FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against MITCHELL ALAN ROBINSON,
a Minnesota Attorney,
Registration No. 0281359.

PETITION FOR DISCIPLINARY ACTION

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on January 14, 1998. Respondent currently practices law in Minneapolis, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

Respondent's history of prior discipline, including admonitions, is as follows:

A. On April 7, 2010, respondent received an admonition for failing to obtain a written agreement signed by a client for the advance payment of nonrefundable fees for representation in a felony criminal matter and a revocation of driving privileges matter, in violation of Rule 1.5(b), Minnesota Rules of Professional Conduct (MRPC).

B. On March 19, 2013, respondent received an admonition for failing to hold a $40,000 advance fee payment in a trust account until it was earned, in violation of Wisconsin Rule of Professional Conduct SCR 20:1.15(b)(4).

FIRST COUNT

Maria Hernandez Matter

1. In 2001 and 2002, federal authorities began investigating Robert Fansler, of Camp Wood, Texas, on suspicion that he and members of his family were engaging in narcotics smuggling.

2. According to a court finding, after a search of Fansler's property,

> [A]pproximately thirty guns and nearly half a million dollars in cash were found. Authorities also found notebooks, address books, and documents at the home. These items contained names, addresses, phone numbers, and notations, presumably reflecting Fansler's contacts and monies owed or paid for narcotics.

3. Fansler and several members of his family were arrested and indicted on various federal charges. Fansler and several others pled guilty and cooperated with authorities.

4. Documents found in Fansler's home, along with statements made by those who cooperated with the prosecution, implicated Rutilio Hernandez and his wife, who was later represented by respondent. Her full name is Maria Antonia Topete Hernandez ("Maria Hernandez").

5. The Hernandezes lived on a twenty-acre ranch at 41721 Road 168 in Orosi, California ("Orosi ranch"), from 1990 until March 2000. The Hernandezes, along with Maria Hernandez's brother, Jose Topete, bought the property in 1990.

6. The Orosi ranch had two houses located on it, a larger one and a smaller one. The Hernandezes lived in the smaller house. The previous owners of the property, the Hayakawas, lived in the larger house until May 1991.

7. In July 1991, Francisco Topete, Maria Hernandez's other brother, moved into the larger house with his wife, Maria Trinidad Pena Topete ("Maria Topete"), and their children. Maria Topete was also known as "Trini."

8. In December 2002, the Hernandezes were indicted on various criminal charges in federal court for the Western District of Texas. In October 2003, they were charged in a six-count third superseding indictment that included the following: (1) conspiracy to possess with the intent to distribute over 1,000 kilograms of marijuana; (2) conspiracy to import over 1,000 kilograms of marijuana from Mexico; (3, 4, 5) three counts of conspiracy to launder money; and (6) conspiracy to use a firearm during, and to possess a firearm in furtherance of, a drug trafficking crime.

9. The Hernandezes' trial was held on January 21-26, 2004. Maria Hernandez was represented by respondent, and Rutilio Hernandez was represented by his own attorney. Fansler was a fugitive and did not testify.

10. Maria Hernandez paid respondent $50,000, which covered only respondent's fee. Maria Hernandez paid no additional money to respondent for costs.

11. Respondent did not hire a private investigator in Maria Hernandez's case because he felt it was not necessary. Respondent believed the government's case was weak, largely because of the apparent unavailability of Fansler as a witness at trial.

12. Respondent's trial preparation was limited to reviewing discovery from the government, meeting once briefly with Maria Hernandez at court just before trial began, and speaking with her by phone. Respondent did not review the discovery with Maria Hernandez or provide her with copies of it.

13. Respondent did not interview any witnesses in preparation for trial. Respondent presented no evidence or testimony at trial on Maria Hernandez's defense, including evidence about the "two Marias" or evidence regarding the residences of Rutilio and Maria Hernandez (*see* ¶ 18 below).

14. The Hernandezes were convicted on all six counts, based primarily on the testimony of various Fansler family members, testimony of a co-defendant named Sebastian Salazar, phone records, a claim for a lost package (discussed below), and other evidence found in Fansler's home.

15. Rutilio Hernandez was sentenced to six concurrent terms of 240 months of imprisonment and six concurrent terms of five years of supervised release. Maria Hernandez was sentenced to six concurrent terms of 204 months of imprisonment and six concurrent terms of five years of supervised release. The Hernandezes appealed their convictions to the U.S. Fifth Circuit Court of Appeals. The Court of Appeals affirmed the convictions and sentences on July 19, 2006.

16. In May 2007, the Hernandezes retained new and separate counsel and filed a joint "Petition to Vacate Judgment/Conviction/Sentence." The petition alleged, among other things, that respondent's representation of Maria Hernandez was "deficient." The petition requested that the Hernandezes' convictions be reversed or that the court hold an evidentiary hearing on their claims.

17. United States Magistrate Judge Collis White held an evidentiary hearing on the Hernandezes' petition on March 9, 2011. Respondent and other witnesses testified at the hearing.

18. Hernandez alleged that respondent's representation at trial was deficient in numerous ways, including the following:

a. Respondent failed to explain to the jury that $125,000 in cash sent by Fansler to "Maria Pena" at 41721 Road 168, Orosi, California, was not sent to her but to the other Maria;

b. Respondent failed to introduce evidence that the Hernandezes moved away from the Orosi property in September of 2000 and Maria Trinidad Pena Topete was the sole owner of the Orosi property at the time that Robert Fansler mailed the $125,000 to "Maria Pena" in 2001. Respondent presented no witness or document evidence, such as utility bills, phone records, and statements from neighbors that Maria and Rutilio Hernandez had moved away from the Orosi property to Dinuba, California in March 2000. Rather, respondent stipulated with the government that Maria and Rutilio Hernandez lived at the

Orosi property in July 2001 when she and Rutilio Hernandez, in fact, moved to Dinuba, California in March 2000.

c. Respondent failed to explain that Maria Trinidad Pena Topete and her three children lived on the same property as the Hernandezes, so either Maria Hernandez or Maria Trinidad Pena Topete could have been the intended recipient of any mail sent to that address;

d. The jury was not informed of surname usage in the Hispanic culture, and was therefore led to believe that "Maria Hernandez" was also "Maria Pena";

e. Respondent failed to contact Maria Trinidad Pena Topete in order to interview her prior to the trial;

f. Respondent failed to present evidence of the (allegedly sexual) relationship between Maria Trinidad Pena Topete and Robert Fansler, as well as evidence that Maria Trinidad Pena Topete and Fansler were living and working together;

g. Respondent failed to introduce evidence that Fansler parked his trailer near Maria Trinidad Pena Topete's house when he would visit Orosi, California; and

19. On August 2, 2011, Judge White issued a report and recommendation, recommending that the Hernandezes' claims of ineffective assistance of counsel be denied for all but one claim: that Maria Hernandez's counsel (respondent) failed to present evidence at trial of another Maria—Maria Trinidad Pena Topete. Judge White found that such failure was prejudicial to Maria Hernandez's case. In other words, absent this failure, there is a reasonable probability that the jury would have acquitted Maria Hernandez of all six counts.

20. Judge White found that "had [respondent] presented readily available evidence of the other Maria, the dates when the other Maria and Petitioners lived at the

Orosi ranch, or even just effectively cross-examined witnesses, there is a reasonable probability that the outcome of the trial would have been different." Judge White advised the district court to vacate Maria Hernandez's sentence and grant her a new trial.

21. With respect to Rutilio Hernandez, Judge White found no deficiencies in counsel's performance that would rise to the level of ineffective assistance of counsel and therefore recommended that the district court affirm his conviction.

22. In an order dated March 31, 2014, United States District Judge Alia Moses adopted in full Judge White's report and recommendation.

23. In particular, Judge Moses noted the following:

a. One of the key pieces of evidence introduced against Maria Hernandez was a claim for $125,000 that Robert Fansler had filed with the United States Postal Service on November 5, 2001.

b. On July 18, 2001, Fansler had mailed a parcel containing $125,000 in cash to "Maria Pena" at 4721 Road 168, Orosi, California, 93647. The parcel never arrived at its destination, prompting Fansler to file a claim for the lost package with the United States Postal Service.

c. Felix Figueroa, a postal inspector who was called to testify at trial, stated that the original Express-Mail receipt indicated that the package was sent to "Maria Pena." However, the only piece of evidence introduced at trial was the claim form filed later by Fansler, which listed "Maria" at 41721 Road 168, Orosi, California, as the recipient of the package.

d. A copy of the original mailing receipt, which revealed that the actual addressee of the original package went by the full name "Maria Pena," was never admitted as evidence at trial.

24. In Judge Moses' March 31, 2014, order, she vacated Maria Hernandez's conviction and sentence and granted her a new trial.

25. On April 8, 2014, the prosecution moved to dismiss the indictment against Maria Hernandez. Judge Moses granted the motion and dismissed the indictment on the same day.

26. Respondent's conduct in failing to competently and diligently represent and communicate with Maria Antonia Topete Hernandez violated Rules 1.1, 1.3, 1.4(a)(3), and 8.4(d), Minnesota Rules of Professional Conduct (MRPC).

SECOND COUNT

Marco A. Arevalo-Santiago Matter

27. Marco A. Arevalo-Santiago ("Arevalo") is a native and citizen of Mexico. He was born on March 27, 1987.

28. Arevalo entered the United States "without inspection" in or about 2001 and has remained in the United States since that time. He received "Deferred Action for Childhood Arrivals" on September 16, 2013.

29. On September 22, 2014, Arevalo pled guilty to two counts of criminal sexual conduct in the fifth degree in Dakota County District Court. Arevalo was sentenced on December 9, 2014, and taken into U.S. Immigration and Customs Enforcement (ICE) custody and placed in removal proceedings. Arevalo was kept at the Sherburne County jail.

30. Members of Arevalo's family met with respondent on December 10, 2014, to discuss the possibility of representation of Arevalo in the criminal and immigration matters. Although respondent was very experienced in handling criminal matters, he had never represented a client in an immigration matter.

31. Respondent presented Arevalo's family with a retainer agreement that provided for a flat fee of $10,000 for representation in "criminal sexual conduct/immigration." Complainant's father, Maurilio Arevalo, signed the agreement and dated it December 10, 2014. Respondent was paid $5,000 at that time and $2,000 on January 12, 2015.

32. Respondent contacted Arevalo's previous criminal defense attorney, David Reyes, and reviewed Arevalo's criminal court file. Respondent determined there was not a meritorious basis to seek to withdraw or overturn Arevalo's guilty plea.

33. Respondent represented Arevalo at two "master calendar" hearings in immigration court. At the first hearing, held on January 6, 2015, respondent received a continuance in order to prepare an application for relief.

34. Respondent visited Arevalo in jail once, on January 12, 2015, for 15 or 20 minutes. Respondent presented Arevalo with immigration form I-589, "Application for Asylum and for Withholding of Removal." Respondent completed the application, reviewed it with Arevalo, and had him sign it.

35. In order to qualify for asylum or withholding of removal, Arevalo was required to demonstrate that he is a refugee who is unable or unwilling to return to Mexico because of persecution or a well-founded fear of persecution, and that one or more factors, including membership in a particular social group, was at least a central reason for Arevalo's fear of persecution. However, respondent answered "no" to all of the questions on the application that asked about fear of persecution or torture and did not otherwise identify on the form whether Arevalo feared persecution or torture in Mexico for any reason.

36. Respondent suspected that Arevalo is gay based on the facts of his recent criminal conviction. In fact, Arevalo's sexual orientation is bisexual and he is HIV-positive. Respondent did not discuss with Arevalo whether his sexual orientation might qualify as "membership in a particular social group" as a basis for asylum or whether Arevalo feared returning to Mexico.

37. Respondent did not answer the question on the asylum application that asked, "Why are you applying for asylum or withholding of removal under section 241(b)(3) of the Act, or for withholding of removal under the Convention Against

Torture? Check the appropriate box(es) below and then provide detailed answers to questions A and B below."

38. At the next master calendar hearing, on January 13, 2015, respondent entered the Form I-589 and other pleadings on Arevalo's behalf. Respondent designated Mexico as the country of removal, despite Arevalo's fear of returning to the country.

39. When the court asked why the asylum application answered "no" to all of the questions regarding fear of persecution or torture, respondent replied, "While in all candor I don't think he's an appropriate candidate for an asylum but it's my understanding that the 1-589, if asylum was denied, the paperwork would be appropriate for withholding of removal and that's what we are looking for." Respondent told the court that Arevalo has not expressed fear of persecution or torture if he returned to Mexico and the court did not question Arevalo about this.

40. When the court asked Arevalo whether he wished to appeal the court's entry of a removal order, Arevalo was confused, did not know how to respond, and looked to respondent for guidance. Arevalo waived the 30-day right to appeal and the court entered an immediate removal order. Respondent told the court he agreed with the waiver.

41. Arevalo retained Wilson Law Group and attorney Anne E. Parsons in place of respondent. Parsons did not immediately know that Arevalo had waived his right to appeal because neither Arevalo nor his family understood that.

42. On January 26, 2015, Parsons filed an emergency motion for stay of removal and emergency motion to reopen based on ineffective assistance of counsel. Parsons did not have time to also submit a new asylum application because Arevalo was within hours of departing for Mexico. The court granted a stay of removal on January 27, 2015.

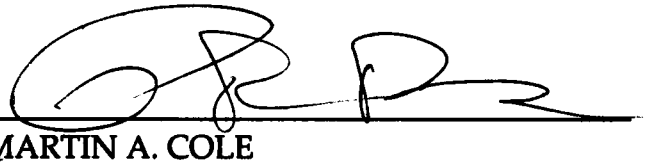
43. On March 5, 2015, an immigration judge granted Arevalo's motion to reopen his case. The Department of Homeland Security did not oppose the motion. An asylum hearing was held on April 13, 2015.

44. On May 4, 2015, immigration judge Kristin W. Olmanson issued a written decision in Arevalo's case, denying Arevalo's applications for relief. Judge Olmanson found Arevalo ineligible for asylum, ineligible for withholding of removal, and denied Arevalo's request for protection under the Convention against Torture.

45. Respondent's conduct in failing to diligently represent and communicate with Marco A. Arevalo-Santiago violated Rules 1.3 and 1.4(a)(2) and (3), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the RLPR, and for such other, further or different relief as may be just and proper.

Dated: July 28, 2015.



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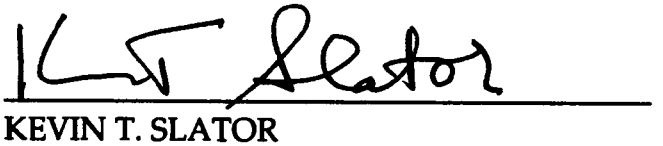

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