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**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF TWO MEMBERS
OF THE STATE BAR OF ARIZONA,**

**Martin E. Brannan
Bar No. 017151**

**Michael B. Whiting
Bar No. 022092**

Respondents.

Nos. 10-0488 and 10-0489

COMPLAINT

Complaint is made against Respondent as follows:

GENERAL ALLEGATIONS

1. At all times relevant, Respondent Brannan was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on October 19, 1996.

2. At all times relevant, Respondent Whiting was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on October 22, 2002.

COUNT ONE (File no. 10-0488 – Brannan; 10-0489 - Whiting)

3. Respondent Whiting is the elected Apache County Attorney.

4. As the elected Apache County Attorney, Respondent Whiting has management and supervisory authority over the Apache County Attorney's Office, its attorneys, (including Respondent Brannan), and its non-attorney staff.

5. Respondent Brannan is the Chief Deputy County Attorney for the Apache County Attorney's Office.

6. As the Chief Deputy County Attorney, Respondent Brannan has management and supervisory authority over the Apache County Attorney's Office, (subject to Respondent Whiting's superseding authority), its attorneys and its non-attorney staff.

7. In or about September of 2009, Joseph Roberts ("Defendant Roberts") was charged in with conspiracy to commit first degree murder, concealment of a dead body and multiple counts of hindering prosecution in Apache County.

8. On or about September 30, 2009, David J. Martin ("Attorney Martin") was appointed as counsel for Defendant Roberts.

9. By February 4, 2010, Respondents Whiting and Brannan were aware that Defendant Roberts was represented by Attorney Martin, as Attorney Martin had appeared in the matter and communicated with Respondents.

10. A preliminary hearing was set for February 5, 2010 in Defendant Roberts' case.

11. On or about February 4, 2010, Respondents Whiting and Brannan authorized Apache County Attorney's Office Investigators Brian Hounshell ("ACAO Investigator Hounshell") and Jerry Jaramillo ("ACAO Investigator Jaramillo") to visit Defendant Roberts in the Apache County Jail.

12. When ACAO Investigator Hounshell asked Respondents Whiting and Brannan about whether Roberts' attorney, Attorney Martin, would need to be present for the visit, Respondents Whiting and Brannan advised ACAO Investigator

Hounshell that Defendant Roberts' attorney did not need to be present as long as ACAO Investigator Hounshell mirandized Defendant Roberts.

13. On February 4, 2010, ACAO Investigators Hounshell and Jaramillo visited Defendant Roberts in the Apache County Jail.

14. Defendant Roberts' attorney, Attorney Martin, was not present for the visit, nor was he informed of the visit ahead of time.

15. The visit lasted approximately eight minutes.

16. ACAO Investigator Hounshell tape recorded the visit.

17. During the visit, ACAO Investigator Hounshell made several statements to Defendant Roberts about the pending case that appeared to be calculated to persuade Defendant Roberts to waive his preliminary hearing and/or accept a pending plea offer, including but not limited to:

- a. "You have an option to go to Preliminary Hearing. You have an option to waive it tomorrow. If we go to Preliminary Hearing tomorrow, it will be a tougher road for you. What I mean by that is, right now they've made some offers to you about doing 25 years, not getting a life sentence. This could be possibly handed down by a judge if you are convicted. That we are not going to seek a death penalty against you. There are benefits for you by not going to Preliminary Hearing... Inmon will probably be sentenced to 25. So, you, by not entering into a deal or at least entertaining the thought of what they are offering you on the 25 years right now, potentially you could more time than Inmon. You could do a life sentence. A natural life sentence. You could possibly, they could possibly seek the death penalty..."

- b. "...I was working with them on that interview where you admitted to shooting the gun at Stoney. So, the evidence is there for the Preliminary Hearing, and it will pan out tomorrow one way or the other. Um, we feel very confident that we will bind you over with no problem. If you are interested in working any type of a deal before we go to Preliminary Hearing, you need to contact your attorney today so you can work it out with them. If not, it's your decision to move forward, but we're going to mention to the judge, on, on, on the record before the Preliminary Hearing that we offered you 25. And, and that's coming off the table. And we could seek natural life, or the death penalty. I just want you to know that, I want to be up front with you, to make sure you understand that might happen, if we go through with the Preliminary Hearing..."
- c. "As far as your wife, I understand she had a baby... See, I don't, that's what I'm saying, I don't know much about your case, I'm sorry you guys lost the baby. We haven't charged your wife yet. OK? ...I mean, about Achten, she was there, by your admission and by Inmon's admission. So that's, that's another situation that you may be dealing with at a later date... So the investigation is still ongoing. But I want you to know if we go through Preliminary Hearing tomorrow, our deals are off the table..."

d. "23, 33, 43, 47, 48 years old, you'd be out... So there'd be life to live after you did your sentence, if you choose to do that. You'll still be in, probably reasonably in good health and live a life. But if you take the risk of a life sentence or lethal injection, if they decide to pursue the death penalty ... that is something you'll have to deal with. So, you know we're not here promising you anything, we're not here trying to talk you either way, either way, because we're prepared to go to Preliminary Hearing to bind you over to Superior Court... We have no problem doing that. But if you want to help yourself on a deal, then you might want to get a hold of your attorney and discuss a few things... And if you intend to go tomorrow, then that's fine, that's your right. If you don't, then get a hold of your attorney today. And then we will talk with your attorney and try and set up some type of deal to eliminate a natural life sentence being pursued or the death penalty. It's up to you."

18. Attorney Martin did not learn of the ACAO Investigators' visit with his client, Defendant Roberts, until February 5, 2010, the day of the preliminary hearing.

19. Defendant Roberts did not waive his Preliminary Hearing, nor did he accept the State's plea offer.

20. On or about February 5, 2010, the preliminary hearing was held in Defendant Roberts' case.

21. ACAO Investigator Hounshell testified at the hearing.

22. During his testimony, ACAO Investigator Hounshell freely admitted that he had met, and spoken with, Defendant Roberts in jail on the previous day (February 4, 2010), that Respondents Whiting and Brannan had authorized the visit, that Respondents Whiting and Brannan were aware Defendant Roberts was represented by Attorney Martin, and that Respondents Whiting and Brannan had advised the ACAO Investigators that Attorney Martin did not need to be present for the visit.

23. Defendant Roberts' wife was arrested at the preliminary hearing.

24. On or about February 26, 2010, Attorney Martin filed a motion to Dismiss based upon prosecutorial misconduct.

25. On or about June 8, 2010, Judge Donna Grimsley ("Judge Grimsley") entered an order finding a willful abridgement of Defendant Roberts' Sixth Amendment rights and disqualifying the Apache County Attorney's Office from the case.

26. Subsequent to the Apache County Attorney's Office's disqualification, the Maricopa County Attorney's Office took over prosecution of Defendant Roberts' case.

27. The Maricopa County Attorney's Office filed a response to Attorney Martin's Motion to Dismiss and the issue was fully litigated.

28. On or about January 18, 2011, Judge Grimsley entered a ruling in the matter finding that Defendant Roberts' Sixth Amendment rights were violated by Respondents' actions.

29. Judge Grimsley found that the damage done to the attorney-client relationship was prejudicial and irreparable.

30. Accordingly, Judge Grimsley ordered the charges against Defendant Roberts be dismissed **with** prejudice, and Defendant Roberts was released from custody.

31. Respondents' conduct as described in this count violated the following Rules of Professional Conduct:

- a. **ER 4.2** – In representing a client, Respondents communicated about the subject of the representation with a party they knew to be represented by another lawyer in the matter.
- b. **ER 5.3(c)** – Respondents are responsible for the conduct of another person that would be a violation of the Rules of Professional Conduct if engaged in by Respondents since: (1) Respondents ordered or, with knowledge of the specific conduct, ratified the conduct involved.
- c. **ER 8.4(a)** – Respondents violated or attempted to violate the Rules of Professional Conduct, knowingly assisted or induced another to do so, or did so through the acts of another.
- d. **ER 8.4(d)** – Respondents engaged in conduct prejudicial to the administration of justice.

DATED this 1st day of March, 2011.

STATE BAR OF ARIZONA

Stephen P. Little
Staff Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 1st day of March, 2011.

by: _____
SPL/ rtb