IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	**)**	
	)	
CARL E. SMITH,	**)**	**Supreme Court #SC91696**
	)	
Respondent.	**)**	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

This action is one in which Informant, the Office of Chief Disciplinary Counsel, is seeking to discipline an attorney licensed by the Missouri Bar for violations of the Missouri Rules of Professional Conduct. Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, RSMo 2000.

STATEMENT OF FACTS[1]

GENERAL INFORMATION REGARDING MR. SMITH

Carl E. Smith is the Respondent in this action. He has been licensed in Missouri since 1988. **App. 159; 179**. He has a general practice in Ava,[2] Missouri, which includes both civil and criminal work. **App. 122** (Tr. 418-19); **160; 179**. He practices primarily in Douglas, Wright and Ozark counties which comprise the 44th Circuit. **App. 23** (Tr. 28); **160; 179.**

Mr. Smith has a background in law enforcement. He served as a Los Angeles police officer for eight years prior to attending law school. **App. 122** (Tr. 419). He also served as the Douglas County Prosecutor from 1994 until 1998. **App. 122** (Tr. 418)**; 160; 179.** He ran for this position again in 2006 but was defeated in the election. **App. 23** (Tr. 31); **160; 179.**

KEY FIGURES IN THIS DISCIPLINARY ACTION

Informant's disciplinary action is based upon statements Mr. Smith made about several local judges and attorneys. Set forth below is background information about the

[1] The Statement of Facts contains no reference to the Shawn Huntsman criminal matter pled as Count I in Informant's Information. The Disciplinary Hearing Panel found no violation upon the part of Mr. Smith regarding the Huntsman matter and recommended dismissal of Count I. Informant is not requesting de novo review of Count I.

[2] Ava, Missouri is located in Douglas County.

judges and attorneys. Mr. Smith utilized third-party affidavits for some of his statements. Also set forth below is background information, if known, on the three affiants.

44th Circuit Judges

Judge John Moody serves as the Circuit Judge for the 44th Circuit. **App. 23** (Tr. 28). He has held this position since 1998. **App. 23** (Tr. 28). He also served as the Wright County Associate Circuit Judge for twelve years. **App. 23** (Tr. 28).

Judge Craig Carter serves as the Associate Circuit Judge for Douglas County. **App. 105** (Tr. 351). He has held this position since 2005. **App. 105** (Tr. 351-52). He was originally appointed by Governor Matt Blunt after Judge Roger Wall resigned. **App. 105** (Tr. 351). He was elected to the position in 2006.

44th Circuit Attorneys

Tom Cline has served as the Ozark County Prosecutor since 1989. **App. 57** (Tr. 165). He has a background in law enforcement and public administration. **App. 57** (Tr. 166-67). Mr. Cline has served as a criminal investigator and child support administrator for both Audrain and Wright Counties, a deputy sheriff for Audrain County and the public works director for Mountain Grove, Missouri. **App. 57** (Tr. 166-67). He is a long-time friend of local attorneys Cynthia and Jason MacPherson. **App. 57-58** (Tr. 166-69). He previously worked for Cynthia MacPherson when she served as the prosecutor for Audrain and Wright Counties. **App. 57** (Tr. 166-67). For a number of years he played in a band with Jason MacPherson. **App. 58** (Tr. 168-69).

Cynthia MacPherson has a private law practice in Mountain Grove,[3] Missouri. **App. 67** (Tr. 205). She practices with her son, Jason MacPherson. **App. 67** (Tr. 205). She previously served as the Prosecutor for Audrain and Wright Counties. **App. 67** (Tr. 205). Ms. MacPherson is very health conscious and closely watches her diet. **App. 68** (Tr. 211); **101** (Tr. 338). She is also a marathon runner. **App. 68** (Tr. 211); **101** (Tr. 338). She has a reputation in the 44th Circuit for being very health conscious. **App. 102** (Tr. 339).

Jason MacPherson has practiced law since 1996 and is the Wright County Prosecutor, along with maintaining a private practice. **App. 93** (Tr. 305). He took office in 2007. He also serves as the Douglas County Assistant Prosecutor and handles cases in which the Douglas County Prosecutor has a conflict and handles the child support cases for the county. **App. 79** (Tr. 249-50).

Dan Wade has practiced law in Ava, Missouri since 1974. **App. 74** (Tr. 230). He currently practices with his son, Chris Wade, and has a general civil practice. **App. 74** (Tr. 230). Mr. Wade has served two terms as the Douglas County Prosecutor. **App. 75** (Tr. 231).

Chris Wade has practiced law since 2000. **App. 79** (Tr. 249). He has served as the Douglas County Prosecutor since 2007 and is the Wright County Assistant Prosecutor, along with maintaining a private practice. As the Wright County Assistant

[3] Mountain Grove, Missouri is located in Wright County.

Prosecutor, he handles matter in which the Wright County prosecutor has a conflict and handles the child support cases for the county. **App. 79** (Tr. 249-50).

Affiants

Mr. Ron Jarrett is Tom Cline's former son-in-law. **App. 58** (Tr. 170-71). Mr. Jarrett was married to Tom's daughter, Barbara Cline. **App. 58** (Tr. 170-71). He previously worked as an administrator of a local nursing home. **App. 78** (Tr. 244). Mr. Jarrett is known for telling bizarre, unbelievable stories. **App. 78** (Tr. 243-44); **109** (Tr. 367). These stories include statements that: (a) he has FBI agents assigned to protect him because his work is so secret; (b) Tom Cline tried to run a background check on him once and four federal agents arrived at Mr. Cline's door within 30 minutes of the background check; (c) a deer chased him up a tree and he had to fight it off with a pocket knife; and, (d) he has two little things sitting on his shoulder, one being bad and the other good, and both things are telling him what to do. **App. 59** (Tr. 173); **109** (Tr. 367-68). Many people believe that Mr. Jarrett is mentally ill. **App. 59** (Tr. 174); **78** (Tr. 243-44); **98-101** (Tr. 325-37); **108-09** (Tr. 366-67).

Pam Brayfield is a convicted felon. **App. 115** (Tr. 390). Ms. Brayfield does not remember how many convictions she has had but believes that it is somewhere between eight and ten. **App. 115** (Tr. 390). A Highway Patrol Criminal History Record shows that she received a twenty-year sentence for the distribution of drugs, a two year sentence for forgery, another two year sentence for forgery, a two year sentence for first degree assault, a four year sentence for receiving stolen property, and a four year sentence for stealing. **App. 92** (Tr. 301-02); **265-278**. She has 27 aliases. **App. 92** (Tr. 301-02); **265-**

278. She has been in prison or on parole from 1982 until 2010. **App. 93** (Tr. 303). She has had several parole violations and was last incarcerated in 2006. **App. 115** (Tr. 391-92); **265-278**. She was also charged, but acquitted, of manslaughter after she shot and killed her husband at the Cox Medical Center. **App. 117** (Tr. 399-400). Ms. Brayfield has a very bad reputation in the community for being truthful. **App. 27** (Tr. 46). Dan Wade describes her as "one of those people in Ava that's always in trouble and just one of our low-lifes." **App. 75** (Tr. 233).

Janice Calvert provided Mr. Smith with an affidavit. Informant's witnesses testified that they did not know Ms. Calvert. **App. 64** (Tr. 194); **69** (Tr. 213); **75** (Tr. 234). Mr. Smith did not know Ms. Calvert until she appeared in his office with Pam Brayfield one day and volunteered to provide him with an affidavit. **(Ex. 47).** Ms. Calvert did not testify at the disciplinary hearing.

GENERAL INFORMATION ABOUT THE 44TH CIRCUIT

The Judiciary and the 44th Circuit Bar got along reasonably well until recent years. **App. 23** (Tr. 29). Problems began developing in the Circuit when the Circuit received a very large grant to implement a drug court. **App. 23** (Tr. 30); **45** (Tr. 118). Disputes arose regarding the appointment of the drug court prosecutors. **App. 23** (Tr. 30); **45** (Tr. 118). The dispute resulted in the local Judiciary and Bar dividing into sides. **App. 23** (Tr. 30); **45** (Tr. 118). Mr. Smith, attorney John Bruffett, attorney Chris Swatosh, and attorney Larry Tyrell, formed an alliance. **App. 45** (Tr. 118). Mr. Smith became very anti-Judge Moody and anti-Dan Wade. **App. 105** (Tr. 353). Mr. Smith's animosity or dislike for Judge Moody and Dan Wade grew to the point that Mr. Smith advised Judge

Carter when he was appointed that Judge Moody and the Wades were evil and crooked and that he should not associate with Judge Moody or the Wades. **App. 105** (Tr. 353-54).

EVENTS LEADING UP TO MR. SMITH'S USE OF MR. JARRETT'S AFFIDAVIT

Ron Jarrett's Divorce

In 2003 and 2004, Mr. Smith represented Mr. Jarrett in his dissolution from Barbara Cline. **App. 98** (Tr. 326); **(Ex. 64, pp. 10, 12, 17).** Opposing counsel in the matter was Jason MacPherson. **App. 98** (Tr. 324). The divorce was very acrimonious. **App. 98** (Tr. 324).

While the divorce was ongoing, Barbara Cline sought a protective order against Mr. Jarrett. **(Ex. 64).** Judge John Jacobs, the Ozark County Associate Circuit Judge, entered an ex parte order on September 8, 2003, and a full order of protection on September 23, 2003. **(Ex. 64).** On December 8, 2003, Barbara Cline sought to modify the Full Order of Protection after Mr. Jarrett advised a special process server that the Ozark County Sherriff's Department had stopped him ten times. **(Ex. 64, pp. 65-67).** He also called the Highway Patrol and advised that he would shoot the next deputy who stopped him. **(Ex. 64, pp. 65-67).** The Sherriff's Department had no record of ever stopping Mr. Jarrett. **(Ex. 64, pp. 65-67).** On October 8, 2004, Ms. Cline sought to amend the Order of Protection again after Mr. Jarrett called a Highway Patrol officer and advised he was tired of "hillbilly justice", he was a former member of the 82nd Airborne and he planned to have he and his buddies kill Ms. Cline. **(Ex. 64, pp. 30, 50-53).** Mr. Jarrett claimed his actions would be legal, as the restraining order had expired. **(Ex. 64, pp. 30, 50-53).** Mr. Smith received a copy of Ms.

Cline's Motions to Modify and supporting documentation, including a report from the Highway Patrol about Mr. Jarrett's actions. **(Ex. 64, pp. 48, 64).**

During the divorce, Mr. Jarrett attempted to obtain a restraining order against Tom Cline. **App. 59** (Tr. 175); **(Ex. 35)**. Judge Jacobs denied Mr. Jarrett's request. **(Ex. 35).** Mr. Jarrett advised an Ozark Deputy Sherriff that he wanted Mr. Cline disbarred and that he intended to "get him one way or another." **App. 109** (Tr. 367-68).

Tom Cline remembers Mr. Smith telling him on several occasions while the divorce was ongoing that he thought Mr. Jarrett was crazy.[4] **App. 61** (Tr. 180). Cynthia MacPherson remembers Mr. Smith telling her during the Jarrett divorce that he could not reason with his client, as he was crazy. **App. 68** (Tr. 208).

Sexual Assault Allegations Raised Against Mr. Jarrett

In May 2006, a nursing home employee reported to law enforcement that Mr. Jarrett had sexually assaulted her while she was at work. **App. 131-32** (Tr. 454-58); **(Ex. 33, p. 6).** Mr. Smith conducted his own investigation into the matter and began communicating with the Wright County Prosecutor, Larry Tyrell, in an attempt to prevent Mr. Tyrell from filing charges. **App. 131-32** (Tr. 454-58).

[4] Mr. Smith disputes this statement and asserts that he advised Tom Cline "that as in most divorces, these people are acting crazy." **App. 130** (Tr. 450).

MR. SMITH DISTRIBUTES JARRETT AFFIDAVIT

WHEN CAMPAIGNING FOR THE 2006 ELECTION[5]

In the 2006 election, local attorney John Bruffett ran against Judge Moody for the Circuit Judge position. **App. 23** (Tr. 30-31). The then sitting Wright County Prosecutor, Larry Tyrell, ran against Lynette Veenstra for the Wright County Associate Judge position, and the then sitting Douglas County Prosecutor, Chris Swatosh, ran against Craig Carter for the Douglas County Associate Circuit Judge position. **App. 23** (Tr. 30). John Tyrell, Larry Tyrell's son, ran against Jason MacPherson for the Wright County Prosecutor's position and Mr. Smith ran against Chris Wade for the Douglas County Prosecutor's position. **App. 23** (Tr. 30-31).

During June and July 2006, Mr. Smith distributed and had others distribute to voters and the local news media a packet of information ("voter information packet") regarding Circuit Court Judge John Moody. **App. 24** (Tr. 32-33); **61** (Tr. 181-82); **165; 184**. An advertisement was also placed in the local newspapers advising readers that they could receive a copy of Mr. Smith's "voter information packet." **(Ex. 19).** The packet contained, among other things, a handwritten affidavit by Ron Jarrett. **App. 201; (Ex. 18)**.

The top of the affidavit provided: "I witnessed the following two acts while Tom Cline's son-in-law." Ten lines of writing were then blacked out[6] and the bottom half of the affidavit provided:

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[5] The facts set forth under this heading constitute Count II of Informant's case.

> "Second act; every summer Judge Jacobs + Tom Cline go fishing. I believe this event to be more sinister. App 2003 or 2004 summer I helped Tom Cline clean his boat for the trip with the judge. We were running late and the Judge showed up with something to drink, a couple of poles and a medium sized paper bag. I thought it was sandwiches but as John tossed it to Tom + said this is for you. Tom opened it and I saw quite a large amount of money. Tom raised his head + winked at me + and placed the bag in the cooler. I will attest to say Judge Jacobs passing Tom Cline a large quantity of money. What it was for or why I did not ask."

Mr. Smith crossed out Judge Jacobs' name and wrote in Judge Moody's name in two different places. **App. 165; 184**.

On July 17, 2006, Mr. Smith sent a letter to the Douglas County Fair Board in which he advised that Judge Moody had filed a complaint with the Missouri Bar seeking to have Mr. Smith's law license taken away from him because he had disseminated his "voter information packet." Mr. Smith included the "voter information packet" with his letter. **App. 202.** Mr. Smith stated that it was "his Christian duty, not a choice, especially as an officer of the court system to make aware the voters who elect those who

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[6] On the copy provided to the *Ozark County Times* one could read the blacked out top of the page. It referenced an alleged incestuous sexual encounter between Tom Cline and his daughter, Rose Pursell, the Douglas County Juvenile Officer. **App. 61** (Tr. 182).

control the administration of justice of the same facts of which we in the system are privy." **App. 202.**

On July 20, 2006, Informant took Mr. Smith's sworn statement. During the statement, Informant's staff requested that Mr. Smith cease distributing the "voter information packet." **(Ex. 29).**

Mr. Smith testified that Mr. Jarrett had advised him of the information set forth in the affidavit in 2003 or 2004 but he did not "use it for years" as he felt the information "was unusual." **App. 130** (Tr. 452). He also testified that he did not report the information to the Judicial Commission or Informant's office when Mr. Jarrett advised him of this information. **App. 137** (Tr. 479).

The Information Set Forth in the Affidavit was False

Mr. Smith admits, as a matter of law, that the allegations set forth in the affidavit were false. **App. 166; 184-85; (Ex. 55).** Mr. Smith's admission is based upon the fact that Mr. Jarrett was later charged and convicted of perjury based upon the affidavit. **App. 166; 184-85; (Ex. 55).** The conviction was upheld on appeal. **App. 280-92.**

At the perjury trial, Judge Moody and Tom Cline both testified that Judge Moody had never given Tom Cline a bag of money on a fishing trip. **(Ex. 55, p. 25).** Judge Moody also testified that he did not believe he had ever met Ron Jarrett before. **(Ex. 55, pp. 16, 25).** Ron Jarrett testified that he wanted to apologize to Judge Moody. **(Ex. 55, p. 30).**

He stated what he had actually observed was Judge Moody handing Tom Cline a twelve pack of beer and the change from the purchase on the top of the sack. **(Ex. 55, p. 30).**[7]

MR. SMITH'S MOTION TO DISQUALIFY THE WRIGHT COUNTY PROSECUTOR IN THE SEXUAL ASSAULT CASE[8]

Mr. MacPherson Charged Ron Jarrett with Sexual Assault

Jason MacPherson took office as the Wright County Prosecutor in January 2007. **App. 97** (Tr. 319). Shortly thereafter, he found approximately two to three boxes of files in which no charges had been filed or the former prosecutor, Mr. Larry Tyrell, had declined to file charges. **App. 97** (Tr. 319-20). Mr. MacPherson immediately began to review the files at home each night. **App. 97** (Tr. 320). About this same time, Deputy Sherriff Donna Sparnicht contacted him and asked him to review a case file concerning an alleged sexual assault by Ron Jarrett on a nursing home employee. **App. 97** (Tr. 320). After Mr. MacPherson reviewed the file, he asked the deputy to do additional investigation and to contact the complaining witness to see if she wanted to go forward with the matter. **App. 97** (Tr. 321). While he was considering whether to bring charges, Mr. MacPherson was contacted several times by Cynthia Basillis and Rebecca Stith of the Equal Employment

[7] At the disciplinary hearing, Judge Moody testified that he only went fishing with Tom Cline once approximately ten years ago and Ron Jarrett was not with them. **App. 24** (Tr. 34). Mr. Cline testified that he had gone fishing with Judge Moody in the past but Mr. Jarrett was not there and Judge Moody did not give him a bag of money. **App. 61** (Tr. 183).

[8] The facts set forth under this heading constitute Count III of Informant's case.

Opportunity Commission about the allegations and other allegations brought against Mr. Jarrett while he was at another nursing home. **App. 99** (Tr. 328). After the deputy completed the additional investigation and confirmed the complaining witness wanted to go forward, Mr. MacPherson decided to file charges. **App. 99** (Tr. 327). He charged Mr. Jarrett with one count of felony deviate sexual assault, three counts of misdemeanor sexual misconduct, and one count of misdemeanor third degree sexual assault. **(Ex. 33, pp. 11-14).**

The Motion to Disqualify Jason MacPherson as Prosecutor

and the Ron Jarrett Affidavit

On March 22, 2007, Mr. Smith filed a motion to disqualify Jason MacPherson as the prosecutor. **App. 203-11**. The motion alleged that Mr. MacPherson should be disqualified due to a conflict of interest resulting from his close personal relationship with Ozark County Prosecutor Tom Cline, Barbara Cline and Mr. Jarrett. **App. 203-11**.

The Motion asserted:

1. Mr. MacPherson believed Mr. Jarrett may have previously been involved in a relationship with Mr. MacPherson's wife;
2. Mr. MacPherson had observed Mr. Jarrett having sex with Cynthia MacPherson (Jason's mother) at a Blues Festival;
3. Mr. Jarrett had information concerning Mr. MacPherson, Ms. MacPherson, Mr. Cline and Judge Moody's actions and Mr. MacPherson was trying to silence Mr. Jarrett by bringing criminal charges against him;
4. Mr. MacPherson and Barbara Cline were lifelong friends; and

5. Mr. Jarrett had witnessed Tom Cline and his adopted daughter, Rose Pursell, having sexual intercourse.

App. 203-11.

Attached and incorporated into the Motion was an affidavit dated March 14, 2007, from Mr. Jarrett. The Affidavit stated:

1. Mr. MacPherson had become very upset with Mr. Jarrett five or more years earlier when Mr. Jarrett had talked with Mr. MacPherson's wife while Mr. MacPherson was performing at a Blues Festival in Mountain Home, Arkansas;
2. At the same Blues Festival, Mr. Jarrett went outside with a drunken Cynthia MacPherson where they had sexual intercourse and Mr. MacPherson caught his mother and Mr. Jarrett having sex;
3. Cynthia MacPherson told Mr. Jarrett that Judge Moody and Tom Cline owned the courts and drug dealers in the Circuit and that if anyone crossed them they would put them away;
4. Cynthia MacPherson had supplied drugs to others in the past;
5. Mr. Cline claimed he was a hit man for a motorcycle gang in Mexico, Missouri;
6. It is commonly known that Mr. Cline and his adopted daughter, Rose Pursell, were lovers and Mr. Jarrett witnessed Mr. Cline and his daughter in an act of sexual intercourse;

7. Mr. Jarrett, while on a fishing trip with Mr. Cline and Judge Moody, observed Judge Moody open a paper bag filled with a significant amount of money and give it to Tom Cline;
8. Ms. MacPherson had donated $50,000 to Jay Nixon's campaign; and
9. Mr. Cline told Mr. Jarrett that Ms. MacPherson's donation would "buy you out of a lot of problems", and that Mr. Cline and Ms. MacPherson would have the "Capitol locked up."

App. 203-11.

Mr. Smith did not ask any of the people named in the affidavit if Mr. Jarrett's allegations were true. **App. 133** (Tr. 462-63). Mr. Smith told Mr. Jarrett that if Mr. Jarrett would swear to the statement and if Mr. Jarrett knew that he could go to jail for a false affidavit, Mr. Smith had to "reasonably believe that it was true." **App. 132** (Tr. 458). Mr. Smith had advised Informant that he had "other information" which tended to verify Mr. Jarrett's affidavit but admitted at the disciplinary hearing that he had done "close to nothing" to independently verify the factual accuracy of Mr. Jarrett's affidavit. **App. 144** (Tr. 505); **(Ex. 33)**. Other than Mr. Jarrett's affidavit, Mr. Smith had no evidence to support any of the allegations in the affidavit. **App. 144** (Tr. 506). Mr. Smith admits that he could have investigated some of the allegations set forth in the affidavit by checking with independent sources. **App. 133** (Tr. 464).

The Hearing For the Motion to Disqualify

On March 22, 2007, Judge Henry, sitting under special appointment, held a hearing on the Motion to Disqualify Jason MacPherson in Douglas County.[9] **(Ex. 64, p. 427).**

Mr. Jarrett's Testimony at the Hearing

At the hearing, Mr. Jarrett testified:

1. He was at the Blues Festival in Mountain Home, Arkansas in late summer of 2003 and it was very hot. **App. 830-31**;
2. Tom Cline and Jason MacPherson's band was the warm up band for Anthony Gomes. **App. 830**;
3. After talking with Lori MacPherson, Jason's wife, Jason told me to stay away from his wife. **App. 830**;
4. He and Cynthia MacPherson went outside to cool off. **App. 831**;
5. He had sex with Cynthia MacPherson in her Cadillac Escalade and Jason came to the vehicle and discovered what had occurred. **App. 831**; and
6. Mr. Jarrett observed Tom Cline and his adopted daughter, Rose Pursell, having sex upstairs in view of Rose Pursell's daughter/Tom Cline's granddaughter while Rose Pursell's husband was asleep in another room. **App. 832-33**.

[9] The hearing was held in Douglas County instead of Wright County as a convenience to Judge Henry. **App. 80** (Tr. 251-52).

The Other Witnesses' Testimony

At the hearing, Cynthia MacPherson testified that:

1. The Blues Festival in Mountain Home, Arkansas occurred each year in January and was called the Winter Blast of Blues. **App. 843**;
2. She had not seen Barbara Cline in over a decade and she had never "laid eyes" on Mr. Jarrett prior to seeing him at the defense table beside Mr. Smith. **App. 843**; and
3. She did not believe Lori MacPherson, Jason's wife, had ever attended the Blues Festival in Mountain Home, except possibly once in 2001 for a few minutes when her two year old son performed on stage. **App. 843**.

At the hearing, Tom Cline:

1. denied receiving a bag of money from Judge Moody while on a fishing trip;
2. denied having sexual intercourse with his daughter Rose; and
3. played an August 16, 2006, taped conversation with Mr. Jarrett in which Mr. Jarrett admitted the allegations were false.[10] **App. 846**.

[10] In the taped conversation, which was also played during the disciplinary hearing, Mr. Jarrett stated that he had prepared the affidavit a long time ago during his divorce and while he was mad. **App. 62** (Tr. 184); **846; (Exs. 28, 66).** He also acknowledged that his allegations in the affidavit were not true. Mr. Jarrett then asked Mr. Cline to turn off the tape recorder and the conversation continued. **App. 847.** Mr. Cline testified that Mr.

The Allegations Contained in the Motion and Mr. Jarrett's Affidavit Were False

As discussed above, Mr. Smith admits, as a matter of law, that the allegations set forth in the affidavit were false. **App. 166; 184-85; (Ex 55).** Mr. Smith's admission is based upon the fact that Mr. Jarrett was later charged and convicted of perjury based upon the affidavit. **App. 166; 184-85; (Ex 55).** The conviction was upheld on appeal. **App. 280-92.**[11]

MR. SMITH'S MOTION TO DISQUALIFY THE

DOUGLAS COUNTY PROSECUTOR IN THE PERJURY CASE[12]

Mr. Wade charges Mr. Jarrett with Perjury

After the July 27, 2007, hearing, Ms. MacPherson was very upset about Mr. Jarrett's testimony as she felt that it smeared her good name. **App. 68-69** (Tr. 211-12). She, along with Tom Cline, contacted the Douglas County Prosecutor Chris Wade and urged him to bring perjury charges against Mr. Jarrett. **App. 69** (Tr. 212); **80** (Tr. 252). Ms. MacPherson also called the Highway Patrol and requested that the Highway Patrol investigate the matter. **App. 69** (Tr. 212). A Highway Patrol officer came to the area,

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Jarrett then talked about his sexual assault charges and asked Mr. Cline to exert his influence to stop his prosecution. **App. 847.**

[11] At the disciplinary hearing, Judge Moody, Tom Cline, Cynthia MacPherson, Rose Cline-Pursell and Jason MacPherson testified that the statements Mr. Jarrett made in his affidavit were false. **App. 24; 61; 63; 68-69; 78; 99.**

[12] The facts set forth below constitute Count IV of Informant's case.

interviewed several people, and wrote up a probable cause statement, which the patrol officer submitted to Mr. Wade. **App. 68-69** (Tr. 211-12).

On September 27, 2007, Chris Wade charged Mr. Jarrett with three counts of perjury. **App. 170-71; 194**. After Mr. Wade charged Mr. Jarrett with perjury, Mr. MacPherson withdrew from the sexual assault case and asked for the appointment of a special prosecutor. He believed he would be called as a witness in Mr. Jarrett's perjury case and it would be a conflict of interest for him to proceed with the sexual assault charge. **App. 100** (Tr. 334-35). The sexual assault case is still pending. **App. 101** (Tr. 345).

Mr. Smith's Motion to Disqualify Chris Wade

On April 3, 2008, Mr. Smith filed a Motion to Disqualify Prosecuting Attorney Chris Wade in the perjury case. **App. 212-61.** Mr. Smith alleged that Mr. Wade should be disqualified because he had committed criminal offenses prior to and after beginning his tenure as the Douglas County Prosecutor and he had a personal interest in the matter. As part of the motion, Mr. Smith alleged (a) Chris Wade was arrested for driving while intoxicated; (b) Chris Wade had at least one administrative alcohol suspension; (c) Dan Wade, (Chris' father and a former Douglas County prosecutor) purchased marijuana over the phone and had Chris Wade pick up the marijuana for him; and (d) Chris Wade had violated the Federal Gun Control Act of 1968. **App. 212-61.**

Attached to the motion and incorporated by reference were affidavits from Pam Brayfield and Janice Calvert. **App. 212-61.** Ms. Brayfield's affidavit provided:

"1. In 1995 I went to the Branding Iron in Mtn. Grove to sell methamphetamine. Ernie Speakes set up the meeting. Ernie is currently selling meth in Cabool with Paula Friend (Dunbar). Paula brings the meth to Ernie by weekly [sic] to Cabool (saw transfer of 25 lbs marijuana, 10 lbs. mixed cocaine and meth in September 2006). Paula lives in Texas.

2. At [sic] Branding Iron was Cynthia MacPherson, John Moody, Janelle Calvert House, Tom Cline, Dan Wade and many other people from Shieks Land & Cattle were there having a private party. I saw Janelle & Cynthia snorting meth off the bathroom counter. Ernie had the dope and made the deal.

3. In 1995 I went with Ernie to sell meth to Tom Cline at Cline's Law Office in Gainesville. Tom brought five glass vials of powdered meth.

4. Dan Wade came to my house in January 2002 to get back the CD's Jeff Wade traded Mike Johnson (my son) for a $40 bag of marijuana.

5. Dan Wade offered (1981) to send me to Brazil like he did for Herman Prock and Barry Barnes for $25,000. Fly on private plane at sea level like he did for them. All to avoid state sentence for distribution of meth."

App. 212-61; 262-64. The affidavit is in Mr. Smith's handwriting and is dated May 21, 2007. **App. 120** (Tr. 411); **(Ex. 47)**. Mr. Smith notarized the affidavit. **A212-61.** Ms. Brayfield testified she asked Mr. Smith to write out the affidavit for her because her arm was injured as a result of a shooting. **App. 120** (Tr. 411).

Ms. Calvert's[13] affidavit provided:

> "1. Dan Wade and Chris Wade currently get their marijuana from Guindia Marino (aka Sandy Baker) and Carl Watson.
>
> 2. Sandy Baker's daughter, Patty Wallace, sends LSD through the mail from Corvalis, OR to Ava, MO. I have their addresses and one of the letters.
>
> 3. Carl Watson's son, Mark Watson, is currently cooking meth.
>
> 4. Dennis Porter's marijuana sales in 2006 was $80,000; this was his ½ share; grows it on other peoples' property.
>
> 5. David Porter and Mark Watson are currently cooking meth at David's house on P and N Hwy.
>
> 6. Dan Wade has currently called Sandy Baker's house in late 2006 on at least 3 occasions trying to buy marijuana. Wade wanted "popcorn buds" not "spears." Dan said he would send his son Chris to pick it up and Chris would come and pick it up.

[13] It is not known whether Janice Calvert is a relative of Janelle Calvert House.

7. When Tom Cline does a line of meth it's a thin line, but Cynthia MacPherson sucks it up like a vacuum.
8. I was at Danita Porter's in 2004 and David Porte showed up, looked bad, scared. David states that he and 'Dobbs', had been forced to wrap a female body in a rug and dumped over a near hill or they would be killed too. The girl kept demanding dope or 'I'll go to the cops.' Fred (Burgesss Perry) shot her 1x in the face with a revolver, handed the gun to Doy Porter who shot her in the head 2x, then gun back to Fred who shot her in the head 2 more times.
9. Roger Wall has been the closest of friends with all the Porters. Danita says she 'does lines' and drinks moonshine with him 'all the time.'
10. Valerie Hire (Moody) in 2005 sold an '8 ball' of meth to Judge John Moody who lives 2 doors down from Valerie.
11. I met Roger Wall through Pete Metroplis in 1995. I sold 7.5 lbs. total to him in 1995 (last sale November 1995), a lb at a time. I quit him because I became convinced he was a child molester because I saw Roger Wall give 13-15 girls coconut flavored moonshine while they were already drunk. Occurred at Vera Cruz."

App. 212-61; 262-64. The affidavit is in Mr. Smith's handwriting and does not appear to be dated or notarized. **App. 212-61.**

There were four other attachments to the motion. One attachment was a 1996 Arrest Report for Chris Wade from Howell County. The second was a Missouri Driver's Record for Chris Wade. The third attachment was a report Mr. Smith made to Informant regarding Chris Wade's handling of drug charges brought against criminal defendant Carl Watson. **App. 212-61.** The report alleges that because Chris Wade and Dan Wade buy their drugs from Carl Watson, Chris Wade reduced the charges against Mr. Watson and consented to the return of a confiscated firearm to Mr. Watson in violation of the Federal Gun Control Act of 1968. **App. 212-61.** The fourth attachment is a Report to Informant and the Commission on Judicial Ethics and Retirement ("Judicial Commission") which alleges that Judge Moody, Dan Wade, Jay Nixon, Assistant Attorney General Ted Bruce, Veronica Casper (Judge Moody's secretary), Roger Wall, and Informant's staff had formed a criminal enterprise and had violated the criminal racketeering act concerning John Bruffett and Roger Wall's criminal prosecutions. **App. 212-61.**

Respondent Did Not Take Any Action to Verify The Accuracy

of the Affidavits or the Allegations He Made In His Motion

Sara Rittman, legal ethics counsel, advised Mr. Smith on June 13, 2007, that when he included affidavits with pleadings he should verify the information if possible before filing the affidavits with the court to ensure the information was accurate. **App. 146** (Tr. 514); **(Ex. 70)**.

Mr. Smith admits that he did nothing to verify the factual allegations in the Affidavits. **App. 143-44** (Tr. 504-05); **145** (Tr. 510). It is Mr. Smith's position that any person who executes a sworn affidavit should be believed, as the affiant is subject to perjury charges. **(Ex. 47).**

Pam Brayfield's Prior Dealings with Carl Smith,

Judge Moody, Dan Wade and Chris Wade

When Mr. Smith served as the Douglas County Prosecutor, he prosecuted Ms. Brayfield for forgery charges. **App. 115** (Tr. 390). Judge Moody sentenced her to prison on at least one occasion. **App. 27** (Tr. 45-46). Dan Wade also criminally prosecuted her. **App. 75** (Tr. 233).

At the time Ms. Brayfield provided Mr. Smith with her affidavit, Mr. Smith was representing her in a third party child custody dispute with her daughter-in-law. **App. 118** (Tr. 403). Ms. Brayfield's son, Michael Johnson, was serving time in a federal penitentiary on a drug conviction, and Ms. Brayfield had obtained visitation rights with the grandchild. **App. 75-76** (Tr. 234-35); **84** (Tr. 267-68). There were disputes about the visitation with the child's mother. **App. 75-76** (Tr. 234-35); **84** (Tr. 267-68).

Before Ms. Brayfield provided her affidavit to Mr. Smith, she requested that Chris Wade bring criminal charges against her daughter-in-law for failing to abide by the court ordered visitation schedule. **App. 84** (Tr. 267-69); **119** (Tr. 408). When Mr. Wade instructed Ms. Brayfield that she should address the issue through a family access motion, Ms. Brayfield became upset with Mr. Wade. **App. 84** (Tr. 269); **119** (Tr. 408).

Also, prior to Ms. Brayfield providing the affidavit, Ms. Brayfield became upset with Mr. Wade for failing to file drug charges against the daughter-in-law. Mr. Wade received a probable cause statement from a city police officer wanting to charge Ms. Brayfield's daughter-in-law with possession of marijuana. **App. 84-85** (Tr. 269-71). The daughter-in-law had reported to police that someone had stolen marijuana out of her car while it was parked at the Ava campus of Drury College. **App. 84-85** (Tr. 269-70). Under the corpus delicti[14] doctrine, Mr. Wade did not believe that he could prosecute the daughter-in-law and declined to file charges. **App. 85** (Tr. 271). After Mr. Wade declined to charge the daughter-in-law, Ms. Brayfield sent an e-mail to the President of Drury College and the instructors at the campus accusing Mr. Wade of allowing drug sales to occur on campus. **App. 85** (Tr. 271); **120** (Tr. 409).

The Parties Referenced in the Affidavit Assert that the Allegations Are False

Judge Moody testified that he had only been to the Branding Iron two times in his life. **App. 27** (Tr. 46). One time he had lunch with Cynthia MacPherson and the other time he and his wife went with another couple but he was never there with Tom Cline, Dan Wade or Janelle Calvert House. **App. 27** (Tr. 46-47). He further testified that he did not even know what Sheiks Land & Cattle Company was and that he had never seen anyone snort meth before. **App. 27-28** (Tr. 47-48).

[14] The legal principle that a prosecutor cannot prove that a crime has been committed from the defendant's confession alone without corroborating evidence. Black's Law Dictionary 181 (abr. 5th ed. 1983).

As far as the allegations in Janice Calvert's affidavit, Judge Moody stated that he does not use or purchase illegal drugs. **App. 27-28** (Tr. 47-48). He further testified that Ms. Valerie Hire does live in a house on the way to his house, but she has never lived two doors down from his house, and to his knowledge she does not sell drugs. **App. 27-28** (Tr. 47-48).

Tom Cline testified that he did not know Pam Brayfield, Janice Calvert, or Ernie Speaks and that he has never used or purchased drugs (except when doing undercover work as law enforcement) or seen Cynthia MacPherson use drugs. **App. 64** (Tr. 194). Mr. Cline further testified that the Branding Iron burned and after the building was rebuilt it was used as a Christian Academy. **App. 64** (Tr. 194). He believed it burned around 1986, the year he left town to attend law school, and the restaurant did not exist in 1995. **App. 64** (Tr. 194).

Cynthia MacPherson testified that she did not know either Pam Brayfield or Janice Calvert, and she did not use drugs. **App. 69** (Tr. 213, 215); **70** (Tr. 217). Ms. MacPherson testified that she went to the Branding Iron one-time years ago with Tom Cline but had not been there with any of the other people set forth in Pam Brayfield's affidavit. **App. 69** (Tr. 214). She also testified that the Branding Iron burned in the 1980s. **App. 69** (Tr. 214). Ms. MacPherson states that her only dealings with Janelle Calvert House was in a murder case in which she was the appointed special prosecutor and Ms. House was defense counsel. **App. 69** (Tr. 214).

Dan Wade testified that he has never seen Cynthia MacPherson use drugs. **App. 73** (Tr. 223). Mr. Wade did testify that there was one instance in 1999, not 2002, where

he went to Michael Johnson's house and saw Pam Brayfield. **App. 75** (Tr. 233-34). At that time Mr. Wade's youngest son, Jeff Wade, was in high school and did use drugs. **App. 75** (Tr. 234). One day Mr. Wade received a phone call from someone that his youngest son's truck was parked at Michael Johnson's house, a known drug dealer. **App. 75** (Tr. 234). Mr. Wade immediately went to Mr. Johnson's trailer and walked in the front door. **App. 75** (Tr. 234). His son was sitting on the couch with a friend. **App. 75** (Tr. 234). He told his son and friend to leave and then told Mr. Johnson that if he ever had any dealings with his son, he would "stomp his ass." **App. 75** (Tr. 234). As he turned to leave, he saw Pam Brayfield standing in the door to the expanding room of the trailer. **App. 75** (Tr. 234). He did not speak to Ms. Brayfield and Ms. Brayfield did not speak to him. **App. 75** (Tr. 234).

Mr. Dan Wade testified that he never offered to send Ms. Brayfield anywhere to avoid criminal charges. **App. 76** (Tr. 235). He further testified that in 1981 Mr. Prock was on the lam after Mr. Prock stole $50,000 of uninsured cattle from Mr. Wade and that he wouldn't have helped Mr. Prock get out of the country. **App. 76** (Tr. 235); **(Ex. 67).** Mr. Prock was apprehended in 1983 or 1984 in Las Vegas, not outside the country. **App. 76** (Tr. 235); **(Ex. 67).**

Mr. Dan Wade does not know Janice Calvert. **App. 75** (Tr. 234). He testified that that he has never used or purchased marijuana and that he does not even know what "popcorn buds" are. **App. 76** (Tr. 237).

Chris Wade testified that he did not have a DWI conviction or multiple DWI's. A**pp. 80** (Tr. 254). Rather, when he was 22 years old he was arrested for DWI but

received a suspended imposition of sentence. **App. 80-81** (Tr. 254-57). The Department of Revenue Driver's Record shows a suspension of his license as the same incident as his July 1996 arrest in Howell County. He further testified that he had never purchased or hauled marijuana for anyone and that neither he nor his father used drugs. **App. 81** (Tr. 258).

Mr. Wade also testified to his handling of the Carl Watson's drug case and his alleged violation of the Federal Gun Control Act. Mr. Wade did reduce the charges against Mr. Watson from a Class B felony to a Class C felony. **App. 82** (Tr. 260). He frequently reduces charges in drug-related cases. **App. 82** (Tr. 260). Mr. Wade did so for two reasons. First, Mr. Watson was in his late 50's with no criminal record. **App. 82.** (Tr. 260). Second, th**e** information Mr. Wade received from the police indicated that Ms. Guidana, not Mr. Watson, had planted and cultivated the marijuana. **App. 82** (Tr. 260).

Mr. Wade asserted that neither he nor the court returned a confiscated firearm to Mr. Watson. He stated that he did consent to the firearm being returned to Mr. Watson's sister. **App. 83** (Tr. 264); **(Ex. 68).** The court records show that Mr. Wade consented to and Judge Carter granted Mr. Watsons' motion to return the firearm to his sister. **(Ex. 68).** Mr. Wade has consented in other cases to releasing firearms or other property to family members of the defendant. **App. 83** (Tr. 264).

Pam Brayfield's Testimony

Pam Brayfield testified at the disciplinary hearing. **App. 115-122** (Tr. 390-417). She claims to have sold methamphetamine and cocaine to Cynthia MacPherson and Judge Moody at a 1995 Christmas party at the Branding Iron. **App. 116** (Tr. 395). She

states that she went into the bathroom with Cynthia MacPherson and Janelle Calvert House and she put a line of cocaine on the back of the stool and let them snort it. **App. 116** (Tr. 395). She states that she saw Tom Cline and believes she saw Dan Wade at the party but did not testify to seeing them buy or use drugs. **App. 116** (Tr. 395).

She testified that she went with her boyfriend, Ernie Speaks, to sell cocaine to Tom Cline and she saw Ernie take the drugs to Tom Cline's office but did not see the actual transaction. **App. 117** (Tr. 398).

She testified that she had family members that were hiding in Brazil or the Bahamas and they told her to contact Mr. Wade about getting her out of the country. **App. 117-118** (Tr. 400-01). She stated that her conversation with Mr. Wade occurred after she had been convicted of the drug charges but before she was sentenced. **App. 117-118** (Tr. 400-01). She stated that Mr. Wade told her that if she stayed away for seven years she could come back to Ava and forgo prison time, as the statute of limitations would have already run. **App. 117-118** (Tr. 400-01).

MR. SMITH'S PETITION FOR WRIT OF PROHIBITION[15]

Chris Wade Takes Ron Jarrett's Perjury Case to the Grand Jury

Sometime after September 2007, Chris Wade requested that the Court impanel a grand jury. **App. 86** (Tr. 277). Mr. Wade requested a grand jury so he could avoid separate preliminary hearings for four co-conspirators in a murder case. **App. 86** (Tr. 277). After the grand jury was convened, he decided to take up Ron Jarrett's perjury case

[15] The facts set forth in this section constitute Count V of Informant's case.

via the grand jury too. **App. 86** (Tr. 277). This way Judge Moody, Jason MacPherson, Tom Cline, Rose Pursell and Cynthia MacPherson only had to testify at the actual trial instead of both at trial and at the preliminary hearing. **App. 86** (Tr. 277).

On March 25, 2008, Mr. Wade served Amanda Kay Evans, Mr. Smith's secretary, with a grand jury subpoena. **App. 296-97.** The subpoena required Ms. Evans to bring her 2006 notary logbook and any item evidencing notary work performed on behalf of Ron Jarrett. **App. 296-97.** The subpoena had Mr. Wade's handwriting on it along with his secretary's handwriting who prepared part of the form and the handwriting of the deputy sheriff who served the subpoena. **App. 87** (Tr. 279-80).

Mr. Smith filed a Motion to Quash the Subpoena. **App. 293-347.** Attached to the motion was his March 12, 2008, Motion to Disqualify Prosecuting Attorney (Chris Wade) with the Pam Brayfield and Janice Calvert affidavits. **App. 293-347.** In the Motion to Quash, Mr. Smith stated that Mr. Wade had called the grand jury to falsely criminally charge Mr. Smith and/or as retribution for Mr. Smith filing his March 12, 2008, Motion to Disqualify Mr. Wade. **App. 293-347.** Mr. Smith claimed that the subpoena had been tampered with because it had Dan Wade's handwriting on it.

Approximately 15 minutes after the Court impaneled grand jury, Chris Wade received a phone call from the *West Plains Daily Quill* asking about the grand jury. **App. 88-89** (Tr. 286-88). When Mr. Wade called the newspaper back, he learned that Mr. Smith had issued a press release to the *Quill* regarding his Motion to Quash. **App. 348-400; (Ex. 63).** In his press release, Mr. Smith had included a portion of his Motion to Quash and his Motion to Disqualify Chris Wade with the attached Brayfield and Calvert

affidavits. **App. 348-400.** In addition to sending his press release to the *Quill*, Mr. Smith provided copies to local television stations, KY3, KOLR 10, KSPR 33, and FOX 27. **(Ex. 61).** He also provided copies to the *Springfield News Leader*, and the *Douglas County Herald*. **(Ex. 61).**

On March 31, 2008, Judge Carter held an oral argument on Mr. Smith's Motion to Quash. **App. 88** (Tr. 284); **106** (Tr. 355). At the hearing, Mr. Smith asked Judge Carter and Chris Wade whether he was a target of the grand jury. **App. 88** (Tr. 284). Mr. Wade did not say anything as grand jury proceedings are secret and he is not permitted by law to disclose information about the proceedings while they are ongoing. **App. 88** (Tr. 284). Judge Carter did not know whether Mr. Smith was a target of the grand jury and could not have answered the question even if the law permitted him to do so. **App. 106** (Tr. 356-57). At the end of the argument, Judge Carter denied Mr. Smith's motion. He reasoned Mr. Wade should have access to the log, as the law does not provide that the log is confidential and a notary is required to keep such log. **App. 106** (Tr. 356). When Judge Carter denied Mr. Smith's motion, he granted Mr. Smith seven days to file a writ of prohibition with the Missouri Court of Appeals.

Mr. Smith filed a writ of prohibition, captioned *State ex rel. v. Amanda Kay Evans and Ron Jarrett vs. The Honorable R. Craig Carter*, Case No. SD296061, with the Missouri Court of Appeals, Southern District. **App. 404.**

Mr. Smith's petition for writ of prohibition contained the following statement:

> "The attached exhibits reflect the personal interest, bias, and purported criminal conduct of Respondent (Judge Carter),

> Prosecuting Attorney Christopher Wade, and others [sic] members in the judicial system in the Forty-Fourth Judicial Circuit. Their participation in the convening, overseeing and handling the proceedings of this grand jury are, in the least, an appearance of impropriety, and at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover–up and chill public awareness of their own apparent misconduct using the power of their positions to do so.
>
> When Relators on March 31, 2008 asked Respondent and the prosecuting attorney who were their targets of this grand jury, Relators' assertion that the targets were Relators and their counsel was [sic] met with the tacit admission of silence. This grand jury, as in the last grand jury in Douglas County, is being used by those in power in the judicial system as a covert tool to threaten, intimidate and silence any opposition to their personal control - not the laudable common law and statutory purposes for which the grand jury system was created."

App. 407. Attached to the Writ petition was Mr. Smith's Motion to Disqualify the Prosecuting Attorney in Mr. Jarrett's sexual assault case and his Motion to Disqualify the Prosecuting Attorney in Mr. Jarrett's perjury case, including the Jarrett, Brayfield and Calvert affidavits. **App. 404.** The Court of Appeals denied the writ. **App. 174; 197.**

JUDGE CARTER BRINGS A CONTEMPT ACTION AGAINST MR. SMITH

On April 16, 2008, Judge Carter filed an order finding that Mr. Smith's filing of the petition for writ of prohibition defamed the Douglas County Prosecuting Attorney, and several members of the bar and that the affidavit and exhibits attached to Mr. Smith's petition were scurrilous, defamatory, and a venomous attack on the Judicial System. **App. 176; 198.** Judge Carter directed the Circuit Clerk to file a copy of his order as well as the Petition for Writ of Prohibition with the Court as a Contempt Proceeding and for the Clerk to request that the presiding judge request an assignment of judge to the contempt proceeding. **App. 176; 198.** Prosecutor Chris Wade recused himself and an Assistant Attorney General was appointed to represent the State. **App. 176; 198.**

On August 5, 2009, the Court held a trial on the contempt charges and a jury found Mr. Smith guilty of misdemeanor in direct contempt of court. **(Ex. G).** The Honorable Gary Witt sentenced Mr. Smith to 120 days in jail. **(Ex. G).** Before Mr. Smith had served his full 120 days in jail, this Court issued a preliminary writ of Habeas Corpus and then ultimately discharged Mr. Smith. **(Ex. G).**

DISCIPLINARY HEARING

On December 24, 2009, Informant filed a Five Count Information charging Mr. Smith with violating Rules 4-1.4(a)(communication), 4-1.7(b)(conflict of interest), 4-3.3(a)(knowingly making a false statement to tribunal), and 4-8.2(a)(making statement regarding judges that a lawyer knows to be false or with reckless disregard of the truth or falsity of the statement). **App. 159-78.**

On February 26, 2010, Mr. Smith filed his Answer to the Information. **App. 179-200.** The Advisory Committee then appointed a Disciplinary Hearing Panel ("DHP") to hear the matter. The DHP conducted a hearing on November 15 through 19, 2010. Nancy Ripperger represented Informant. Mr. Smith was present and appeared by counsel Bruce Galloway and Daniel Brogdan. The following exhibits were admitted into evidence at the request of Informant: Exhibits 1-7, 9-10, 14, 16-19, 21-33, 35-36, 38, 42, 44-51, 53, 55-70. The following Exhibits were admitted into evidence at the request of Mr. Smith: A-B and G, I, and J.

Informant put on live testimony from Judge John Moody, Judge Lynette Veenstra, Thomas Cline, Cynthia MacPherson, Daniel Wade, Rose Cline-Pursell, Christopher Wade, Jason MacPherson, Judge Craig Carter and Jeffrey Loeberg.

Mr. Smith called Pamela Brayfield to testify and also testified on his own behalf.

The Panel issued its decision. The Chair of the Advisory Committee served a copy of the decision on the parties on or about February 14, 2010.

The Panel found that the allegations set forth in the Jarrett, Brayfield and Calvert affidavits were false; that it could not conclude Mr. Smith knew the allegations were false, but that Mr. Smith acted in reckless disregard as to their truth or falsity. The Panel then found that Mr. Smith violated Rule 4-8.2(a) when he:

1. Distributed the "voter information packet" with Mr. Jarrett's affidavit attached;
2. Filed the Motion to Disqualify Jason MacPherson with the Jarrett Affidavit attached;

3. Filed the Motion to Disqualify Chris Wade with the Pam Brayfield and Janice Calvert affidavits attached; and
4. Filed a Petition for Writ of Prohibition with the Court of Appeals accusing members of the judicial system and prosecutors of the 44th Circuit of calling a grand jury as a conspiracy to threaten him and imprison innocent people.

The Panel recommended that this Court disbar Mr. Smith.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH MADE NUMEROUS FALSE STATEMENTS ABOUT JUDGES AND PUBLIC LEGAL OFFICERS WITH RECKLESS DISREGARD AS TO THEIR TRUTH OR FALSITY.

In re Coe, 903 S.W.2d 916 (Mo. banc 1995)

In re Madison, 282 S.W.3d 350 (Mo. banc 2009)

In re Westfall, 808 S.W.2d 829 (Mo. banc 1991)

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989)

United States Constitution, Amendment I

Rule 4-8.2(a)

Hazard, Geoffrey C., Jr. & Hodes, W. William, The Law of Lawyering, 63-14, 63-18 (3d. ed. Supp. 2009)

II.

THIS COURT SHOULD DISBAR MR. SMITH BECAUSE DISBARMENT IS APPROPRIATE FOR A LAWYER WHO USES FALSE STATEMENTS FOR PERSONAL GAIN AN BECAUSE THERE ARE AGGRAVATING FACTORS WHICH SUGGEST THAT MR. SMITH SHOULD RECEIVE THE MOST SEVERE DISCIPLINE

In re Storment, 873 S.W.2d 227 (Mo. banc 1994)

In re Madison, 282 S.W.3d 360-362 (Mo. banc 2009)

In re Wells, 36 So.3d 198 (La. 2010)

Nebraska State Bar Assoc., v. Michaelis, 316 N.W.2d 46 (Neb. 1982)

ABA Standards for Imposing Lawyer Sanctions (1991)

Rule 4-8.2(a)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE MR. SMITH'S LICENSE BECAUSE MR. SMITH MADE NUMEROUS FALSE STATEMENTS ABOUT JUDGES AND PUBLIC LEGAL OFFICERS WITH RECKLESS DISREGARD AS TO THEIR TRUTH OR FALSITY.

In matters of attorney discipline, the DHP's decision is only advisory. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). This Court reviews the evidence de novo and reaches its own conclusions of law.[16] *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003). Professional misconduct is established by a preponderance of the evidence. *Id.* An attorney must comply with the Rules of Professional Conduct as set forth in Supreme Court Rule 4 as a condition of retaining his license. *In re Shelhorse*, 147 S.W.3d at 80. Violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *Id.*

Mr. Smith is charged with violating Rule 4-8.2(a). Rule 4-8.2(a) provides that a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or

[16] The standard of review is the same for all of the Points Relied On in this Brief. Consequently, Informant has only set forth the standard for review under Point I of this Brief and incorporates the standard of review into the other Point.

public legal officer. The comments to the rule provide that a "public legal officer" includes a prosecuting attorney. Rule 4-8.2(a) cmt. 1. While the language of the rule could be read to apply to both true and false statements made with reckless disregard, courts usually restrict the rule to **false** statements. *See Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 813 fn. 4 (Min. 2006); *Contra Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996).

Mr. Smith claims in his Answer and his Written Closing that Rule 4-8.2(a) is inapplicable to his actions because his actions are protected by his First Amendment Right to Freedom of Speech. Mr. Smith assertions are off the mark.

First, this case is about conduct instead of speech. In *In re Coe*, 903 S.W.2d 916 (Mo. banc 1995), Ms. Coe had been charged with violating Rule 4-3.5(c) (conduct intended to disrupt a tribunal). Ms. Coe made several disparaging comments to the judge in a jury trial including a comment to the judge, "Can you in the name of Jesus be fair?" after the judge overruled her objection. She also made a statement in open court that "someone" from the judge's office told a subpoenaed witness not to appear. The judge denied the allegation. *Id.* at 918. Ms. Coe argued that she was not subject to discipline because her statements were "protected speech." This Court disagreed. This Court ruled:

> "An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal…. Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge."

Id. at 917 (citations omitted).

This Court's holding in *Coe,* remains good law and was applied in *In re Madison*¸ 282 S.W.3d 350 (Mo. banc 2009). In *Madison*, this Court was asked to decide whether Mr. Madison violated Rule 4-8.2(a). Mr. Madison had sent several letters to one judge accusing the judge of being: (1) a racist, (2) "drunk with power", (3) corrupt, and (4) part of an "evil network." *Id.* at 354-356. Mr. Madison was angry with the judge for continuing a case. He sent a letter to a second judge accusing the judge of: (1) being "unfaithful to the law", (2) showing contempt of the law, (3) abusing the judge's power, and (4) violating the Code of Judicial Conduct. *Id.* at 356-358. Mr. Madison was upset with the second judge's ruling in a landlord tenant case.

Although Mr. Madison did not specifically assert that his actions were "protected speech", this Court examined the issue. This Court stated that debate and public comment regarding the judiciary are protected speech but that "unbridled speech" amounts to misconduct that threatens a significant State interest. This Court went on to opine that the State may restrict a lawyer's exercise of personal rights guaranteed by the Constitution. *Id.* at 353. This Court again quoted its holding in *Coe* that an attorney may not resist a ruling of the trial court, by speech or conduct, beyond the point necessary to preserve the issue for appeal. *Id.* at 354. Judge Wolff concurred, along with Judge Teitelman, and wrote in a separate opinion to "emphasize" the case was about conduct, not speech. *Id.* at 363 (concurring opinion).

When the facts of this case are viewed as a whole it is evident that Mr. Smith's attacks against Judge Moody, Judge Carter, Prosecutor MacPherson, Prosecutor Wade,

Prosecutor Cline, Cynthia MacPherson and Dan Wade were intended to harass these individuals, not to assist his clients, or to improve the administration of justice. There was evidence presented that Mr. Smith intensely disliked Judge Moody and Dan Wade to the point that he advised Judge Carter that they were evil and that Judge Carter should not associate with them. **App. 105** (Tr. 353-54). The evidence also showed that Judge Moody, Jason MacPherson and Chris Wade defeated Mr. Smith and his friends in the 2006 election. **App. 23** (Tr. 30-31).

When you examine Mr. Smith's Motion to Disqualify Jason MacPherson it is obvious that he could have proceeded with the Motion to Disqualify based upon a general allegation that Jason MacPherson was a family friend of the Cline family, that the Cline family intensely disliked Mr. Jarrett, and that it created an appearance of impropriety or prosecutorial vindictiveness for Mr. MacPherson to remain as the prosecutor. **App. 203-11.** It was not necessary to include the scurrilous allegations about Tom Cline, Judge Moody, Jason MacPherson, Cynthia MacPherson and Rose Pursell in the motion.

With Mr. Smith's Motion to Disqualify Chris Wade, Mr. Smith included a report to Informant and the Judicial Commission alleging Judge Moody, Dan Wade, Jay Nixon, Assistant Attorney General Ted Bruce and Informant's staff had engaged in a criminal conspiracy relating to attorney John Bruffett and Judge Wall's criminal prosecutions. **App. 212-61.** Chris Wade was not involved in Mr. Bruffett or Judge Wall's criminal prosecution and the information was irrelevant to whether Mr. Wade had a conflict in prosecuting Mr. Jarrett.

Mr. Smith's statements regarding Judge Carter were obviously done to avoid an unfavorable ruling or as a vindictive action against Judge Carter. When Judge Carter overruled Mr. Smith's Motion to Quash the Grand Jury Subpoena, Mr. Smith could have sought a writ on the alleged legal insufficiencies of the subpoena. Instead, he filed a petition for writ accusing Judge Carter of engaging in a conspiracy to threaten and imprison innocent people. **App. 407.** With Judge Carter, he never presented any evidence to support his statements. One must conclude his statements regarding Judge Carter were made merely because Judge Carter overruled his motion and Mr. Smith was angry about the ruling. Thus, Mr. Smith engaged in conduct, not speech and the First Amendment provides him with no protection from discipline.[17]

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[17] Mr. Smith has engaged in a pattern and practice of making scurrilous statements about judges when they rule against him. Mr. Smith sent Judge Veenstra a letter and motion and asked her to rule upon it. In his letter, he stated that he trusted her to do what was correct and that he had confidence in her honesty and integrity. **(Ex. 6 p. 31).** After Judge Veenstra overruled his motion and reported Mr. Smith's actions to Informant, he advised Informant that Judge Moody had committed three felonies, that Judge Moody had used his political influence to suppress those individuals who were exposing the corruption in the 44th Circuit and was subjecting the individuals to indictment, imprisonment and disbarment. He then stated Judge Veenstra was a lieutenant for Judge Moody and she was protecting a criminal enterprise in the Circuit. **App. 54** (Tr. 152); **(Ex. 5, pp. 4-5).**

Even if Mr. Smith's actions were considered "speech", this Court is permitted to regulate speech even when of a political nature, such as Mr. Smith's use of the Jarrett affidavit in the 2006 election. Regulation of speech based upon content is subject to strict scrutiny and must be narrowly tailored to promote a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). When analyzing whether Rule 4-8.2(a) violates the First Amendment, this Court must balance "the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073 (1991). In cases where the attorney's "unbridled speech amounts to misconduct which threatens a significant state interest, a state may restrict the lawyer's exercise of personal Constitutional rights." *In re Johnson*, 729 P.2 1175, 1178 (Kan 1986).

Even when engaged in a political campaign, such as Mr. Smith was in the 2006 election, an attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. *Nebraska State Bar Assoc. v. Michaelis*, 316 N.W.2d 46 (Neb. 1982). While an attorney may seek out and state his opinion on campaign issues, the right to freedom of speech will not protect him if he makes a false statement for the purpose of misleading voters and gaining personal advantage for himself as a candidate. *Id.* In the 2006 election, Mr. Smith used Mr. Jarrett's false affidavit to gain support for his friend, John Bruffett, who was running against Judge Moody and to bolster the public's perception of Mr. Smith as someone who would fight wrongdoing if elected as prosecutor. He then misrepresented to the voters

that the allegations contained in the affidavit were "facts" not merely unsubstantiated allegations. **App. 202.** Ms. Smith's intent was to mislead the voters and his actions are not protected by the First Amendment.

Mr. Smith also asserts that he cannot be disciplined for the statement he made against Judge Carter, as his statements were only opinions. Within the context of the expression of an opinion, an attorney's speech is protected if true or in good faith believed to be true, but when derogatory factual allegations are false and with ordinary care should have been known to be false, discipline should be imposed. *Id.*; *Garrison v. State*, 379 U.S. 64, 75 (1964); *See also Berry v. Schmitt*, No. 3:09-60-DCR, 2011 WL 1376280, at 7 (E.D. Ky. April 12, 2011). This is true because states have a compelling interest in maintaining public confidence in the judiciary and judicial officers. As the Seventh Circuit stated in *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995):

> "Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning as judges do not take to the talk shows to defend themselves and few litigants can separate accurate from spurious claims of judicial misconduct."

Id. Thus, Mr. Smith cannot avoid discipline for his statements about Judge Carter by categorizing his actions as merely opinions.

This Court did restrict a lawyer's right to freedom of speech and his right to engage in political activities in *In re Woodward,* 300 S.W.2d 385 (Mo. banc 1957). Mr. Woodward had mailed out 25,000 to 30,000 post cards to City of St. Louis residents with rambling statements alleging that the City Court was a "Nazi Fascist Spirit", a "Kangaroo Court", and the judges were "stooges." *Id.* at 385. Some of the cards had the Nazi Swastika symbol on them. *Id.* at 393. Mr. Woodward argued that his activities were protected under the First Amendment, as the cards were sent out in a spring election campaign and as political data. This Court held that neither the right of free speech nor the right to engage in "political activities" may be construed so as to permit Mr. Woodward's activities. As this Court noted, "A layman may, perhaps, pursue his theories of free speech or political activism. . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics." *Id.* at 393-94.

As Mr. Smith's First Amendment argument fails, the Court must then decide if Mr. Smith violated Rule 4-8.2(a). To prove a violation of Rule 4-8.2(a) it is necessary to show that the lawyer (1) made a false statement (2) concerning the qualification or integrity of a judge or prosecuting attorney and (3) the lawyer knew the statement was false or made the statement with reckless disregard as to its truth or falsity. *Charges of Unprofessional Conduct,* 720 N.W.2d at 813.

Although this Court has not addressed the burden of persuasion regarding the falsity of the statement, other Courts have held that disciplinary counsel meets its burden by presenting documentary evidence or testimony from the persons at whom the

accusations were aimed that the statements were false. The burden then shifts to the attorney to prove that the statements were true or that, following a reasonable diligent inquiry, he formed a reasonable belief that the accusations were true. *Office of Disciplinary Counsel v. Wrona*, 908 A.2d 1281, 1288 (Pa. 2006); *Statewide Grievance Comm. v. Burton*¸10 A.3d 507, 512 (Conn. 2011).

In Mr. Smith's matter, Informant's witnesses testified that Mr. Jarrett's statements, Ms. Brayfield's statements, Ms. Calvert's statements and Mr. Smith's statements in his Motions to Disqualify Jason MacPherson and Chris Wade, and in his Petition for Writ of Prohibition, were false. **A24** (Tr. 32-35); **27-28** (Tr. 46-48); **61-62** (Tr. 183-84); **63** (Tr. 189-91); **64** (Tr. 194); **68-69** (Tr. 209-14); **73** (Tr. 225); **75** (Tr. 233-34); **78** (Tr. 244); **80-81** (Tr. 254-57); **82** (Tr. 260); **99** (Tr. 330). The burden then shifted to Mr. Smith to show that the allegations were true or that he did not act in reckless disregard of the truth or falsity of the statements. Mr. Smith cannot meet his burden.

Mr. Smith admits that, as a matter of law, Mr. Jarrett's statements were false. **App. 166; 184-85; (Ex. 55).** Mr. Smith did not put on evidence to show that Ms. Calvert's or his own statements in his Motions and Petition for Writ of Prohibition were true. Ms. Calvert did not testify and a review of her affidavit shows that she did not even state that she had personal knowledge of the events set forth in the affidavit. **App. 212-61.** For instance, she alleged that Dan Wade and Chris Wade obtained their marijuana from Guindia Marino and Carl Watson. She did not state that she personally observed any drug transactions for Dan Wade or Chris Wade or provide specific details. Similarly, she alleged that when Tom Cline used meth it was a thin line of meth. She did not state

that she personally observed Mr. Cline using meth or why she believed Mr. Cline used meth. Because the parties named in the affidavit denied the allegations, Ms. Calvert did not testify, and Ms. Calvert's allegations are very vague and do not purport to be based upon Ms. Calvert's own personal knowledge, this Court should find that the allegations were false.

Ms. Brayfield did testify at the hearing. Some parts of her testimony were not consistent with her affidavit. For example, in her affidavit she states that she saw Cynthia MacPherson snorting meth off a bathroom counter. **App. 212-61.** At the hearing, she testified that Ms. MacPherson was snorting the cocaine off the back of the toilet. **A116** (Tr. 395). She also testified at the hearing that she did not actually see Mr. Cline purchase drugs from Ernie Speaks. **App. 77** (Tr. 239). Mr. Smith did not meet his burden in showing Ms. Brayfield's allegations were true.

Even though this Court's review is de novo, the DHP, who heard all the testimony and reviewed all the evidence, is in the best position to assess witness credibility. The DHP found that the allegations made by Mr. Smith regarding Judge Moody, Judge Carter, Prosecutor Tom Cline, Prosecutor Jason MacPherson and Prosecutor Chris Wade were false. This Court should reach the same finding.

Thus, the real issue before this Court is whether Mr. Smith acted with reckless disregard when he: (1) included Mr. Jarrett's affidavit in his "voter information packet", (2) filed his Motion to Disqualify Jason MacPherson with the attached Jarrett Affidavit (3) filed the Motion to Disqualify Chris Wade with the attached Pam Brayfield and Janice

Calvert Affidavits and (4) filed his Petition for Writ of Prohibition with the Court of Appeals.

This Court most recently addressed the reckless disregard provision of Rule 4-8.2(a) in *In re Westfall,* 808 S.W.2d 829 (Mo. banc 1991). In this case, Mr. Westfall, the St. Louis County prosecutor, made a statement to the press criticizing the Court of Appeals' opinion regarding Double Jeopardy and charging a defendant with armed criminal action after the defendant had been acquitted on first-degree murder charges. More specifically, Mr. Westfall stated:

> "[T]he Supreme Court of the Land has said twice our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.
>
> . . . .
>
> [B]ut for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.
>
> . . . .
>
> The decision today will have a negative impact on all murder one cases pending in Missouri, in the future in Missouri, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.
>
> . . . .

> But if it's murder in the first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach."

Id. at 831-832. This Court noted that lawyers who make derogatory statements about judges are protected by the First Amendment and Fourteenth Amendments of the United States Constitution from civil and criminal liability unless the statements were made with knowledge of their falsity or in reckless disregard of whether they were true or false. *Id.* at 833.

This Court then went on to decide whether the "with reckless disregard of its truth or falsity" standard was the same for attorney disciplinary cases as the standard used is defamation cases. *Id.* at 837. In defamation cases, the standard is a subjective test – whether there is sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication or that the defendant actually had a "high degree of awareness of probable falsity." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). This Court held that in attorney disciplinary matters an objective standard should be applied as there is a much greater interest in protecting the public, the administration of justice and the profession in disciplinary matters than in defamation cases. *Westfall*, 808 S.W.2d at 837. With an objective standard, the question is "what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* In the

instant case, it is clear that a reasonable attorney would not include allegations of bribery, incest, and drug usage by judges and prosecutors without independently verifying the allegations in some manner. This is especially true when one affiant is mentally ill and one affiant has an extensive criminal history and is angry with the people identified in the affidavit. Mr. Smith admits that he did **nothing** to independently verify any of the allegations made by Affiants Ron Jarrett, Pam Brayfield and Janice Calvert. There were many things he could have done to verify the information. The extreme, scandalous nature of the allegations made by affiants should have alerted Mr. Smith to the need to investigate and not to rely upon the word of the affiants solely. *Lawyer Disciplinary Bd. v. Turgen*, 557 S.E.2d 235 (W. Va. 2000).

Informant anticipates that Mr. Smith will cite to *In re Smith*, 313 S.W.3d 124 (Mo. banc 2010), for the proposition that this Court should apply a subjective test and dismiss the disciplinary action against Mr. Smith. The cited case is Mr. Smith's habeas action. In that case, this Court did reverse Mr. Smith's contempt conviction and held that when an indirect contempt action is brought against an attorney, the trier of fact must apply a subjective standard. This Court also stated in dicta that the *Westfall* case may have been wrongly decided.[18] *Id.* at 135, ftn. 15.

[18] This Court stated that the *Westfall* decision was issued before *Gentile v. State*, 501 U.S. 1030 (1991), and that the scrutiny of a state's interest may be higher today than when the Court decided *Westfall*. The Court then went on to cite Hazard, Geoffrey C., Jr. & Hodes, W. William, The Law of Lawyering, 63-14, 63-18 (3d. ed. Supp. 2009). This

The fact that this Court overturned Mr. Smith's contempt conviction and called into question its holding in *Westfall* does not mean Mr. Smith should escape discipline in this matter. To the contrary, this Court specifically stated in its decision that its ruling had no bearing on any disciplinary matter and that the disciplinary forum may be a more suitable forum for ascertaining a lawyer's knowledge as to the truth or falsity of the lawyer's statements. *Id.* at 126.

In *Smith*, this Court changed the law on indirect contempt committed by an attorney. Prior to its decision, the law was very unclear on the subject, especially when the case was tried to a jury. *Id.* at 133. The jury instructions had not required the jury to find that Mr. Smith's statements were false, that Mr. Smith knew the statements were false or that he made the statements with reckless disregard as to their truth or falsity. *Id.* at 128, 129. The Court also noted that there was no evidence from which the jurors could have found the requisite state of Mr. Smith's mind regarding the statements.

The Court's findings in the habeas action is not fatal to this disciplinary action. In the contempt action, the only witness to testify was Judge Carter and the State limited the contempt action explicitly to Mr. Smith's statements regarding Judge Carter in the

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treatise noted that the *Westfall* decision was troubling because the Court did not conscientiously assess the reasonableness of the *lawyer's state of mind in making his statements,* but appeared to be judging the reasonableness of what was said. The treatise also criticized the *Westfall* decision by noting that Mr. Westfall was arguably correct in his statements about the judge.

Petition for Writ of Prohibition. *Id.* at 127-128, ftn 2. This disciplinary action addresses so much more. It includes: (1) the original Jarrett affidavit Mr. Smith distributed as part of the voter information packet, (2) the Motion to Disqualify Jason MacPherson, which had the second Jarrett affidavit attached, and (3) the Motion to Disqualify Chris Wade with affidavits of Pam Brayfield and Janice Calvert attached. There were many witnesses in this hearing who testified as to the falsity and the absurdity of Respondent's allegations. There was evidence presented that both Ron Jarrett and Pam Brayfield had motives to lie and were not known for their veracity. There was also evidence presented regarding Ms. Smith's dislike of Judge Moody.

In this case, even if a subjective standard is applied, the evidence shows that Respondent was reckless in his actions.[19] In *Harte-Hanks*, the United States Supreme

[19] Even if the Court reconsiders its decision in *Westfall*, the Court may decide to continue with an objective standard. A majority of state courts that have considered the question have applied an objective standard, including jurisdictions which addressed the issue after *Gentile v. State*, 501 U.S. 1030 (1991). See *In re Cobb*, 838 N.E.2d 1197 (Mass. 2005); *Florida Bar v. Ray*, 797 So.2d 556 (Fla. 2001); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Id. 1996); *Matter of Terry*, 394 N.E.2d 94 (Ind. 1979); *In re Weaver*, 750 N.W.2d 71 (Ia. 2008); *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996); *State Bar Ass'n v. Karst*, 428 So.2d 406 (La. 1983); *In re Nathan*, 671 N.W.2d 578 (Minn. 2003); *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425 (Ohio 2003); *Office of Disciplinary Counsel v. Price*, 732 A.2d 599 (Pa. 1999).

Court considered whether a newspaper was libel for a story it had published. 491 U. S. 657. The article quoted a grand jury witness who alleged that a judicial candidate had "used dirty tricks" in an investigation of an incumbent's staff and that the candidate had offered the witness and her sister jobs and a trip to Florida for their cooperation in the investigation. The defendant argued that the court of appeals erred in affirming the jury's decision because the court had not applied a subjective standard to the "reckless disregard" element of the cause of action.

The Court clarified that a subjective standard was required and that the plaintiff had to show that the defendant had made the false publication with a "high degree of awareness of probable falsity" or stated slightly differently, that the defendant must have "entertained serious doubts as the truth of the publication." *Id.* at 2686. The Court, noted, however, that plaintiff could prove the defendant's state of mind through circumstantial evidence. *Id.* Moreover, the Court found that when reporting a third party's allegations "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* at 2696.

The Court advised that the fact there was some evidence in the record to support the conclusion that the grand jury witness was truthful, it was not enough to show defendant's actions were subjectively reasonable. Rather the decisive question was whether the defendant had "purposely avoided the truth." The Court then went on to find that defendant had, in fact, purposely avoided the truth because he had: (1) ignored statements from plaintiff and five other witnesses denying the witness's allegations; (2) ignored inconsistencies in the witness's statement and the "hesitant, inaudible and

improbable tone" of the witness's answers to questions; (3) had failed to review tape recordings which would have confirmed or disproved some of the witness's allegations; and (4) had failed to interview a key witness.

When one looks at the record as a whole in Mr. Smith's case, it is very evident that Mr. Smith "purposely avoided the truth" so as to act in reckless disregard of the truth or falsity of the allegations. He admits that he found Mr. Jarrett's statements "unusual." **App. 130** (Tr. 452). Mr. Smith did nothing to verify any information in the affidavits even though there were many things he could have done to independently verify the allegations including talking to witnesses, checking records, asking the affiants for more specifics, etc. **App. 143-44** (Tr. 504-05); **146** (Tr. 510); **(Ex. 33).**[20] Most important was the fact that he never asked the individuals named in the affidavits whether the allegations were true. **App. 133** (Tr. 462-63). He had been told both by Informant and Ethics Counsel that he had a duty to verify the information. **App. 146** (Tr. 514); **(Exs. 29, 70).**

There were obvious reasons to question the veracity of both Mr. Jarrett and Ms. Brayfield. Mr. Jarrett's original affidavit named Judge Jacobs, not Judge Moody, as the person who gave the bag of money to Tom Cline. **(Ex. 18).** Judge Jacobs was the one

[20] It is interesting to note that when Mr. Smith was trying to convince Prosecutor Tyrrell that he should not charge Mr. Jarrett with sexual assault, Mr. Smith conducted his own investigation into the matter. In contrast, he did nothing to verify Mr. Jarrett's, Ms. Brayfield's or Ms. Calvert's allegations.

who had issued the order of protection against Mr. Jarrett and had denied Mr. Jarrett's Motion for Protective Order. **(Ex. 64).** Cynthia MacPherson has a reputation for being very health and fitness conscious, not the usual traits of a long-term drug user. **App. 68** (Tr. 211); **101-02** (Tr. 338-39). Numerous witnesses testified as to Mr. Jarrett's dislike of his former father-in-law, Prosecutor Tom Cline, and of Mr. Jarrett's questionable mental state. **App. 59** (Tr. 174-75); **78** (Tr. 243-44); **98-102** (Tr. 325-39). There was also evidence that Mr. Smith advised at least two people that he believed Mr. Jarrett was "crazy". **App. 61** (Tr. 180); **68** (Tr. 208). Mr. Smith acknowledged that Mr. Jarrett had advised him of Judge Moody and Tom Cline's alleged actions back in 2003 or 2004 but Mr. Smith did not report these alleged acts to Informant's office or the Judicial Commission. **App. 137** (Tr. 479). Surely, if Mr. Smith believed Mr. Jarrett's allegations, he would have reported them when he learned about them. Rather he waited until the allegations were personally useful in his bid for prosecutor and his friend, John Buffett's, bid for circuit judge.

Ms. Brayfield's credibility was very suspect. Ms. Brayfield has numerous felony convictions and was prosecuted or sentenced by many of the individuals she mentioned in her affidavit. **App. 27** (Tr. 45-46); **75** (Tr. 233); **115** (Tr. 390); **265-78.** Respondent even admits that he prosecuted her for forgery – a crime that goes to her veracity. **App. 115** (Tr. 390). There was testimony that Ms. Brayfield was upset with Chris Wade, the Douglas County Prosecutor, when he declined to prosecute Ms. Brayfield's daughter-in-law for violation of a child custody order and when he declined to bring drug charges against the daughter-in-law. **App. 84** (Tr. 267-29); **119** (Tr. 408). Her dislike for Mr.

Wade gave her reason to lie. Mr. Smith was aware of these facts because he was acting as counsel for Ms. Brayfield in the custody matter. **A118** (Tr. 403). Ms. Brayfield's statement about Dan Wade offering to fly her out of the country did not make sense. First of all, it is unlikely that Mr. Wade would help Herman Prock, who had stolen $50,000 of cattle from Mr. Wade. **App. 76** (Tr. 235); **(Ex. 67).** Ms. Brayfield's states that Mr. Wade offered to fly her out of the country after she had been convicted, but before she had been sentenced. She also stated that Mr. Wade told her that if she stayed out of the country for seven years she could return to Ava without jail time. **App. 117-18** (Tr. 400-01). A convicted criminal cannot escape prison time by leaving the country and returning seven years later.

Ms. Calvert's affidavit only contained very generic allegations and Ms. Calvert did not attest that she has personal knowledge of any of the facts.[21] Mr. Smith contends that she and Ms. Brayfield appeared at his office without solicitation and volunteered the affidavits to assist in "eliminating public corruption and drug trafficking." **(Ex. 47).** It seems unlikely that someone would just appear at an attorney's door and offer to provide an affidavit.

When Mr. Smith alleged Mr. Wade had violated the Federal Gun Control Act, he Smith didn't even take the time to review the court file on the case. If he had done so, he would have known that Mr. Wade consented to the return of the gun to Mr. Watson's sister. **(Ex. 68).** Surely, these facts appear very suspect and indicate Mr. Smith was

[21] Ms. Calvert also did not appear at trial to testify to the facts.

burying his head in the sand as to the truth of the allegations. Thus, when the facts of this case are viewed as a whole, it is easy to see that Mr. Smith "purposely avoided the truth" and violated Rule 4-8.2(a) so that he could harass Judge Moody and the other legal officials in the 44th Circuit.

Mr. Smith asserts that based upon *Gentile v. State Bar of Nevada*, 501 U.S. 1030 and this Court's decision in his habeas case he cannot be disciplined for his statements in his Petition for Writ of Prohibition. He asserts that his statements in the Petition for Writ of Prohibition did not show a "substantial likelihood of material prejudice to an adjudicative proceeding." Mr. Smith's argument is without merit. First, the *Gentile* decision is not determinative in this case as it concerned an attorney disciplinary rule that prohibits lawyers from making extrajudicial statements to the press that the lawyer knew or reasonably should have known would have a substantial likelihood of materially prejudicing an adjudicative proceeding. 501 U.S. at 1030-31. Rule 4-8.2(a) does not contain any such requirement.

Second, a different standard should apply for contempt actions as opposed to disciplinary actions. In the habeas action, this Court did state that the lawyer's statements and attendant conduct must have actually interfered with or possessed an imminent threat of interfering with the administration of justice. *Smith*, 313 S.W.3d at 136. This Court went on to note that the parties had stipulated that Mr. Smith's actions did not interfere with the grand jury. *Id.*

As discussed above, this Court must balance the State's right and need to maintain public confidence in the administration of justice with a lawyer's First Amendment rights.

Mr. Smith's contempt conviction was a quasi-criminal matter in which Mr. Smith was subject to jail time. As such, it is entitled to greater constitutional protection than in a disciplinary matter. Thus, while it was not appropriate to confine him to jail for his statements unless his statements actually interfered with the Douglas County grand jury proceedings it is appropriate to discipline his actions as Mr. Smith's actions threatened the public perception of the judiciary. It is appropriate in a disciplinary context to find that Mr. Smith's actions interfered with the administration of justice, as his actions undermined the public's confidence in the Judiciary.

II.

THIS COURT SHOULD DISBAR MR. SMITH BECAUSE DISBARMENT IS APPROPRIATE FOR A LAWYER WHO USES FALSE STATEMENTS FOR PERSONAL GAIN AND BECAUSE THERE ARE AGGRAVATING FACTORS WHICH SUGGEST THAT MR. SMITH SHOULD RECEIVE THE MOST SEVERE DISCIPLINE.

When determining an appropriate penalty for the violations of the Rules of Professional Conduct, this Court assesses the gravity of the misconduct, as well as mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003).

Since its decision in *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994), this Court has consistently turned to the ABA Standards for Imposing Lawyer Sanctions (1991) ("ABA Standards") for guidance in deciding what discipline to impose. ABA Standard 3.0 states that a court should look at four primary factors in determining which sanction is appropriate. The factors are: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the conduct; and (4) aggravating and mitigating circumstances. Injury, per the standards, includes harm to the legal system or the profession. See Definitions of ABA Standards. If there are multiple violations, the Standards provide that the sanction imposed should, at a minimum, be consistent with the sanction for the most serious instance of misconduct and generally should be greater than that sanction. See Theoretical Framework of ABA Standards.

In *In re Madison,* this Court determined that ABA Standard 6.2 (Abuse of the Legal Process) is appropriate to use when attorneys make false statements about judges or legal officials. 282 S.W.3d 360-362. The standard states, absent aggravating or mitigating circumstances:

> A. Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding. ABA Standard 6.21 (underlining added);
>
> B. Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to client or a party, or interference or potential interference with a legal proceeding. ABA Standard 6.22; and
>
> C. Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and there is injury or potential injury to client or a party, or interference or potential interference with a legal proceeding. ABA Standard 6.23.

Respondent's actions were "knowingly" done as opposed to "negligently" as he intended to include the affidavits with his pleadings and he intended to distribute the pleadings to news sources.[22] As a result, a reprimand is not appropriate in this case.

The real question is whether Respondent should receive a suspension or disbarment. The distinguishing factor between suspension and disbarment in the ABA Standards is whether the attorney intended to obtain a benefit for the lawyer or another.

In this case, Respondent distributed the initial Jarrett affidavit as part of a "voter information packet" to the public while he was running for the Douglas County prosecutor. He states that he used the affidavits because he wanted someone to investigate the issues and determine if the allegations were true. **App. 130** (Tr. 449). He admits that he Mr. Jarrett told him about these matters in 2003 or 2004 during the divorce but he did not make reports to the Judicial Commission or Informant. **A137** (Tr. 479). He intended for the Affidavits to help he and his friend, John Bruffett, in their campaigns.

When one looks at his Motion to Disqualify Jason MacPherson it is clear that he could have merely alleged that Mr. MacPherson should be disqualified because he was a close family friend of Barbara and Tom Cline and that this relationship created a conflict

[22] The ABA Standards define "negligence" as "the failure of a lawyer to heed a substantial risk that circumstances exit 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." "Intent" is defined as "the conscious objective or purpose to accomplish a particular result." Definitions of ABA Standards.

of interest for Mr. MacPherson. He did not have to make lurid allegations about Mr. MacPherson, Ms. MacPherson, Mr. Cline, Judge Moody and Rose Pursell. He included these allegations because he wanted to tarnish his victims' reputations.

When he believed that he might be a target of the grand jury investigation, he distributed the Brayfield and Calvert affidavits to the press in order to intimidate the prosecutor and judge presiding over the grand jury. Thus, Respondent attempted to benefit from his actions and the ABA Standards support disbarment.

In addition, there are many aggravating factors which indicate that the most severe discipline should be imposed. Respondent's actions were dishonest. ABA Standard 9.22(b). He engaged in a pattern of misconduct that went on for several years. ABA Standard 9.22(c). He continued to use Mr. Jarrett's affidavit after Informant had advised him to cease distributing the affidavit, and he used the Brayfield and Calvert affidavits after Legal Ethics Counsel advised him that he should verify the information in the affidavits before attaching the affidavits to pleadings. **App. 146** (Tr. 514); **(Exs. 29, 70).** These are multiple offenses. ABA Standard 9.22(d).

Respondent testified and had the opportunity to express remorse for his actions. He failed to do so. ABA Standard 9.22(g).

Respondent's victims were very vulnerable. ABA Standard 9.22(h). Ron Jarrett, Respondent's own client, was obviously mentally ill and because of Respondent's actions was convicted of perjury. **App. 280-92.** Mr. Jarrett suffered greatly because of Mr. Smith's actions.

Rose Pursell is a juvenile officer and has young children. She sobbed while on the stand when she told the panel how mad Mr. Smith's actions made her, especially in light of the fact that one of her children was mentioned in the affidavit and her children were old enough to understand what the allegations meant. As Ms. Pursell stated, she couldn't believe that Mr. Smith would stoop so low as to potentially hurt a child with the false accusations. **App. 78** (Tr. 244).

Judge Moody testified that when he made the three-person panel for a position on the Court of Appeals the governor asked him about the allegations. **App. 28** (Tr. 48). He also testified that the allegations had to have affected the community's trust in him. **App. 28** (Tr. 49).

Tom Cline testified that the fact that Mr. Smith, as an attorney, published the lies about him gave some credibility to the lies and made him look bad in the community. **App. 65** (Tr. 196). Cynthia MacPherson testified about the pride that she took in being the first woman prosecutor in the State of Missouri and Mr. Smith's actions had tarnished her reputation. **App. 68-69** (Tr. 211-12). Dan Wade testified that he has always tried to be a good citizen, never been arrested, never had a bar complaint and served as a deacon of his church for years and Mr. Smith's actions had impugned his reputation. **App. 77** (Tr. 239).

Moreover, Mr. Smith increased the harm to his victims when he distributed the affidavits to the media. There was no need to provide the information to the media except to increase his victims' distress.

Respondent has substantial experience in the law. ABA Standard 9.22(i). He has been licensed since 1988 and previously served as a prosecutor and police officer. As such, he knows the importance of maintaining the public's confidence in the integrity of the legal system.

The only mitigating factors are Respondent's absence of a prior disciplinary record and the fact that he spent some time in jail before the Supreme Court issued the writ of habeas corpus in the contempt action. ABA Standard 9.3(a) and (k). These are not enough to lessen the discipline imposed upon Respondent, especially in light of the fact that Mr. Smith has shown no remorse.

Case law from other jurisdictions also supports disbarment. In *In re Wells*, 36 So.3d 198 (La. 2010), fact pattern similar to the instant case is presented. In *Wells*, the attorney was angry with a local district attorney. The attorney went to a prison and obtained an affidavit from a prisoner which alleged that in 1996 the district attorney and several local police officers had paid the prisoner $250,000 to murder someone. *Id.* at 200-01. The attorney then filed the affidavit into the public records of the parish. *Id.* The attorney did not investigate the allegation and he did not otherwise possess any independent, credible information to suggest the prisoner's allegations were true. *Id.*

The attorney also filed a federal lawsuit against the district attorney and his assistants where he alleged they had committed extortion, tainted the grand jury, tampered with evidence, obstructed justice and knowingly made false statements to the court. *Id.* at 202. The attorney dismissed the lawsuit on his own accord but continued to circulate copies of the petition in various public places in the parish. *Id.* at 202.

The Court found that the attorney had violated Rule 8.2(a) (lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge or public legal officer), Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice). The Court disbarred the attorney finding the attorney's conduct was both knowing and intentional and disbarment was the applicable baseline discipline, absent extenuating mitigating factors.[23]

In *Nebraska State Bar Assoc. v. Michaelis*, 316 N.W.2d 46 (Neb. 1982), the Nebraska Supreme Court considered what discipline should be assessed against an attorney who had placed an advertisement in a local newspaper alleging unethical conduct upon the part of the incumbent county attorney, distributed and circulated various documents to the public which alleged illegal and unethical conduct upon the part of the incumbent county attorney and a local city attorney, made statements to the press about the integrity of the Nebraska Supreme Court, and made false statements on a radio station about the Nebraska Bar and disciplinary counsel. The Nebraska Supreme Court disbarred the attorney because the attorney had exhibited no remorse, no change in attitude or desire to cease his scurrilous attacks upon the bar and bench. The Court found that the attorney's conduct clearly demonstrated he was not fit to practice law.

[23] The attorney had also lied to the court and while his interim suspension was pending, had taken money from a client and not performed the work.

Mr. Smith has engaged in a long-term, repeated campaign to unfairly tarnish the reputation of the Judges and Prosecutors of the 44th Circuit and has shown no remorse or change in his attitude, even after serving time in jail. Therefore, as the Nebraska Supreme Court found in *Michaelis*, disbarment is appropriate in this case.

CONCLUSION

For the reasons set forth above, this Court should:

(a) Find that Mr. Smith violated Rule 4-8.2(a) when he:

1. distributed the "voter information packet" with Mr. Jarrett's attached affidavit;
2. filed the Motion to Disqualify Jason MacPherson with the Jarrett affidavit attached and incorporated;
3. filed the Motion to Disqualify Chris Wade with the Pam Brayfield and Janice Calvert affidavits attached and incorporated; and
4. filed a Petition for Writ of Prohibition with the Court of Appeals accusing members of the judicial system and prosecutors of the 44th Circuit of calling a grand jury as a conspiracy to threaten him and imprison innocent people; and

(b) Disbar Mr. Smith.

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2011, two copies of Informant's Brief and a CD containing the brief in Microsoft Word format have been sent via First Class mail to:

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_____
Nancy L. Ripperger

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. Complies with the limitations contained in Rule 84.06(b);

3. Contains 17,415 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Trend Micro software was used to scan the disk for viruses and that it is virus free.

_____
Nancy L. Ripperger

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