IN THE SUPREME COURT
STATE OF MISSOURI

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| IN RE: | ) | |
| | ) | |
| ROBERT H. WENDT, | ) | |
| | ) | No. SC86642 |
| Respondent. | ) | |

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**RESPONDENT'S BRIEF**

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Respectfully Submitted,

LAW OFFICES OF
WOLFF & D'AGROSA

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# TABLE OF AUTHORITIES

## JURISDICTIONAL STATEMENT

Respondent, Robert Wendt, herein asserts that Jurisdiction over attorney discipline matters rest with the Supreme Court pursuant to the Missouri Constitution Article 5, Section 5, Supreme Court Rule 5 and Section 484.040 RSMo.

## STATEMENT OF FACTS

**Case No. 02-0486-Y1**

The Respondent, Robert H. Wendt represented Randall B. Knese on the charges of Murder First Degree and Attempted Forcible Rape in June 1997. Upon conviction on June 16, 1997, Knese was sentenced to death. On direct appeal, this Court affirmed. State v. Knese 985 S.W.2d 759 (Mo. banc), cert. denied, 526 U.S. 1136 (1999).

Knese then moved for post conviction relief on the grounds that Respondent was ineffective for not striking two jurors as biased and unqualified. Respondent received a "stack of questionnaires" on the morning of the jury selection and trial, as well as other questionnaires received prior to the day of trial. Respondent reviewed the questionnaires received prior to the day of trial but did not thoroughly review all of those provided on the day of trial, including two eventual jurors that were found to be biased and prejudiced.

In this post conviction proceedings, Respondent accepted full and complete responsibility for failure to read these questionnaires during his

deposition and testimony.

The trial judge denied the motion. This Court rendered its decision in



Knese v. State, on August 27, 2002 reversing the penalty phase because of the ineffective assistance of Respondent as counsel. (Respondent's Appendix, A-2).

Within several days of this Court's ruling the trial judge filed a bar complaint against Respondent. The complaint was referred to the Regional Disciplinary Committee which voted unanimously, in September, 2003, to close the complaint filed upon their unanimous findings of no probable cause of professional misconduct.

On November 5, 2003, the trial judge complainant requested review of the unanimous Regional Disciplinary Committee findings.

On October 19, 2004, almost a year later the Advisory Committee referred the complaint to the Office of Chief Disciplinary Counsel for further investigation.

On November 10, 2004, less that one month later the Office of Chief Disciplinary Counsel wrote Respondent a letter stating:

> "After reviewing the information …your prior record of

discipline which includes sanctions for similar misconduct is an aggravating factor to note."

Respondent again accepted full responsibility for his ineffectiveness



in not fully and completely reviewing all questionnaires given to him the morning of trial while acknowledging his mistake he questioned whether this mistake was worthy of discipline. He does not agree that he has received sanctions for similar misconduct although he does agree that he has been disciplined in the past and disbarred in 1981. Subsequent to his criminal conviction, Respondent received a Presidential Pardon, which was a factor most certainly taken into consideration in the reinstatement of his license to practice law. On May 16, 1989, the Court readmitted him on a three year probationary basis.

Respondent wrote on December 15, 2004:

"Since being reinstated in May of 1989, I have attempted to practice law in a manner consistence with honestly, integrity and competency. In the past fifteen years, I have freely and gladly given of myself to assist fellow lawyers with substance abuse problems. I have given talks at numerous bar functions and at the University of Missouri and

Washington University Law Schools. These talks often deal with ethical issues. Therefore, I hope you can understand why I take this matter seriously and why it is personally embarrassing to me. I have been sober since October, 1983. Since being readmitted in May of 1989, I believe I



have been a credit to the legal profession, to my clients and to the community. In this particular case, I failed my client as well as myself. At the same time however, my conduct here does not involve dishonestly or other conduct touching on my integrity. I forthrightly admitted my mistake at the very beginning of the post-trial proceedings and I did not attempt to conceal or excuse my mistake. All of the facts in this case were known to the court at the time of the hearing on March of 2001, yet no complaint was filed against me until after the Supreme Court ordered a rehearing and a re-sentencing was conducted. This coming some eighteen months after all of the facts were known. I take responsibility for my inaction and I am truly sorry. My attorney and I are seeking to gather character statements and matters of extenuation and mitigation for you to consider. When my attorney returns we will get those documents to you." (Informant's Appendix, A-221).

Letters were received supporting Respondent and confirming his activities helping impaired lawyers in Missouri. For more than twenty (20) years Respondent has been an active leader with Missouri Lawyers Concerned for Lawyers (MLCL), the intervention committee of this court and the Missouri Lawyers Assistance Program (MOLAP). (Informant's



Appendix, A-222-225).

**Case No. 05-0069**

When counsel for the Informant and Counsel for the Respondent could not agree on the language of the proposed stipulation, even though the recommendation to this Court was agreed upon and it was and is the same as now before this Court, the offer for settlement and proposed stipulation was withdrawn on February 2, 2005. (Respondent's Appendix, A-12).

When the offer and stipulation were withdrawn Respondent was at that time notified not only that an information would be filed but that Respondent was delinquent in his MCLE compliance and that he failed to complete three hours of ethics required for years 1999-2002.

Respondent informed informant that all requirements had been met but for actual filing of formal reports of compliance and payment of fees.

While this proof was forthcoming a joint stipulation as to discipline and recommendation to this Court was agreed upon and subsequently signed with the understanding that if all deficiencies were resolved this new charge would not be added.

Reports of Respondent's annual compliance and all fees were paid. However, the continuing legal education programs and activities reported on



the 1999-2000 annual report resulted in a 1.8 hour deficiency. (Respondent's Appendix, A-13).

On that same day Respondent was notified that "since this deficiency (of 1.8 hours) is for a period beginning seven years ago, I am going forward with the stipulation and urge your client to bring himself current as quickly as possible" (emphasis added). (Respondent's Appendix, A-13).

The newly added charge was thus retained in the previously signed stipulation.

Unfortunately, for Respondent he was unable to show prior complete compliance in time. However, the Missouri Bar, Director of Programs, has acknowledge in his letter dated June 23, 2005, that Respondent did not in fact have a deficiency of 1.8 hours, but rather had 15 carryover hours.

(Respondent's Appendix, A-14).



## POINTS RELIED ON

**I.** THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE RESPONDENT FAILED TO PROTECT HIS CLIENT'S RIGHT TO ADEQUATE VOIR DIRE IN THAT HE NEGLIGENTLY FAILED TO REVIEW VENIRE QUESTIONNAIRES ON THE MORNING OF TRIAL.

State v. Knese 985 S.W.2d 759 (Mo. banc), cert. Denied, 526 U.S. 1136 (1999).

Rule 4-1.1 of the Rules of Professional Conduct.

Rule 4-1.3 of the Rules of Professional Conduct

Rule 4-1.4 of the Rules of Professional Conduct

**II.** THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT IN ACCORDANCE WITH THE JOINT RECOMMENDATION OF THE PARTIES BECAUSE PUBLIC REPRIMAND IS AN APPROPRIATE SANCTION FOR NEGLIGENT VIOLATION OF THE DUTIES OF COMPETENCE AND DILIGENCE IN THAT THE MISCONDUCT OCCURRED IN 1997 AND HAS NOT BEEN REPEATED AND RESPONDENT HAS OPENLY ACKNOWLEDGED HIS WRONGDOING.

ABA Standards for Imposing Lawyer Sanctions (1991 Ed.)

## ARGUMENT

**I.** THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE RESPONDENT FAILED TO PROTECT HIS CLIENT'S RIGHT TO ADEQUATE VOIR DIRE IN THAT HE NEGLIGENTLY FAILED TO REVIEW VENIRE QUESTIONNAIRES ON THE MORNING OF TRIAL.

Respondent agrees that this Court's opinion in Knese v. State, 85 SW3d 632 (Mo. Banc 2002), is final on the question that Respondent's conduct during the voir dire process was ineffective representation and

prejudicial to his client.

The question here is not whether Respondent was ineffective by not reading fully and completely all jury questionnaires given to him the morning of the trial of a murder first degree which resulted in prejudice to his client's sentencing, but rather whether or not this ineffectiveness should be a matter of discipline and further whether or not that discipline should exceed the public reprimand in accordance with the joint recommendation of the parties.

It is respectfully submitted here that Respondent's ineffectiveness during the jury selection process in 1997 in and of itself would not subject



him to discipline nor has this Court disciplined all or even most of the attorneys that have rendered ineffective assistance of counsel because of negligence nor has this Court disciplined all or even most of the attorneys who have been found liable for malpractice or malfeasance. For example civil law attorneys who fail to meet the statute of limitations to the prejudice of their clients do not and have not for the most part been subject to discipline for conduct violations. Perhaps they all should face some form of discipline for negligence -- but they don't at this time.

Would any lawyer, not having the past record of Respondent, be subject to discipline here only because of the ineffectiveness? To better answer that question lets look more closely at the ineffectiveness itself.

Respondent represented Randall Knese at this trial for Murder First Degree and Attempted Forcible Rape in June 1997.

On or about June 16, 1997, Knese was found guilty of both charges and on or about August 8, 1997, the death penalty was ordered on the first degree murder conviction.

On or about August 12, 1997, Knese filed a direct appeal to the Supreme Court. Thereafter, on March 15, 1999, the Court affirmed the judgment. State v. Knese 985 S.W.2d 759 (Mo. banc), cert. denied, 526



U.S. 1136 (1999). On or about September 20, 1999, in Randall B. Knese v. State of Missouri, 11th Judicial Circuit, Case no. 11V019903822, Knese filed a post conviction relief motion pursuant to Supreme Court Rule 29.15.

Among other issues Knese alleged that Respondent had rendered ineffective assistance of counsel while defending him at his trial during jury selection. Specifically, the allegations dealt with Respondent's failure to adequately review the jury questionnaires which he received on the morning

of trial or complete initial inquires to determine whether the jurors venire or potential were qualified to sit in judgment as jurors. The result was that two jurors were seated whose questionnaires suggested that they would automatically impose the death penalty after a murder conviction.

Knese's motion under Supreme Court Rule 29.15, was heard on March 20, 2001 before the trial judge in the murder case. The transcript on appeal from that hearing reflects the testimony of Respondent and the statements of the trial judge, which deal with the jury questionnaires provided to Respondent the morning of trial just prior to selection of the jury.

Respondent stated that a significant number of jury questionnaires were given to him the morning of voir dire. The trial judge stated,



"However, as Mr. Wendt has said, we don't always get all the questionnaires in, some trickle in later, some we don't even get until the morning of voir dire because of the fact that we have, you know, a lot of times we will run short on jurors, that we go ahead and take those late questionnaires and give them to the lawyers, perhaps even the morning of the trial." (Respondent's Appendix, A-15).

Although the prosecutor couldn't remember the trial, four years later, the trial judge hearing the motion did recall:

"The Court: My Recollection is the same as Mr. Wendt's that there was some of the questionnaires that came in late, that happens in every trial. So I didn't mean to interrupt you, I wanted to let you know for the record how our procedure is."

Respondent testified that he "spent hours studying the questionnaires received before trial but only a short time on the ones received the morning of trial". (Respondent's Appendix, A-16). The trial judge stated , "There was quite a stack … That is how I would expect it. I wouldn't expect him to have any recollection of reading any specific questionnaires. I remember seeing the stack. It was a pretty good size stack." This from the trial judge who more than three years later filed this complaint against Respondent.

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During the hearing on this motion, in March 2001, Respondent took full responsibility for his failure to adequately review the questionnaires given to him on the morning of voir dire. After the trial, when Respondent did review the two questionnaires, he testified, "I about vomited. I missed it and there is no chance that I would have left them on a jury if I would have

seen them ahead of time … the mistake I made in this case, I believe is the most egregious mistake I've ever made in a trial of a case … there is no excuse for it."

Yet the trial court overruled the motion. This Court then reversed that finding.

This Court found that at a minimum Respondent should have read the questionnaires and voir dired to determine whether the two prospective jurors could serve as jurors. His failure to do so was ineffective assistance of counsel warranting the reversal of the penalty phase. All other claims against Respondent were denied.

We all agree that Respondent should have sought additional time to properly and adequately review each and every juror questionnaire. In every death penalty case the trial counsel should fully and completely question every potential juror to learn of their prejudices and bias,



especially when they are admitted or hinted to in their own questionnaires.

This court's finding of Respondent's failure to provide adequate assistance of counsel has been and still is admitted by Respondent and counsel. But this failure is a negligent violation, not intentional. While not

an excuse for failure to read these juror questionnaires completely and fully or to seek, on the record, additional time to do so, it may be offered as mitigation that the very morning the trial is set to begin with jury selection, to be at that very time given " a significant number of jury questionnaires" is not the most desired procedure for the jury selection process in a capital murder case.

Upon this Honorable Court's finding , August 27, 2002, that Respondent was ineffective in his representation of Knese at his trial June 1997, no referral for discipline or investigation was initiated by this Court.

It should be noted that at no time did Respondent's client or his family, which retained him, ever file a complaint.

The complaint was first filed, by the same trial judge that also heard and denied the 29.15 motion, against Respondent after this Court's ruling August 2002. The trial judge filed his complaint against Respondent on September 6, 2002 even though Respondent accepted responsibility as early



as August 11, 1999, in his deposition filed with this Court. The complainant also heard the testimony of Respondent, which incidentally was supported by the complainant in March 2001, yet no complaint was filed against

Respondent by the complainant until three years later. In fact, complainant did not file any complaint until days after this Court reversed the death sentencing of Knese. The complaint was referred to the Regional Disciplinary Committee for Region XI. After investigation and review complainant on October 6, 2003 was notified by that committee as follows:

"The committee has determined that there is not probable cause to believe that Robert Wendt's action involved professional misconduct, accordingly the committee has dismissed your complaint and is closing it's file". (Respondent's Appendix, A-17).

This finding of no probable cause by Region XI committee was unanimous.

After being notified of this result the complainant trial judge sought further review on November 5, 2003.

No action was taken on complainant's request for review until more than eleven (11) months later when on October 19, 2004, the Advisory Committee referred the complaint to the Office of Chief Disciplinary Counsel for further investigation. (Respondent's Appendix, A-19).



On November 10, 2004 Respondent received a letter from the Office of Chief Disciplinary Counsel indicating that this Court's decision in the

Knese decision on August 27, 2002 was the basis for the conclusion that respondent violated Rules 4-1.1, 4-1.3 and 4-1.4 of the Rules of Professional Conduct. (Respondent's Appendix, A-20).

One might argue that any and every lawyer that is found ineffective or found to have been liable for malpractice should be disciplined for conduct sanctions, even when such actions come about as a consequence of negligence as opposed to intentional misconduct but this has never been the position of the committee or this Court.

Here we are told to consider Respondent's past conduct some twenty (20) plus years ago even though that conduct and behavior is totally unrelated to the ineffectiveness in 1997.

Respondent's behavior here would be more relevant if it was the same or similar misconduct. Even more so if the ineffectiveness resulted from the same alcoholic problems of the past but that is not the case here.

Respondent was disbarred after surrendering his license in 1981. On May 16, 1989 he was readmitted on a three year probationary basis. Since his disbarment Respondent has been alcohol free. His inadequacy of



counsel in the Knese trial is absolutely and totally unrelated to the alcohol

problems of the distant past. Respondent's negligent failure to properly review all the questionnaires given to him on the morning of voir dire, is not repetitious of any prior act. His adequacy as an attorney has not been questioned prior to this trial in 1997 or since that time to the present time. In twenty eight (28) years as a practicing trial attorney that has tried over 20 criminal cases, including several capital cases, he has never before or since been deemed inadequate nor guilty of malpractice.

Respondent both prior to and subsequent to his reinstatement has been actively involved in assisting other attorneys recognizing and treating substance abuse problems. He has been an instructor on numerous occasions and has received recognition and awards for his contributions to the Bar. (Informant's Appendix, A-222, A-225).

The fact that he was disbarred twenty-four years ago is no doubt a factor that led to the agreement for public reprimand in the first instance.

We tend to treat individuals more harshly when they have had past problems even when unrelated.

**II.** THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT IN ACCORDANCE WITH THE JOINT RECOMMENDATION OF THE PARTIES BECAUSE PUBLIC REPRIMAND IS AN APPROPRIATE SANCTION FOR NEGLIGENT VIOLATION OF THE DUTIES OF COMPETENCE AND DILIGENCE IN THAT THE MISCONDUCT OCCURRED IN 1997 AND HAS NOT BEEN REPEATED AND RESPONDENT HAS OPENLY ACKNOWLEDGED HIS WRONGDOING.

The parties have jointly agreed that a public reprimand is the appropriate sanction in this matter. Had this Court not reversed the sentencing process because of Respondent's ineffectiveness there would not even have been a complaint filed against respondent. In fact, the complainant supported Respondent in the 29.15 hearing and being well aware of Respondent's acceptance of responsibility still filed no complaint until after this Court's reversal of his sentencing.

Respondent has taken full and complete responsibility for his failure to review the jury questionnaires he received the morning of trial. Although, ashamed of his inadequacy he immediately admitted his negligence in his deposition in the Rule 29.16 hearing, as well as, before the

Regional Disciplinary Committee for Region XI which unanimously found no probable cause for any sanction on October 6, 2003 and later the Office of Chief Disciplinary Counsel.

The parties considered the untimely and lengthy delay of the complaint itself which was not filed until more than five (5) years after the trial.

The parties agree that the disciplinary case itself has taken the "long route to the Court". The Regional Committee had it for a year before they unanimously agreed and found "no probable cause" against Respondent and closed the file.

The Advisory Committee likewise reviewed the file, after the complainant again complained after being notified of the Regional Committee's unanimous finding of no probable cause. This "review" by the Advisory Committee lasted a full year, during which time Respondent was never notified, before referring it to the Office of Chief Disciplinary Counsel for further consideration.

In all, eight (8) years has expired since the inadequacy caused by Respondent's negligence. We do agree with Informant that Respondent's

inadequacy is due to negligence. He received a "stack of questionnaires" on



the morning of trial and jury selection. He should have read them all completely and fully and if he didn't have time and felt pressure of the start of trial he should have sought additional time and made a record to support his lack of time. But he did neither and as a result his client's death sentence was reversed and a new sentencing hearing had to be held resulting in a life sentence rather than a death sentence.

Although this new sentence benefited his client it does excuse his negligence as has been pointed out by the Informant. The ABA Standards for Imposing Lawyer Sanctions (1991 Edition) as a general rule, anticipates no more than a lower level sanction for cases such as this. Absent other circumstances, i.e. the presence of specified mitigating and aggravating factors, the standards typically recommend admonition or reprimand in cases of negligent violation of the rules.

The only aggravating factor here is Respondent's prior unrelated bad record. Because of that past poor record Respondent's ineffectiveness is now being disciplined further.

Respondent's past was due in large part to his abuse of alcohol. He

was an alcoholic. But since his reinstatement he has been alcohol free. The parties agree that this trial ineffectiveness was not related to his prior



alcohol problems. In support of this statement, and to offer further support for his recovery and his assistance to other attorneys three (3) additional letters are now submitted by Respondent. (Respondent's Appendix, A-22, A-24, A-25). The Informant has no objection to these letters being submitted.

## CONCLUSION

WHEREFORE, for the above stated reasons Respondent respectfully requests that this Honorable Court, in view of the evidence and the strong mitigating factors present, adopt the recommendation of the parties and issue a public reprimand, as such is the appropriate sanction to address the wrongfulness of Respondent's conduct.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

This brief complies with the requirements set forth in 84.06 (b) in that it contains 4,081 words and has been scanned for viruses and is virus free in accordance with the Rules of Civil Procedure. On this ___ day of July, 2005, two copies of Respondent's Brief and a diskette were mailed to Ms. Sharon Weedin, Staff Counsel for the Office of Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, Mo. 65109.

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**APPENDIX**

A-1