctrine of forfeiture by wrongdoing would not apply. **R. at Vol. 1, p. 249**. Mr. Johnson had told Respondent that he had talked to B.C. on the telephone and she was available to testify. **R. at Vol. 1, p. 251**. When B.C. came to Respondent's office, she was not crying, upset in any way, or appear to have a mental deficiency. **R. at Vol. 1, p. 256 – 257**. Respondent dictated the proposed affidavit consistent with what B.C. had told him in the conference room and B.C. approved or disapproved of each proposed sentence. **R. at Vol. 1, p. 257, 258**. B.C. disagreed with at least one proposed

sentence about no G.P.S. if Matthew Johnson were released from jail. **R. at Vol. 1, p. 259**.

The States Motion for Protective Order against Respondent was filed at 4:45 p.m., the afternoon before the matter was taken up the next morning without Respondent's knowledge. **R. at Vol. 1, p. 270**. Matthew Johnson did not want Respondent to withdraw as his attorney and there was concern that the state could attempt to disqualify lawyers for taking statements from witnesses. **R. at Vol. 1, p. 203**.

The Waiver of Conflict filed at the plea hearing reads as follows: "I, Matthew Johnson, hereby acknowledge that I have reviewed the pleadings in my case. *I have reviewed the complaints made against my lawyer by the State and his responses thereto and I have been informed* that my interests may potentially be in conflict with those of Witness B.C. in connection should it be determined in the future that my attorneys' actions created by an attorney client relationship between Bender and Bender and witness B.C. *I nevertheless knowingly and voluntarily consent to continued representation by Peter Bender and Bender and Bender*. I further expressly acknowledge that I have been advised that I have the right to seek independent counsel in connection with the advisability of waiving said conflict, and that I have had a reasonable opportunity to do so." **R. at Vol. 2, p. 603** (emphasis added).

The Waiver of Conflict did not specifically identify all potential conflicts between the interests of Mr. Johnson and Respondent, as was alleged by the State in their motion, but did so by reference to Mr. Johnson having read the pleadings and complaints against his lawyer. **R. at Vol. 2, p. 603**.

At the sentencing hearing on October 18, 2019, Mr. Johnson was asked about his satisfaction with his attorney's services:

> THE COURT: Is there anything you want me to consider with regard to your lawyer?
>
> THE DEFENDANT: What?
>
> THE COURT: I'm just asking you, is there anything you want me to consider, anything I need to know, about your satisfaction with your lawyer?
>
> THE DEFENDANT: No. He's good. He just got caught in a catch -22.
>
> THE COURT: He did a good job for you?
>
> THE DEFENDANT: Yeah, he did a real good.

R. at Vol. 2, p. 772-773. The state did not object to the form or timing of the Waiver at the plea or sentencing hearing. **R. at Vol. 2, p. 726, 773**.

ARGUMENT

I, RESPONDENT DID NOT VIOLATE RULES 4-1.7(a)(2), 4-3.7, 4-3, 4 (c), 4-4.3, 4-4.4, 4-8.4(a) AND (d) AS ALLEGED IN THE INFORMATION.

Respondent's defense of this matter is not that he believes that his obligations as a defense attorney outweigh any requirements or prohibitions imposed by the Rules of Professional Conduct. Respondent's position is that he performed duties to provide effective assistance of counsel under the Constitution and under the disciplinary rules.

Nothing in the ABA Defense Standards suggests that a lawyer may disregard the applicable Rules of Professional Conduct in order to provide effective assistance of counsel. ***R. at Vol. 3, p. 776 et seq***. Those standards note that defense counsel is the client's professional representative and not his alter ego; counsel should act zealously within the bounds of the law and standards on behalf of their clients, but has no duty to and may not violate the law or ethical standards.

The Supreme Court of the United States has cited the ABA Defense Standards as guides when considering claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Informant acknowledges that Respondent may have followed the guidance in the ABA Defense Standards to provide effective advocacy to his client but argues those standards do not trump the Rules of Professional Conduct.

Informant's argument is that if the ABA Defense Standards are only guides then they do not have the force of law. But *Strickland* went on to say that, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent defendant." *Id*. at 688-89. Respondent submits that the ABA standards are guides to the constitutional requirement that defendants receive effective assistance of counsel. The right to counsel is the right effective assistance of counsel and the "Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions with about how to conduct the defense." *Id*. at 686.

Relevant ABA standards include the following:

1. Defense counsel are essential to the administration of justice. ***Ex. C at 4-1.2(a); R. at Vol 3, p. 779***.

2. Defense counsel is the client's professional representative, not his alter-ego. ***Ex. C at 4-1.2.(d); R. at Vol. 3, p. 780***.

3. Counsel should investigate the factual predicate that has been advanced to support detention and custodial conditions, and not assume its accuracy. ***Ex. C at 4-3.2(b)***; ***R. at Vol. 3, p. 812***.

4. The duty to investigate is not terminated by factors such as the apparent force of the prosecutor's evidence, a client's alleged admission to others of facts

suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt. ***Ex. C at 4-4.1(b); R. at Vol. 3, p. 830***.

5. Defense counsel should seek to interview all witnesses including the victim, and should not intimidate or unduly influence any witness. **E*x. C at 4-4.2(c)***; ***R. at Vol. 3, p. 833***.

When a defense attorney fails to provide effective assistance of counsel, convictions are overturned, and the administration of justice suffers. Examples are *Rowland v. State*, 603 S.W.3d 125 (Mo. App. 2020) (failure to call witness prejudiced defendant), *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981) (Counsel assumed client was guilty and did no investigation, citing ABA Defense Function), *Vickers v. State*, 632 S.W.3d 781 (Mo. App. 2021) (failure to interview and endorse alibi witness, citing Strickland).

"Witnesses to a crime are not the property of the prosecution or the defense and both sides have an equal right and should have an equal opportunity to interview them." *United States v. Long*, 449 F.2d 288, 295 (8th Cir. 1971). Informant suggests that B.C. was a "vulnerable" victim and, therefore, Respondent should be restricted in his ability to take a statement from her without involving the State in the process. However, B.C. came to Respondent's office of her own volition, was counseled that Respondent did not represent her and that she could

retain her own counsel, and she made at least one revision to the initial draft of the affidavit. Under these circumstances, this Court should not second guess Respondent's determination that B.C. was agreeing to the affidavit voluntarily, and without coercion.

In *Fox v. State*, 640 S.W.3 744 (Mo. Banc 2022) Missouri public defenders and criminal defendants successfully challenged the constitutional validity of a statute requiring criminal defense attorneys to provide information to victims of sexual assault offenses. Under a 2020 law, criminal defense attorneys were required to advise a survivor of sexual assault of certain rights under the statute and obtain a receipt signed by the victim including the right to consult with an employee or volunteer of a rape crisis center and the right to have a support person present during the interview. *Id. at 748*. The court held that the statute was constitutionally invalid as applied to defense attorneys, violating the attorneys' free speech rights *Id. at 754*. It is hard to image a more vulnerable class of victims than the survivors of rape and sexual assault.

Informant's position is that there is a special class of victim witnesses who are cloaked with on aura of vulnerability requiring special rules. Respondent had a duty to investigate whether B.C. was afraid of Matthew Johnson. When B.C. voluntarily appeared at his office, she was not crying or upset in any way. There was nothing sinister in Respondent interviewing B.C. and then attempting to

document that interview with affidavit. Informant's position that Respondent violated ethical rules is bottomed on the belief that he "lured" a vulnerable witness to his office and, interviewed her and then obtained her affidavit pursuant to a plan with his client. Respondent believed he owed a duty to interview B.C. and if the interview was beneficial to the client, memorialize the interview with an affidavit if the witness was willing to sign it.

Respondent does not suggest that his client's Constitutional rights as a criminal defendant are absolute and therefore transcend the Rules of Professional Conduct. In re *Hawver*, 339 P.3d 573, 592 (Kan. 2014) involving a disciplinary hearing against a Kansas attorney named Ira Hawver and cited by Informant, aids Respondent and will be discussed in depth. Hawver represented Cheatham in a death penalty case. Hawver's failings in representing Cheatham included (a) no experience in death penalty cases; (b) unfamiliar with ABA guidelines; (c) failure to devote sufficient time to a death penalty case, only 60 hours; (d) failure to hire co-counsel, an investigator, consultants, a capital jury expert, a mitigation specialist and expert witnesses; (e) failure to hire a mental health professional; (f) lacked knowledge that he could compel attendance of out of state witnesses; (g) failure to track Cheatham's cell phone to determine defendant's location at the time of the murders; (h) failure to investigate possible alibi witnesses or file a notice of alibi; (i) unfamiliar with how to death-qualify and life qualify a jury; (j)

during trial described his client as a "professional drug dealer" and a "shooter of people," (k) admitting his client's prior conviction for manslaughter during the guilty phase of the trial (the prior conviction was not admissible during the guilt phase unless Cheatham testified); (l) unfamiliar with capital jury instructions; (m) failure to conduct an investigation for the sentencing phase of the trial; (n) during sentencing phase he presented only one mitigator – his client's innocence; (o) in his closing argument in the sentencing phase, after the same jury had found Cheatham guilty of the murders, he told the jury they ought to execute the killer. *Id. at 484-85*.

Hawver argued that "disciplining him for his conduct in representing [the criminal defendant] would infringe upon [the defendant's rights because it would deprive [him] of the right to counsel of his choice[.] *Hawver*, 339 P.3d at 591. The Kansas Supreme Court disagreed: "This argument is without merit because a lawyer cannot raise a client's Sixth Amendment rights as a defense in a disciplinary proceeding." *Id.* The Court noted that was Hawver's ethical misconduct that created the violation of Cheatham's right to effective representation. *Id* at 592. Cheatham's right to counsel did not insulate Hawver from his duties to provide effective representation.

RULE 4-1.7(a)(2)

Informant contends that Respondent violated Rule 4-1.7(a)(2) which provides that a concurrent conflict of interest exists if "there is a significant risk that the representation. . . will be materially limited by . . . a personal interest of the lawyer." A lawyer is not to represent a client if the representation involves such a concurrent conflict of interest. Subsection (b) provides the exceptions to 4-1.7(a).

Informant claims that Respondent had a personal interest that was a concurrent conflict of interest for two reasons. First, Informant claims that the State of Missouri implicated Respondent's personal interest by filing and obtaining an order of protection against Respondent and on behalf of the victim in Case No. 1931-CR00009-01. Second, Informant claims that Respondent's personal interest was implicated in Case No. 1931-CR02903 because, despite the fact that he was referenced in the Felony Complaint and identified by name in the Probable Cause Statement, Respondent entered his appearance for Matthew Johnson in the case.

In 1931-CR02903, the state charged Matthew Johnson with attempted tampering with a victim by trying to prevent or dissuade B.C. from assisting in the felony prosecution of Matthew Johnson, based on Respondent obtaining the affidavit of B.C. The State's position at the preliminary hearing in the 009-01 case was that B.C. was unavailable as a witness for the State. The affidavit challenged the State's position as to her availability and allowed the witness to express an

opinion as to bond. It was appropriate for Respondent to inquire of B.C. as to those issues. How is it even possible to get a witness to not assist the prosecution when the State claims that the witness is not available to come to court. According to Wynn "We still hoped to secure BC's cooperation in this case. We knew that we would need her if we went to trial. And these actions, specifically by limiting her ability to express how she felt and the situations she had experienced is absolutely a substantial step towards preventing her from assisting in a felony prosecution." It is not apparent how Respondent taking a statement or affidavit from B.C. on May 7, 2019, would limit her ability to express her feelings and experiences in the future. Respondent does not have a personal interest merely because he interviews and obtains an affidavit from a victim of a crime.

The concept of personal conflicts is discussed in the Comments section of Rule 4-1.7. In the Comments section, examples of an attorney's personal interests are given. These examples include business and financial transactions, blood and marriage relationships, and sexual relations. The Informant's claims of personal interest do not fall within the purview of the types of personal interest conflicts described in the rule.

Respondent was never charged with a crime by the Greene County Prosecutor's office in connection with B.C.'s affidavit nor was Respondent ever charged with violating the order of protection. Therefore, Respondent had no

personal criminal interest to protect that would interfere with his representation of his client.

Further, even if Respondent did not have a personal interest of some sort, that Mr. Johnson effectively waived that personal interest. Judge Cordonnier ruled that Respondent was not disqualified from representing Mr. Johnson provided that any conflict or potential conflict was waived in writing. The Waiver of Conflict reads as follows: " I, Matthew Johnson, hereby acknowledge that *I have reviewed the pleadings in my case, I have reviewed the complaints made against my lawyer by the State and his responses thereto* and I have been informed that my interests may potentially be in conflict with those of Witness B.C. in connection should it be determined in the future that my attorneys' actions created an attorney client relationship between Bender and Bender and witness B.C.. I *nevertheless knowingly and voluntarily consent to continued representation by Peter Bender and Bender and Bender*. I further expressly acknowledge that I have been advised that I have the right to seek independent counsel in connection with the advisability of waiving said conflict, and that I have had a reasonable opportunity to do so." (emphasis added)

The part of the written waiver that refers to a possible conflict with B.C. was actually unnecessary in this case. Respondent never represented B.C. He told B.C. he did not represent her. She never believed that he represented her.

Informant's argument that Respondent could not represent the victim and Mr. Johnson at the same time and that any waiver would have to be signed by B.C. is based on surplusage in the waiver. The important part of the waiver is italicized and waives all of conflicts and potential conflicts which had been raised in the State's motions to disqualify Respondent by reference to the pleadings and complaints made in the case. The fact that Judge Cordonnier discussed the written waiver with Mr. Johnson at the end of the plea hearing does not mean that it was prepared after Mr. Johnson had plead guilty. Judge Cordonnier found that the waiver was sufficient, and the State did not argue otherwise during the plea proceeding or at sentencing.

Because Respondent had no personal interest in conflict with Johnson, and even if there was such a personal interest, that conflict was waived, Respondent did not violate Rule 4-1.7(a)(2).

Rule 4-3.4(c)

Missouri Rule of Professional Conduct 4-3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the Rules of a Tribunal. Informant states that Respondent violates Rule 4-3.4 because he continued to represent Mr. Johnson without obtaining a timely conflict waiver that addressed the potential conflict between Mr. Johnson's interest and the personal interest of Respondent.

As noted in the discussion above, the Respondent did not have a personal interest under Rule 4-1.7(a)(2). If Respondent had no personal interest, no conflict waiver was required by the Rules. Even if there was a personal interest, Informant has failed to point out what specific actions Respondent took to represent Johnson in violation of the Court's order.

In his July 16, 2019, Order, Judge Cordonnier overruled the State's Motion to Disqualify Respondent as attorney for Matthew Johnson. Respondent was directed to review conflicts and potential conflicts with his client and to obtain a written waiver from the client before proceeding with continued representation. On August 7, 2019, Matthew Johnson testified that he had signed a waiver of any conflict or potential conflict of interest and that he had chosen to waive any conflict and continue with Respondent as his attorney. At his sentencing hearing, Mr. Johnson indicated that he was satisfied with Respondent's services and that Respondent had done a real good job. The Court was satisfied with the written waiver and the State never raised an issue with the trial court that Respondent had violated the Court's July 16, 2019, Order. Respondent did not violate Rule 4-3.4(c).

Rule 4-3.7

Rule 4-3.7 states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]" Informant contends that Respondent

violated the Rule by entering his appearance on behalf of Mr. Johnson in Case No. 1931-CR02903. Respondent did not act as an advocate at trial in Case 1931-CR02903. Because Rule 4-3.7 on its face does not apply to pretrial proceedings, Respondent was not required to withdraw before the preliminary hearing. *Droste v. Julien*, 477 F.3d 1030, 1036 (8th Cir. 2007). Respondent did not violate Rule 4-3.7.

Rule 4-4.3

Rule 4-4.3 prohibits a lawyer from giving legal advice to an unrepresented person, other than the advice to secure counsel. Informant asserts that Respondent violated Rule 4-4.3 by advising B.C. to execute an Affidavit in that he exerted his influence with respect the contents of the Affidavit and created an atmosphere of intimidation with respect to its signing. Respondent did not reach out to B.C. Rather, she telephoned Respondent's office. When she arrived at Respondent's office, he told her that he was not her lawyer, that she didn't have to talk to him, and that if she wanted a lawyer, she should get one. B.C. testified during her deposition that she was not pressured to sign the Affidavit. Respondent did not violate Rule 4-4.3.

Rule 4-4.4

Rule 4-4.4 prohibits a lawyer, "in representing a client" from using "methods of obtaining evidence that violate the legal rights of such person." Informant asserts that Respondent violated Rule 4-4.4 by conspiring with his client to obtain an affidavit from B.C. with the objective of reversing the trial court's probable cause finding and securing Mr. Johnson's release from jail. B.C. was not represented by Respondent, that she never believed that she was. The State does not own the witness and there is no authority for the proposition that a defense attorney cannot interview a victim and take a statement from the victim. The guidelines for criminal defense lawyers require a defense lawyer to interview witnesses including victim. B.C. has never claimed that her legal rights were violated by Respondent. Respondent did not violate Rule 4-4.4.

Rule 4-8.4(a)

"It is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct . . . or do so through the acts of another." Rule 4-8.4(a). Respondent did not violate Rule 4-8.4(a) by continuing to represent Matthew Johnson because of a potential conflict between Mr. Johnson's interests and Respondent's personal interests as has been discussed herein under Rules 4-1.7(a) and 4-3.4(c). Respondent did not violate Rule 4-8.4(a) by collaborating with

his client, Mr. Johnson, to obtain an affidavit from B.C. to support Mr. Johnson's efforts to have his criminal case remanded back to associate circuit court and to secure his release from jail as is discussed under Rule 4-4.4.

Rule 4-8.4(d)

"It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]" Rule 4-8.4(d). Informant contends that Respondent violated Rule 4-8.4(d) by engaging in the following:

a. Asserting that the prosecutor filed the OCDC complaint in order to create a conflict of interest;
b. Continuing to represent Mr. Johnson without a conflict waiver after a potential conflict of interest had been identified;
c. Disobeying a direct order of the trial court;
d. Demonstrating intent to act as an advocate in a manner where he had been identified as a necessary witness;
e. Having an inappropriate interaction with an unrepresented person; specifically, the vulnerable victim in a criminal case, while representing the defendant;
f. Violating the rights of that victim;
g. Failing to appear in court for scheduled motion hearings.

These assertions have been largely addressed already

herein. Subparagraph (a) suggests that Respondent violated Rule 4-8.4(d) by asserting that the Prosecutor filed the OCDC Complaint in order to create a conflict of interest. Although the prosecutor may not have had any ulterior motive in filing the OCDC Complaint, the fact that Respondent might have a contrary opinion does not violate the Rule.

The allegations contained in subparagraphs (b), (c), (d), (e), and (f) have been previously addressed herein. Subparagraph (g) contends that Respondent violated this Rule by failing to appear in Court for scheduled motion hearings in Judge Carrier's Court. Respondent did fail to appear on two occasions after Matthew Johnson had plead guilty in Judge Cordonnier's Court. The case was scheduled to be dismissed and Respondent thought the State would pass their Motion as moot. Respondent's failure to appear was not detrimental to the administration of justice.

Respondent did not violate Rule 4-8.4(d).

II. RESPONDENT SHOULD NOT BE SUSPENDED

For reasons' stated in the Argument of the previous point, Respondent did not violate the ethical Rules. If Respondent is sanctioned for interviewing a victim witness and obtaining a witness affidavit the Court would send a chilling message to all attorneys who defend criminal cases regarding their ability to interview

witnesses without oversight by the State. It was for that reason that Respondent rejected the proposed admonition in this case. Respondent believes that he represented his client zealously within the bounds of the law. The Trial Court did not find that Respondent's conduct required any sanctions, other that the ex-parte protective order granted by Judge Cordonnier. The witness B.C. has not complained about Respondent's treatment of her. Respondent's client thought Respondent did a good job. Respondent has not concealed his actions in this case. He acted openly and only challenges the contention that his actions were inappropriate. This complaint was initiated by the Greene County Prosecutor's office because they believed Respondent was effective in challenging their right to proceed under the doctrine of forfeiture by wrongdoing.

CONCLUSION

For the reasons set forth above, Respondent requests that the Court find and conclude that Respondent did not violate the Rules of Professional Conduct.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2022, a copy of Respondent's Brief is being served upon Informant's counsel through the Missouri Supreme Court electronic filing system pursuant to Rule 103.08.

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/s/ Richard D. Bender

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. was served on Informant's counsel through the Missouri electronic filing system pursuant to Rule 103.08;
3. complies with the limitations contained in Rule 84.06(b);
4. contains 5,725 words, according to Microsoft Word, which is the word processing systems used to prepare this brief.

/s/ Richard D. Bender