IN THE SUPREME COURT
STATE OF MISSOURI

IN RE: DANIEL L. VIETS 15 N 10th Street Columbia, MO 65201 MO Bar No.: 34067 Respondent.	Case No.: SC99160

RESPONDENT'S BRIEF

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SUPPLEMENTAL STATEMENT OF FACTS

PROCEDURAL HISTORY

Respondent accepts the procedural history of the case as submitted by Informant with the following supplementation.

RECORD SUPPLEMENTATION

Respondents' Unopposed Motion to Supplement the Record herein was sustained on September 3, 2021.[1]

HEARING TESTIMONY AND EVIDENCE

Respondent accepts the testimony and evidence presented or admitted as submitted by Informant with the following supplementation.

SEPARATE CHARGES. David DePriest was charged in Case Nos. CR01611 and CR01611-01. **App. 99-110, 228-229.** Natalie DePriest were charged separately in Case Nos. CR01612 and CR01612-01. **App. 111-121, 243-244.** Neither docket sheet reflects a motion by any party to order the DePriests to be tried jointly. **App. 99-110, 228-229; App 111-121, 243-244.** Neither docket sheet reflects an order of the Court that the DePriests be tried jointly. **App. 99-110, 228-229; App. 111-121, 243-244.**

[1] References to the Informant's Appendix will be cited as: **App.--;** the Supplemental Record Affidavit of Dan Viets, which is included in Respondent's Appendix will be cited as: **D1, p.--,R. App.**

PRECEDENT. At the time of his representation of the DePriests, Respondent was not aware of any legal authority in Missouri that a conflict of interest was created if co-defendants had different levels of culpability for the offenses charged. **App. 73 (Tr. 184).** At the time of his representation of the DePriests, Respondent was not aware of any authority that a prosecutor making an offer created a conflict of interest unless it involved one of the defendants taking action adverse to the other defendant. **App. 69 (Tr. 168).**

WANTED TO BE A TEAM. The DePriests wanted to have one lawyer and be a "team." **App. 34, 70 (Tr. 28, 169).** The DePriests made it clear to Respondent that they would never testify against each other. **App. 71 (Tr. 174.) (**See also**, Tr. 90).**

REDUCED FEE. Respondent agreed to represent the DePriets for a substantially lower fee due to the joint representation. **App. 67, 68 (Tr. 160-161).** The DePriests were short on money to hire a lawyer. **App. 34 (Tr. 28).**[2]

CHALLENGE TO SEARCH. Respondent agreed with the DePriests that the arguments to suppress the evidence for the search of the condominium were very good. **App. 68-69 (Tr. 164-165).** The DePriests wanted to litigate the validity of the search. **App. 73 (Tr. 169).**

[2] Each court appearance required a 6 hour round trip from Respondent's office.

CHECK CHARGE ARREST. The prosecuting attorney had Natalie arrested when she went to his office to pay the checks. **App. 39 (Tr. 46).** The prosecuting attorney used the bad check charges to revoke Natalie's bond. **App. 39 (Tr. 47).**

ATTORNEY HARTMANN CONSULTED. Respondent advised Natalie she would be better served to engage a local attorney on the check charges. **App. 42 (Tr. 63).** Natalie consulted a local attorney (Chris Hartmann) whom she had known since she was 12 years old about representing her on the check charge. **App. 43 (Tr. 66).** She described this attorney as an "old friend" who was "willing to help in any way." **App. 43 (Tr. 66).** This attorney told Natalie that "…it would be best to retain [Respondent]…since they are being used against me for my bond revocation…basically the cases are intertwined…He just didn't think it would be a good idea to have two different lawyers since these cases are so tangled. **App. 251.**

ATTORNEY HARRIS CONSULTED. Natalie, or her family, also contacted another local criminal defense attorney (Rick Harris). **App. 43 (Tr. 66-67), 232-233.** Attorney Harris offered to help Natalie and David. **App. 157-158.** Attorney Harris was authorized to talk to the prosecuting attorney about both cases. **App. 157-158.** The prosecuting attorney refused to talk to attorney Harris unless he entered his appearances. **App. 157-158.** Attorney Harris did not enter his appearances because Natalie and David could not afford to pay him. **App. 61 (Tr. 133).** Attorney Harris did not tell Natalie or David there would be a conflict of interest in joint representation. **App. 61 (Tr. 133).**

Natalie and David did not have the money to hire Mr. Harris. **App. 43 (Tr. 68), App. 61 (Tr. 133).**

OPTION TO HIRE OTHER COUNSEL. Respondent told Natalie on a number of occasions that she could obtain other counsel at any time. **App. 43 (Tr. 68).** Natalie knew she could obtain other counsel at any time. **App. 43 (Tr. 66).** Natalie did not have the money to hire other counsel. **App. 43 (Tr. 68-69).** David did not have the money to hire another lawyer. **App. 60 (Tr. 129).**

DAVID'S INTENTION TO PLEAD GUILTY. On or before June 26, 2013, David informed Respondent that he intended to enter an open guilty plea to all counts if the prosecuting attorney consented to reinstatement of Natalie's bond. **App. 159-160.**

On June 27, 2013, David offered to plead guilty to all pending charges if the prosecuting attorneys would agree to allow Natalie to plead guilty to misdemeanors in exchange for dismissal of the felony charges and being released from jail. **App. 163-164.**

On August 13, 2012, Respondent informed the prosecuting attorney that David intended to enter a plea of guilty on Friday (August 16, 2012). **App. 168.**

On August 16, 2012, David was already considering pleading guilty before the prosecuting attorney told Respondent that he would not agree to the deal to reinstate Natalie's bond unless David also pled guilty. **App. 169-170.**

RULE 24 MOTIONS. According to this Court, the Rule 24.035 motion court erred in relying on *Poole v. State, 825 S.W.2d 669 (Mo App 1992),* for the proposition that: "In

order to evidence a conflict of interest, something must have been done by counsel in trial, or something must have been foregone by counsel and lost to the accused, which was detrimental to the accused interests and advantageous to the one with antagonistic interests." **App. 190.**

On appeal to this Court, the state argued that Natalie and David's post plea allegations of Respondent's "conflict" did not prove an actual conflict of interest and, if they did, the conflict did not adversely affect Respondent's representation of either DePriest. **App. 194.**

As noted by this Court, the Rule 24.035 motion court had an opportunity to, but did not, inquire as to whether an actual conflict of interest had arisen and whether any such conflict adversely affected Respondent's representation of the DePriests. **App. 195.**

SUBSEQUENT RECOGNITION OF CONFLICT. Recently, Respondent has withdrawn from joint representation of family members in separate unrelated charges when a potential conflict of interest became apparent after his engagement. **App. 76-77 (Tr. 196-197).** Respondent is far more cautious about representing codefendants as a result of the decision in *DePriest.* **App. 80 (Tr. 210).**

CHARACTER: CONTRIBUTIONS TO THE QUALITY OF JUSTICE.[3]

Respondent has served the interest of justice as a volunteer in various causes of public interest for decades as evidenced by the following contributions and accolades.

Respondent was named **2019 Lawyer of the Year**, by Missouri Lawyers Media, recognizing his work and contributions to the drafting and passage of Article XIV of the Missouri Constitution. **D1, p.3; R App.** Respondent has served as President and a Board member of the Missouri Association of Criminal Defense Lawyers and received its **Atticus Finch Award** for work in the community in 2005. **D1, p.3; R App.** Respondent has served as the state coordinator for NORML (National Organization for Reform of Marihuana Laws) for many years and received the **Lifetime Achievement Award** and the **Peter McWilliams Award for Medical Marijuana Advocacy** from NORML. **D1, p.4; R App.** Additionally, Respondent has served on the national board of directors of NORML (chair for 10 years) and has participated as a speaker and/or moderator in many national conferences and legal seminars. **D1, p.4; R App.** Respondent has presented at many seminars sponsored by the Missouri Bar, Missouri Association of Criminal Defense Lawyers, and Missouri DWI Institute. **D1, p.4; R App.** Respondent has served on committees of the Missouri Bar including the committee charged with rewriting the

[3] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Rule 4, Preamble [1].

Missouri criminal code (including the repeal of the antiquated "prior and persistent drug offender law") and the committee charged with drafting the criminal expungement law. **D1, p.4-5; R App.** Respondent has served as a member of the board of directors of the American Civil Liberties Union of Eastern Missouri and as president of the Mid-Missouri ACLU chapter. **D1, p.6; R App.** During his service to the Mid-Missouri ACLU chapter, Respondent was instrumental in adoption of an amendment to the Human Rights Ordinance of the City of Columbia adding sexual orientation to the grounds upon which discrimination is prohibited. **D1, p.6; R App.** Respondent has been awarded the Keeping the Dream Alive Award from the Martin Luther King, Jr. Memorial Association, the Civil Libertarian of the Year Award from the Mid-Missouri ACLU chapter, and the Trailblazer Award from the NAACP. **D1, p.6; R App.**

Respondent has worked to serve the interest of justice for individuals as evidence by the following. He worked to persuade Governor Nixon to commute the sentence of Jeff Mizanskey who had been sentenced to life without parole for a third marijuana offense under the antiquated "prior and persistent drug offender" law. Respondent was pro bono counsel at Jeff's parole hearing. Jeff was released on parole after serving 21 years in DOC as a model prisoner. **D1, p.5; R App.** He also worked, pro bono, in support of the application for clemency from Governor Parson on behalf of Dimetrious Woods who had been sentenced to 25 years without parole for drug possession under the antiquated "prior and persistent drug offender" law. Mr. Woods 'sentence was commuted by Governor Parson. **D1, p.5; R App.** He worked**,** early in his career, along with Hon. Gary

Oxenhandler, defending 42 university students known as the Shanty Town demonstrators, who were charged with trespassing after peaceful protests on the MU campus quadrangle following anti-apartheid demonstrations. 41 of the charges were dismissed and the remaining defendant was found not guilty. **D1, p.6; R App.** Respondent also worked to reform the Boone County Sheriff's practice of strip and body cavity searches of all persons entering the Boone County Jail. Ultimately the court ruled these searches were in violation of the law which impacted the practice of all Missouri Sheriffs. **D1, p.6-7;R App.**

ARGUMENT

INFORMANT'S POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT'S LICENSE BECAUSE RESPONDENT VIOLATED RULE 4-1.7 (CONFLICT OF INTEREST-CURRENT CLIENTS) WHEN HE REPRESENTED CRIMINAL CODEFENDANTS DAVID AND NATALIE DEPRIEST BECAUSE THEY HAD NOT WAIVED CONFLICTS AND THERE WAS A DIFFERENCE IN THE LEVEL OF THEIR CULPABILITIES AND THE PROSECUTOR WAS MAKING GROUP PLEA OFFERS TO THEM.

A. RESPONDENT ACTED IN GOOD FAITH WHEN HE ACCEPTED JOINT REPRESENTATION OF THE DEPRIESTS NINE YEARS AGO.

As will be more fully detailed in point II of this brief, in 2012, Respondent acted in good faith[4] when he agreed to represent the DePriests who: 1) were siblings; 2) had been unable to hire counsel in several months; 3) did not have the money to hire separate lawyers; 4) would never testify against each other; 5) were charged in separate cases; 6) agreed on the facts and circumstances resulting in the charges; and 7) shared a common legal defense.

In 1978, the United States Supreme Court considered whether multiple defendants, represented by one appointed public defender were deprived of "effective assistance of counsel" when they insisted on testifying at trial, against the advice of their appointed counsel, and after the court refused to allow counsel to withdraw and denied counsel's request for separate counsel to be appointed for the defendants. *Holloway v. Arkansas*, 435 U.S. 475, 477-478 (1978). The Court held the failure to appoint new counsel or to ascertain the risk of a conflict of interest "…in the face of representations made by counsel weeks before trial and again before the jury was empaneled, deprived petitioners of the guarantee

[4] Respondent acknowledges his "good faith" does not excuse non-compliance with the Rules of Professional Responsibility. *In Re Weier*, 994 S.W.2d 554, 558 (Mo 1999). However, as explained in point II, Respondent's "good faith" is supported by precedent and relevant to the appropriate discipline.

of "assistance of counsel." *Id.* However, the Court reiterated and quoted from *Glasser v. United States*, 315 U.W. 60 (1942) as follows:

> "One principle applicable here emerges from *Glasser* without ambiguity. Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." (Internal citation omitted). *Hollaway* @ 482-483.

When Respondent was engaged by the DePriests, in 2012, it was clear that representation of co-defendants did not create a per se conflict of interest. *State v. Howard,* 896 S.W. 2d 471, 488 (Mo. App. S.D. 1995) (internal citation omitted). Existing precedent supported his decision to provide joint representation. See, e.g. *Hopson v. State,* 728 S.W. 2d 276, 278 (Mo. App., W.D. 1987) (no conflict of interest when co-defendants accounts of circumstances were in substantial agreement); *Odom v. State*, 783 S.W. 2d 486, 488 (Mo. App. W.D. 1990) (no conflict where common defense asserted); Smith *v. State*, 972 S.W. 2d 551, 555 (Mo. App. S.D. 1998) (no conflict of interest where counsel represented husband, wife and brother).

B. RESPONDENT UNDERSTANDS AND APPRECIATES THE SIGNIFICANCE OF THE HOLDING IN *DEPRIEST V STATE*, 510 S.W. 3d 331 (MO. 2017).

The law has been clarified. *DePriest* is this court's decision based on the DePriests ' Rule 24.035 motions decided five years after Respondent was hired and four years after the DePriests entered guilty pleas. *Informant's Brief*, pg. 35, ftn. 11. The DePriests 'Rule 24 litigation clarified the law regarding actual conflicts of interest in joint representation of criminal defendants.

Informant argues that Respondent's "first actual conflict arose based upon the difference in the levels of culpability of the DePriests." *Informant's Brief*, pg. 36. In support, Informant cites *LaFrance v. State*, 585 S.W. 2d 317 (Mo App KCD 1979). *Informant's Brief*, pg. 34. Respondent was unaware of the import of *LaFrance*. **App. 73 (Tr. 184).** As will be more fully discussed in point II, the circumstances in *LaFrance* were very different from the circumstances confronting Respondent when the DePriests asked him to represent them. Nevertheless, in *DePriest*, five years after Respondent accepted the joint representation of the DePriests, this court clearly stated its agreement with *LaFrance*,

and rejected the *Mason/Mooring*[5] standard for actual conflicts of interest involving pleas of guilty.[6] *DePriest* @ 340.

Informant also argues that Respondent's "[a]ctual conflicts arose when the Prosecutor made group plea offers to the DePriests before Ms. DePriest was jailed on the bad check charge. *Informant's Brief*, pg. 37. In support, Informant cites *DePriest. Informant's Brief*, pg. 35. Respondent was not aware of any authority for the proposition that the joint plea offers by the prosecutor created a conflict of interest. **App. 69 (Tr. 168).** As will be more fully discussed in point II, Respondent (or separate counsel) could not control or prevent the prosecuting attorney from making group plea offers after he accepted the DePriests' representation; the DePriests contacted other lawyers after the group plea offers; and, the DePriests could not afford and were unable to engage other counsel. Nevertheless, in *DePriest*, this court included the group plea offers which were offered on a "both or

[5] The *Mason/Mooring* a standard refers to the proposition that in order to evidence a conflict of interest, something must have been done by counsel in trial, or something must have been foregone by counsel and lost to the accused, which was detrimental to the accused's interests and advantageous to the one with the antagonistic interest. *DePriest*, 339.

[6] The *Mason/Mooring* standard was accepted/applied by the motion court judge.

neither" basis among the DePriests allegations of actual conflict of interest entitling them to an evidentiary hearing.[7] *DePriest* @341.

C. RESPONDENT UNEQUIVOCALLY ACCEPTS AND ACKNOWLEDGES THE CONFLICT OF INTEREST CREATED BY JOINT REPRESENTATION OF THE DEPRIESTS AND RESPONDENT DOES NOT CONTEND THE CONFLICT WAS ADEQUATELY WAIVED.

Respondent acknowledges, understands and is committed to follow this court's guidance provided by *DePriest.* Disparities in the weight of the evidence against codefendants create an actual conflict of interest. *Id.* A group plea offer to codefendants conditioned on "both or neither" creates an actual conflict of interest. *Id.* Respondent admits a disparity in the weight of the evidence against the DePriests was apparent. Respondent admits the prosecuting attorney extended group plea offers conditioned on "both or neither" to the DePriests. Respondent admits a conflict of interest existed due to the disparity in the weight of the evidence and when the prosecuting attorney made the group plea offers on a "both or neither" basis. Respondent is more cautious about representing codefendants as a result of the decision in *DePriest.* **App. 80 (Tr. 210).**

[7] The DePriests' motions allege the prosecuting attorney exploited the conflict of interest by the group offers. *DePriest*, @ 341.

INFORMANT'S POINT RELIED ON

II.

THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE BECAUSE THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST THAT SUSPENSION IS AN APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO KNOWS OF A CONFLICT OF INTEREST AND DOES NOT FULLY DISCLOSE TO THE CLIENT THE POSSIBLE EFFECT OF THE CONFLICT AND THE ATTORNEY CAUSES INJURY OR POTENTIAL INJURY TO THE CLIENT.

A. REPRIMAND IS THE APPROPRIATE DISCIPLINE WHEN A LAWYER IS NEGLIGENT IN DETERMINING WHETHER HIS REPRESENTATION WILL ADVERSELY AFFECT ANOTHER CLIENT.

The purpose of imposing discipline is not to punish the attorney, but to protect the public and maintain the integrity of the profession. *In re Forck*, 418 S.W.3d 437, 441 (Mo 2014).

Informant argues ABA Standard 4.3 governs sanctions for conflict of interest violations. *Informant's Brief*, pg. 44. Respondent agrees**.** Informant argues ABA Standard 4.32 is most applicable here. *Informant's Brief*, pg. 44. Respondent disagrees**.** ABA Standard 4.32 requires the lawyer to act knowingly. "Knowledge" is defined as the " conscious awareness of the nature of attendant circumstances of the conduct but without

the conscious objective or purpose to accomplish a particular result. *In re Forck* @ 442 (internal citation omitted). Respondent did not accept or continue the DePriests' joint representation with "conscious awareness" of the conflict of interest. Therefore, Respondent did not act knowingly and ABA Standard 4.32 does not apply.

The ABA Standard applicable here is 4.33 which provides that a reprimand is appropriate when a lawyer is negligent in determining whether a conflict of interest exists.[8] "Reprimand is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client." ABA Standard 4.53." *In re Forck*, 442. "Negligence" is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id* . (internal citation omitted). See, *In re Weier*, 994 S.W. 2d 554 (Mo 1999) (reprimand is the appropriate sanction when the lawyer has merely been negligent where lawyer failed to disclose his financial interest).

When Respondent accepted joint representation of the DePriests, he was unaware that an actual conflict of interest was created because co-defendants had different levels of

[8] ABA Standard 4.33 states: Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

culpability for the offenses charged. He was also unaware that a prosecutor making an offer created a conflict of interest unless it involved one of the defendants taking action adverse to the other defendant. **App. 73, 64 (Tr. 184, Tr. 168).** Respondent did not act with the "conscious awareness" necessary to find that he acted knowingly.

As noted above in point I, when Respondent agreed to joint representation of the DePriests he knew that the joint representation was not prohibited as Missouri precedent established that joint representation of co-defendants did not create a per se conflict of interest. *State v. Howard*, 896 S.W. 2d 471, 488 (Mo. App. S.D. 1995) (internal citation omitted).

The DePriests wanted to have one lawyer and to be a "team." **App. 29 (Tr. 28, 169).** They were short on money and they could only afford one lawyer. **App. 29 (Tr. 28).** The DePriests made it clear to Respondent that they would never testify against each other. **App. 71 (Tr. 174) (See also, Tr. 90).** David and Natalie were brother and sister and they wanted to hire one lawyer to represent them. **App. 28 (T. 24); App. 29 (T. 28).** See, Smith *v. State*, 972 S.W. 2d 551, 555 (Mo. App. S.D. 1998) (no conflict of interest where counsel represented husband, wife and brother). They didn't have the money to hire another lawyer. **App. 40 (T. 69); App. 55 (T. 129).** Respondent agreed to represent the DePriets for a substantially lower fee due to the joint representation. **App. 67-68 (Tr. 160-161).** It is noteworthy, that they acknowledge that they could not afford to hire another lawyer, even after the joint pleas were offered, and after Natalie was arrested and charged on the check charge. **App. 56 (T. 133).**

The DePriests tried unsuccessfully for several months to hire a lawyer before hiring Respondent. After spending $20,000 to post bonds, David and Natalie were told they were not eligible for a public defender. **App. 29 (T. 27-28).** In the four months after their arrest, before they contacted Respondent, they went together to 2 or 3 attorneys. **App. 29 (T. 28).** The attorneys told them they would represent Natalie but not David. **App. 29 (T. 28).** The attorneys did not explain why they would not represent both of them, and Natalie claims they did not mention a conflict of interest. **App. 29 (T. 28) App. 30 (T. 29).** Before contacting Respondent, the DePriests appeared in court without counsel November 10, 2011, December 27, 2011. Respondent entered his appearance on January 23, 2012. **App. 99-100, App. 113.**

The DePriests were charged separately and they were facing separate trials which significantly reduced the potential for divergence of their interests. *State v. Weeks*, 603 S.W.2d 657, 662 (Mo. App. S.D. 1980) (quoting from *Cuyler v. Sullivan*, 446 U.S. 335). After their arrest in August 2011, David and Natalie DePriest, were charged in separate cases. **App. 29 (Tr. 25); App. 48 (T. 101).** David was charged in Case Nos. CR01611 and CR01611-01. **App. 99-110, 228-229.** Natalie were charged separately in Case Nos. CR01612 and CR01612-01. **App 111-121, 243-244.**

The DePriests' cases were never joined for trial.[9] The prosecuting attorney did not file a motion to order David and Natalie to be tried jointly. **App. 99-110, 228-229; App 111-121, 243-244.** The Court did not order that David and Natalie be tried jointly. **App. 99-110, 228-229; App 111-121, 243-244.**

The challenge to the warrantless search of the DePriests 'home was a common defense**.** See, *Odom v. State*, 783 S.W. 2d 486, 488 (Mo. App. W.D. 1990) (no conflict where common defense asserted). The search of the condominium where Natalie and David lived was made without a warrant and they believed it was illegal. **App. 32 (T. 40); App. 51 (T. 113).** They believed this was a strong argument to have the case thrown out. **App. 33 (T. 41); App. 57 (T. 138).** Respondent filed motions to suppress the evidence in both divisions of the court in both cases. **App. 101; App. 113-114.** Respondent believed the arguments to suppress the evidence from the search of the condominium were very good and the DePriests wanted to litigate the validity of the search. **App. 68-69 (Tr. 164-165, 169).**

The DePriests told the same story of the circumstances of the offense. In *Hopson v. State*, 728 S.W. 2d 276, 278 (Mo. App. W.D. 1987) the Court found no conflict of interest

[9] Rule 24.06 (a) authorizes the joint trial of defendants who are charged in separate indictments or informations, upon the motion of any party. No motion for joint trial is shown on either docket sheet. **App. 103-110; App. 115-122.**

in the representation of co-defendants who were in substantial agreement on the circumstances of the crime, stating:

> "One might hypothesize a situation in which the positions of Hopson and Mack would be opposed to each other, and that representation of the one would prevent a lawyer's doing justice to the other. But from the words from these two defendants ' own mouths, there was no such conflict. Their accounts of the circumstances of the crime, as noted, were in substantial agreement. If either had been attempting to exculpate himself by incriminating the other, or some such circumstance, then the lawyer would be in an impossible situation representing both of them. But nothing of that sort appears here. Hopson has failed to show an actual conflict of interest on lawyer Simon's part which adversely affected his performance in representing him. *Hopson*, @ 278. (Emphasis added.)

Informant cites *LaFrance v. State*, in support of its argument that Respondent's "first actual conflict arose based upon the difference in the levels of culpability of the DePriests." *Informant's Brief*, pg. 34, 36. In *LaFrance* the jointly represented defendants told different stories of "the crime." *LaFrance @* 322. (Emphasis added.) This factor was critical to the court of appeal's determination (reversing the trial court finding) that a conflict of interest existed.

The DePriests told the same story of "the crime," to-wit: David grew the marijuana; David owned the gun; marijuana and drug paraphernalia were found in common areas; there was no warrant for the search. The circumstances confronting Respondent when he

was hired are much closer to the circumstances in *Hopson.* Informant's reliance on *LaFrance* to demonstrate Respondent acted "knowingly" is misplaced because it conflates different levels of responsibility with different versions of the facts.

In part Informant argues that Respondent acted "knowingly" because David did not want to plead guilty on August 16, 2013 (i.e. when he had 5 minutes to decide on the prosecuting attorney's offer). *Informant's Brief, pg. 45*. However, six weeks earlier, David informed Respondent that he intended to enter an open guilty plea to all counts if the prosecuting attorney consented to reinstatement of Natalie's bond. **App. 160-161.** The prosecuting attorney knew that David intended to plead guilty six weeks before the date of the plea. **App. 163-164.**

Informant also cites the final disposition of David and Natalie's Rule 24 litigation which happened in 2017, in support of its argument that Respondent's "[a]ctual conflicts arose when the Prosecutor made group plea offers to the DePriests before Ms. DePriest was jailed on the bad check charge. *Informant's Brief*, pg. 35, 37. Informant's reliance on DePriest to demonstrate Respondent acted "knowingly" is misplaced because it was decided years after the joint representation of the DePriests concluded.

The other lawyers consulted about this matter likewise did not "know" a conflict existed. The first plea offer was made in March 2021. **App. 129.** The second offer was made in March 2013. **App. 139.** Natalie was arrested on the check charge in April 2013. **App. 143.** Hartmann and Harris were both consulted after the joint plea offers were made by the prosecutor. **App. 43 (Tr. 66); App. 43 (Tr. 66-67), 232-233.** Both of these

lawyers presumably were aware of the disparity in the weight of the evidence against David and Natalie. Neither of the lawyers voiced concern to the DePriests of a conflict of interest. Instead, one advocated for joint representation and the other agreed to participate in joint representation. **App. 251; App. 157-158.**

Attorney Chris Hartmann was an old friend and he was willing to help Natalie. **App. 43 (Tr. 66).** Attorney Hartman recommended she continue representation with Respondent. **App. 251.** Attorney Hartman specifically advised Natalie that it would not be a good idea to have different lawyers. **App. 251.** Attorney Hartman apparently did not recognize any conflict of interest because he recommended against Natalie hiring a different lawyer.

Attorney Rick Harris was consulted. **App. 43 (Tr. 66-67), 232-233.** He offered to help both Natalie and David. **App. 157-158, 247.** Attorney Harris did not tell Natalie or David there would be a conflict of interest. **App. 61 (Tr. 133).** He was authorized to talk to the prosecuting attorney about both cases. **App. 157-158.** The prosecuting attorney would not speak with Mr. Harris unless he entered his appearances. **App. 232.** However, Natalie and David did not have the money to hire Mr. Harris. **App. 43 (Tr. 68), App. 61 (Tr. 133).** Attorney Harris did not enter his appearances because Natalie and David could not afford him. **App. 61 (Tr. 133).** Apparently Attorney Harris did not recognize a conflict of interest because he agreed to advocate with the prosecuting attorney about both cases.

The trial judge did not recognize a conflict of interest when he accepted the pleas of guilty or when he denied the DePriests hearings on their Rule 24 motions. Respondents ' joint representation of David and Natalie did not raise a "red flag" in the trial court. In 2015, as noted by this Court, when the DePriests 'pleas of guilty were offered and accepted, the trial court had an opportunity to inquire as to whether an actual conflict of interest had arisen and whether the conflict adversely affected counsel's representation of either Natalie or David. *DePriest* @ 342. But, the trial court did not do so. *Id.*

When the same judge was confronted with the Rule 24 claims of conflict of interest, he did not believe the DePriests had adequately alleged a conflict of interest and he denied them an evidentiary hearing. He relied on the proposition that:

> "In order to evidence a conflict of interest, something must have been done by counsel in trial, or something must have been foregone by counsel and lost to the accused, which was detrimental to the accused interests and advantageous to the one with antagonistic interests." *Id.* @ 339.

Thereafter, the lawyers for the state defended Respondents 'joint representation before this court in *DePriest*, arguing there was no conflict of interest and contending the claims by Natalie and David did not prove an actual conflict of interest, and if they did, the conflict did not adversely affect counsel's representation of either DePriest. *Id.* @ 341.

The advice of one attorney to continue representation with Respondent, the willingness of another attorney to advocate on behalf of both David and Natalie, the failure

of the trial judge to investigate a conflict at the time of the pleas, and the motion judge's belief that an actual conflict was not stated in the Rule 24 pleadings illustrate that none of the involved lawyers, including Respondent, were consciously aware of the actual conflict of interest created by the different levels of culpability or the joint plea offers.

Respondent did not accept or continue joint representation of the DePriest with conscious awareness of a conflict of interest. ABA Standard 4.33 applies and reprimand (or admonition) is the appropriate sanction.

B. THE PROSECUTING ATTORNEY'S JOINT PLEA OFFERS AND THE TRIAL COURT'S FAILURE TO INQUIRE INTO THE PROPRIETY OF JOINT REPRESENTATION CONTRIBUTED TO THE DEPRIESTS' INJURY.

The prosecuting attorney's joint plea offers could not be prevented by separate counsel. Respondent could not anticipate in 2012, or control in 2013, the joint "both or neither" plea offers extended by the prosecuting attorney. Moreover, the same group plea offers could have been extended by the prosecuting attorney, whether or not David and Natalie were represented by the same lawyer or different lawyers.

The prosecuting attorney's decision to have Natalie arrested, revoke her bond, and condition her release from jail on David's guilty plea could not be prevented by separate counsel. Respondent could not anticipate in 2012, or control in 2013, that Natalie would be arrested on additional charges or that the prosecuting attorney would move to revoke

her bond and condition offers allowing her release from confinement on plea offers to David. Moreover, the same actions could have been taken by the prosecuting attorney, whether David and Natalie were represented by the same lawyer or different lawyers.

The DePriests did not have money to hire separate counsel. As noted above, after the joint "both or neither" plea offers and after bad check arrest, the DePriests contacted Attorney Hartman and Attorney Harris. However, the DePriests did not engage other counsel because they could not afford to pay them. It was not Respondent's failure to advise the DePriests of a conflict of interest which prevented them from engaging other counsel but rather their inability to pay other counsel.

The trial judge accepted the DePriests' guilty pleas and imposed their sentences without considering if a conflict of interest actually existed. The trial judge was aware of the conditional joint plea offers before he accepted the guilty pleas tendered by the DePriests and before he imposed their sentences. The Court of Appeals, Eastern District noted, "During this plea proceeding, Counsel and the prosecutor informed the trial court that the dismissal of Natalie's additional charges and the reinstatement of her bond were contingent on Movant's [i.e. David's] plea of guilty. The trial court was also aware that Counsel represented both Movant and Natalie, but made no further inquiry into the possibility of an actual conflict of interest upon hearing the terms of the plea agreement." *DePriest v. State*, 478 S.W. 3d 494, 499 (Mo. App. E.D. 2015). See, *Mickens v. Taylor*, 535 U.S. 162, 168 (2002) (where the trial court knows or reasonably should know that a conflict of interest exists, it has a "duty to inquire into the propriety of a multiple

representation.") (internal citations omitted). As this court noted, the trial court never conducted any such inquiry.

If the trial judge had conducted the mandated inquiry, the disparity in the weight of the evidence and the joint "both or neither" plea offers would have disclosed. Presumably the trial judge would not have accepted the pleas of guilty tainted by the conflict of interest.

It is appropriate to consider the actions of the prosecuting attorney and the trial judge which caused or contributed to the injury the DePriests suffered, because ABA Standard 4.34 may be applicable if the injury was caused by the actions of others.[10] The prosecuting attorney recommended the maximum sentences for the DePriests and the court imposed the sentences; not Respondent.

C. MITIGATING FACTORS JUSTIFY DOWNWARD DEPARTURE FROM THE PRESUMPTIVE DISCIPLINE.

The mitigating factors present here should be considered to justify a downward departure from the presumptive discipline. They include: 1) absence of a dishonest or selfish motive. ABA Standard 9.32 (b); and, 2) character or reputation. ABA Standard 9.32 (g);

[10] ABA Standard 4.34 provides that an admonition is generally appropriate if the joint representation will adversely affect a client and causes little or no actual or potential injury to a client.

Respondent's motive to accept joint representation was to provide affordable legal service to family members who wanted joint counsel and could not afford to hire separate lawyers. He agreed to represent the DePriets for a substantially lower fee due to the joint representation. **App. 67-68 (Tr. 160-161).** The DePriests were short on money to hire a lawyer. **App. 34 (Tr. 28).** As noted by Judge Wolff, Respondent has a reputation as a good lawyer who delivers good value to his clients. **App. (Tr. 154).** Respondent's motive was not dishonest or selfish and this should be considered in mitigation.

Respondents' character evidence, including the supplemental record affidavit, indicates a career dedicated to the service of others and the interests of justice. He has contributed untold hours as a volunteer to public and private issues in the interest of justice as evidenced by his pro bono works and awards including:

Respondent was named **2019 Lawyer of the Year**, by Missouri Lawyers Media, recognizing his work and contributions to the drafting and passage of Article XIV of the Missouri Constitution. **D1, p.3; R App.** Respondent has served as president and a board member of the Missouri Association of Criminal Defense Lawyers and received its **Atticus Finch Award** for work in the community in 2005. **D1, p.3; R App.** Respondent has served as the state coordinator for NORML (National Organization for Reform of Marihuana Laws) for many years and received the **Lifetime Achievement Award** and the **Peter McWilliams Award for Medical Marijuana Advocacy** from NORML. **D1, p.4; R App.** Additionally, Respondent has served on the national board of directors of NORML (chair for 10 years) and has participated as a speaker and/or moderator in many national

conferences and legal seminars. **D1, p.4; R App.** Respondent has presented at many seminars sponsored by the Missouri Bar, Missouri Association of Criminal Defense Lawyers, and Missouri DWI Institute. **D1, p.4; R App.** Respondent has served on committees of the Missouri Bar including the committee charged with rewriting the Missouri criminal code and the committee charged with drafting the criminal expungement law. **D1, p.4-5; R App.** Respondent has served as a member of the board of directors of the American Civil Liberties Union of Eastern Missouri and as president of the Mid-Missouri ACLU chapter. **D1, p.6; R App.** During his service to the Mid-Missouri ACLU chapter, Respondent was instrumental in adoption of an amendment to the Human Rights Ordinance of the City of Columbia adding sexual orientation to the grounds upon which discrimination is prohibited. **D1, p.6; R App.** Respondent has been awarded the Keeping the Dream Alive Award from the Martin Luther King, Jr. Memorial Association, the Civil Libertarian of the Year Award from the Mid-Missouri ACLU chapter, and the Trailblazer Award from the NAACP. **D1, p.6; R App.**

Respondent has worked to serve the interest of justice for individuals as evidence by the following. He worked to persuade Governor Nixon to commute the sentence of Jeff Mizanskey who had been sentenced to life without parole for a third marijuana offense under the antiquated "prior and persistent drug offender" law. Responded acted as pro bono counsel for Jeff at his parole hearing. Jeff was released on parole after serving 21 years in DOC as a model prisoner. **D1, p.5; R App.** He worked in support of the application for clemency from Governor Parson on behalf of Dimetrious Woods who also had been

sentenced to 25 years without parole for drug possession under the antiquated "prior and persistent drug offender" law. Mr. Woods 'sentence was commuted by Governor Parson. **D1, p.5; R App.** He worked**,** early in his career, along with Hon. Gary Oxenhandler, defending 42 university students known as the Shanty Town demonstrators, who were charged with trespassing after peaceful protests on the MU campus quadrangle following anti-apartheid demonstrations. 41 of the charges were dismissed and the remaining defendant was found not guilty. **D1, p.6; R App.** Respondent also worked to litigate and reform the Boone County Sheriff's practice of strip and body cavity searches of all persons entering the Boone County Jail. Ultimately the court ruled these searches were in violation of the law which impacted the practice of all Missouri Sheriffs. **D1, p.6-7;R App.**

Respondent's contributions to the interest of justice and public discourse should be considered in mitigation.

Finally, although Informant expresses concern that Respondent will engage in repeated behavior (*Informants Brief, pg. 47*), Respondent has fully accepted responsibility as noted in this brief and he has recently withdrawn from representation when a potential conflict became apparent due to representation of a family member. Tr. 196-197. Respondent contends there is no risk of repeated behavior.[11]

[11] Informant argues that one of Respondent's prior admonitions involved a conflict of interest. (*Informants Brief, pg. 48*). However, Respondent was unaware that a prior

CONCLUSION

Given the Court's ruling in *DePriest*, Respondent acknowledges his joint representation of the DePriests was a violation Rule 4-1.7 because of the disparity in the level of the DePriests' culpabilities and because of the group plea offers made by the prosecuting attorney.

Respondent contends that he did not act with "conscious awareness" of the conflict of interest and the appropriate discipline is a reprimand[12] in accordance with ABA Standard 4.33 or admonition.

client was a potential witness against his current client until the government filed its motion to disqualify him.

[12] An admonition would be the appropriate discipline per ABA Standard 4.34 if the injury suffered by the DePriests resulted from the actions of the prosecuting attorney and/or the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Brief has been sent via the Missouri Supreme Court e-filing system and served via email on this **20th** day of **September, 2021** to the following:

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CERTIFICATION: RULE 84.06(c)

I, the undersigned, hereby certify that this brief includes the information required by Rule 55.03, was served on Informant through the Missouri electronic filing system pursuant to Rule 103.08, complies with the limitations of Rule 84.06 and contains 7237 words.