In the
Indiana Supreme Court

CASE NO. 53S00-1104-DI-244

IN THE MATTER OF)
)
DAVID E. SCHALK)
Attorney Number 15551-53)

RESPONSE TO HEARING OFFICER'S FINDINGS,
CONCLUSIONS AND RECOMMENDATION

David E. Schalk
1706 South Olive Street
Bloomington, IN 47401

812-336-9093
schalk@schalk.net

Attorney Number 15551-53

Disclaimer

I do not know how false statements accompanied by citations to the record which do not support those false statements came to be filed in the Indiana Supreme Court by the Disciplinary Commission on August 10, 2012 and again by the hearing officer on September 27, 2012 in the proposed findings, conclusions, and recommendation, and again in the same document only this time signed by the hearing officer. I doubt that the hearing officer knew that he was making false allegations with phony references, but I have no way of knowing.

One naturally tends to assume that counsel for the Disciplinary Commission knew about the false allegations and phony references in the document he filed with this honorable Court and tendered to the hearing officer for signature. But then the question arises: How could he have possibly imagined that he might get away with it?

I try to be polite in my comments. If I sometimes lapse into suggesting or saying that counsel for the Disciplinary Commission was dishonest, I apologize. It should be understood that all I have is the signed and unsigned documents, and no extraneous knowledge of what is at the root of this unseemly state of affairs. Maybe counsel for the Disciplinary Commission signed proposed findings, etc. which were prepared by an assistant and he didn't know the allegations were false and citations phony. Maybe this is a case of automatism, and counsel was not conscious of what he did. I don't mean to be cruel in my criticism of what purports to be his work product, and the work product of the hearing officer. This is being written at the eleventh hour, and I will have to file it shortly.

David Schalk's Commentary on the Proposed Findings, Etc.

The following is the Hearing Officers "Findings, Conclusions, and Recommendation" (hereinafter, "Findings, etc.") along with David Schalk's comments, written in the first person.

Procedural History

This matter was commenced with the filing of a Verified Complaint For Disciplinary Action. The Respondent filed an Answer. The Hearing Officer, Wayne S. Trockman, was duly appointed and discovery deadlines were entered. The final hearing of this matter was held on May 21, 2012 at the offices of the Disciplinary Commission. The Commission was represented by Seth T. Pruden, Staff Attorney. The Respondent appeared pro se.

Findings of Fact

General

1. Respondent is an attorney admitted to the Indiana Bar on October 15, 1990. (Admitted in Answer)

2. Respondent practiced law in Bloomington, Indiana at relevant times. (Admitted in Answer)

"*Private Sting Operation*"

3. In 2007, Respondent represented a client named Chad Pemberton in a case in which Pemberton had been charged with dealing or possession of methamphetamine. (Admitted in Answer; R. 14-15; Court of Appeals Opinion-Ex. 3)

4. Respondent learned that the confidential information involved in the Pemberton case was Bandon Hyde. (R. 17; Court of Appeals Opinion-Ex. 3)

COMMENT: Chad Pemberton was charged with dealing a small amount of methamphetamine within 1000 feet of a public housing project or playground. The case was charged as a Class A felony and litigated under Cause Number 53C02-0703-FA-00290 in the Monroe Circuit Court, Division 2.

5. Respondent sought to establish that Brandon Hyde was still dealing drugs by having friends of Pemberton engage in a drug deal with Hyde. (Admitted in Answer; R. 20; Court of Appeals Opinion-Ex. 3)

COMMENT: This is the beginning of an attempt to paint a false picture of what happened, and of what the record shows. It is true that I on or about June 27, 2007, I discussed with Leslie Pemberton the idea of her working under the direct supervision of a police detective, and that after she agreed, I asked Detective Cody Forston of the Bloomington Police Department's Special Investigations Unit if he would supervise a buy from a dealer named Brandon Hyde using Leslie Pemberton as the confidential informant. Detective Forston's sworn testimony confirming this is in State's Exhibit "1" which was admitted without objection at my bench trial. Trial Tr. p. 13, Ex. 1, Tr. p. 145. It is also true that prior to June 25, 2007, I discussed the possibility of making a buy from Brandon Hyde with Lisa Edwards, again in conjunction with a police agency. I wanted evidence of Brandon Hyde's drug dealing for use in a jury trial so the more documentation of a buy the better. Tr. p. 13, 41. I was not trying to have friends of Chad Pemberton "engage in a drug deal with Hyde" under my sole supervision. I would have preferred not to be involved at all.

The first time anything resembling my "having friends of Pemberton engage in a drug deal with Hyde" arose was on June 25, 2007 after Lisa Edwards called, a week

prior to Chad Pemberton's scheduled trial, and astonished me by saying she intended to obtain marijuana from Brandon Hyde in one hour. Tr. pp. 28, 34. I had previously asked her if she would be willing to get involved with the police in proving that Hyde was dealing and she emphatically declined, not wanting to be known as a "snitch." Trial Tr. p. 91. On June 25, after Edwards told me she was going to Brandon Hyde's abode to obtain marijuana from him, I asked her to meet me at a restaurant first so I could provide her with a digital voice recorder. Tr. p. 37,39. At the meeting, it occurred to me that I could write down the serial numbers of some currency the way police detectives do and it could be used for the buy. Tr. 39. I wrote down serial numbers and gave two hundred dollars in recorded currency to Ms. Edwards' companion, Roger Grubb. Tr. p. 38. I encouraged and facilitated a drug transaction at that time, but I did not plan it or think that anything like it would happen prior to the phone call from Edwards and the impromptu meeting that followed, both on June 25, 2007. I recall mentioning at that meeting that the police should be involved, but that is not audible in the recording I made. Lisa Edwards indicated that she was opposed to involving the police at that time, so I let things proceed hoping it would help Chad Pemberton.

The State's best offer a week prior to the scheduled trial was a fully executed twenty year sentence, but amidst the turmoil that ensued after my meeting with Lisa Edwards, Chad Pemberton pleaded guilty to a lesser charge and was sentenced to eight years of incarceration. Pemberton's good time credit was revoked by the parole board after his resease from prison and he currently resides at the Wabash Valley Correctional Facility with an earliest possible release date of September 9, 2013.

I will explain later why I strongly believe that encouraging, facilitating, and participation in drug sting operations is not, and should never become the sole prerogative of law enforcement officers. It is also a fact that I have been a deputy sheriff ever since Monroe County Sheriff Jim Brown appointed me and I was sworn into the office of deputy sheriff for an indefinite term, a term similar to that of a paid deputy which continues indefinitely unless and until an elected county sheriff revokes my credentials or I die.

I don't think finding "5" was admitted in my answer. The citation doesn't specify which answer or answers supposedly contain the alleged admission.

With respect to Exhibit "3," the Court of Appeals opinion in State v. Schalk, Finding Number "5" does not state facts relevant to my conviction for the misdemeanor of attempted possession of marijuana between June 23 and June 25, 2007, or relevant to the affirmation of that conviction by the Court of Appeals in Exhibit "3", so even if exhibit "3" can be read to say what the hearing officer says in Finding Number "5," it would be hearsay within hearsay and of negligible probative value.

"R. "designates the transcript of the hearing conducted in this matter, so "R.20" refers to page 20 of that transcript . Saying that page "20" of the transcript says what is alleged in finding "5" demonstrates a reckless disregard for the truth (or worse) on the part of the Disciplinary Commission attorney who wrote it; and it illustrates the negligence of the hearing officer who rubber stamped the hearing officer's proposed findings, conclusions, and recommendations. The Disciplinary Commission's proposed findings, conclusions, and recommendations were filed on August 10, 2012,

and the document is included with the “Brief of Respondent” as Exhibit “A”.

The first time anything resembling my “having friends of Pemberton engage in a drug deal with Hyde” arose was on June 25, 2007 after Lisa Edwards called, a week prior to Chad Pemberton’s scheduled trial, and astonished me by saying she intended to obtain marijuana from Brandon Hyde in one hour. I had previously asked her if she would be willing to get involved with the police in proving that Hyde was dealing and she emphatically declined, not wanting to be known as a “snitch.” On June 25, after Edwards told me she was going to Brandon Hyde’s abode, I asked her to meet me at a restaurant first so I could provide her with a digital voice recorder. At the meeting, it occurred to me that I could write down the serial numbers of some currency the way police detectives do and it could be used for the buy. I did so and gave two hundred dollars in recorded currency to Ms. Edwards’ companion, Roger Grubb. I encouraged and facilitated a drug transaction at that time, but I did not plan it or think that anything like it would happen prior to the phone call from Edwards and the impromptu meeting that followed on June 25, 2007. I recall mentioning at that meeting that the police should be involved, but that is not audible in the recording I made. Lisa Edwards was opposed to that, so I let things proceed hoping it would help Chad Pemberton. The State’s best offer a week prior to the scheduled trial was a fully executed twenty year sentence, but amidst the turmoil that ensued after my meeting with Lisa Edwards, Chad Pemberton pleaded guilty to a lesser charge and was sentenced to eight years of incarceration. Pemberton’s good time credit was revoked by the parole board after his resease from prison and he currently resides at the Wabash Valley Correctional Facility with an earliest possible release date of September 9, 2013.

6. Respondent first spoke to Pemberton's mother about the possibility of trying to prove that Hyde was still dealing drugs. He also spoke with Pemberton's sister, a minor, about whether she or someone she knew would be willing to buy some drugs from Hyde. The Respondent iterated to her that the amount purchased should be large enough to be a felony amount to make the evidence "more reliable." (R. 21-25; See Also, Admission in Answer to Verified Complaint; Court of Appeals Opinion- Ex. 3)

COMMENT: I don't know why it says "first" mentioned this to Pemberton's mother.

The only time I asked Pemberton's sister if she would be willing to make a buy was when I asked her if she would be willing to make a buy under the supervision of the Bloomington Police Department. She said she would so I called and found out that Cody Forston was the only narcotics detective available since the other were involved in training. He said he would not do it because, among other things, it would be a conflict for him to help me defend Chad Pemberton. I thought that would most likely be his reaction. Cody Forston confirmed this at a hearing conducted to determine if I should be removed as Pemberton's lawyer. The hearing was held on June 29, 2007 in the Monroe Circuit Court in the case of State v. Chad Pemberton, Cause Number XXXXX.

11. Respondent first gave the tape recorder to the juvenile, but it was too large for him to conceal. He then gave the tape recorder to Grubb (R. 43) along with $200 for the drug purchase. The respondent wrote the serial numbers of the bills down, presumably to be able to trace the funds later.[1] (Court of Appeals Opinion, R. 35-37;

Admitted in Answer to Verified Complaint)

COMMENT: Reading this, one would think that the statement, “Respondent first gave the tape recorder to the juvenile, but it was too large for him to conceal” rephrases or repeats something in Exhibit “3,” the *Schalk* opinion. It is nowhere to be found! So we turn to pages 35, 36, and 37 of the transcript of the hearing. There is nothing at all about giving the tape recorder to the juvenile or it being too large for him to conceal, but later in the transcript we find this:

23 Q. Roger Grubb took the recorder from you, is that

24 correct?

25 A. Yes

1 Q. Did they try to put it in the pocket of the 15-

2 year-old boy?

3 A. No, I don't think that ever even happened.

4 Q. Somebody testified to that, though, didn't they?

5 A. Well, they may have some crazy story and then

6 even the prosecutor didn't follow up on that.

7 Q. But someone did testify to that, that someone

8 tried to put the tape-recorder in his pocket and it

9 wouldn't fit, somebody did testify to that?

10 A. No, I don't think so.

11 Q. No one made that statement to the police?

12 A. The officer who very demonstrably and clearly

13 committed perjury in the Probable Cause Affidavit wrote

14 something to that effect in there, I'm pretty sure.

15 Q. Okay, so in some police report that is a

16 statement that the policeman made, correct?

17 A. Right, that's right.

Tr. pp. 42,43.

The unfounded and untrue statement, “Respondent first gave the tape recorder to the juvenile, but it was too large for him to conceal.” serves a purpose in the hearing officer’s attack on me. This is the lead-in to the first paragraph of the section captioned “FINDINGS AND CONCLUSONS REGARDING AGGRAVATING FACTORS AND/OR LACK OF INSIGHT” which says, in part, “Respondent placed three people at risk of arrest or physical danger due to his misguided attempt to create new evidence in his client’s case. The fact that one of the three other persons was a 15-year old juvenile makes this factor even more significant.” There is no reference to the record here. The only references offered in support of the false allegation that I placed a juvenile at risk are “R. 21-25; See Also, Admission in Answer to Verified Complaint; Court of Appeals Opinion- Ex. 3” in allegation “6” above. And then, this leads into the crescendo under the caption, “RECOMMENDATION OF THE HEARING OFFICER” where we read, “Asking a 15 year old to buy pot for any purpose is profoundly wrong, but intentionally asking him to tape record a transaction with a known drug dealer is unfathomable. Drug dealing is a dangerous activity at any level. Respondent knew Brandon Hyde was a drug dealer and had sold his client

methamphetamine. What if the three people solicited for this stunt were found out while the transaction was ongoing?" This is false. It is rooted in Finding "6" with its deceptive citations to the record.

I will write about the lack of danger to the boy, or the adults for that matter, later. Counsel for the Disciplinary Commission thinks Chad Pemberton was in trouble because a confidential informant sold him some methamphetamine. If the hearing officer read and comprehended the Findings etc. that he signed, he must think so too. That shows lack of understanding on the part of counsel for the Disciplinary Commission, but it is his deviousness, and his recklessness in brazenly causing false information to this honorable Court in an effort to deprive me of the ability to nourish, educated, and provide a decent home for my eleven-year-old son that I find appalling. Yes, it was the hearing officer who signed the Findings etc., but he is just a rubber stamp for the Disciplinary Commission. It was counsel for the Disciplinary Commission who prepared the document for him to sign.

There is one more place to look for something supporting the finding, "Respondent first gave the tape recorder to the juvenile, but it was too large for him to conceal" and that is in the "Answer to Verified Complaint" where counsel would have you believe I admitted that this is true. Here is what we find in the "Answer to the Verified Complain":

> 10. On or about June 25, 2007, the respondent met with Edwards and Grubb and also a 15-year old boy and provided them with a tape recorder and $200 cash to purchase marijuana from the informant.
>
> Answer: Admit. Lisa Edwards said she intended to get marijuana from Brandon Hyde. I persuaded her to meet me at the Ellettsville Arby's restaurant to get a digital voice recorder. Once there, I realized I had two hundred in cash and, on the spur of the moment, I wrote down the serial numbers and provided the currency for the transaction. A boy named John Grubb, Roger Grubb's

nephew, came with Roger and Lisa Edwards. I did not know he existed until then. I was informed that Brandon Hyde had given him marijuana in the past. He and Roger Grubb made a false report to the police which included the allegation that I tried to recruit John Grubb to buy drugs from the informant. The fact that the reports contained outright lies was exposed. I gave the cash and recording device to Roger Grubb.

Again, counsel for the Commission if grossly negligent or else trying to deceive the hearing officer and this honorable Court. As is apparent from my answer, I did not say I "first gave the tape recorder to the juvenile, but it was too large for him to conceal." I did not give the digital recording device to the juvenile. I did not ask the boy to do anything. He was tagging along with Lisa Edwards and Roger Grubb on their trip to Brandon Hyde's house to obtain marijuana. I was not expecting Roger Grubb or his nephew to show up at the meeting. They were not going to Brandon Hyde's residence because of me. I could not have stopped them. Lisa Edwards told me the juvenile and Brandon Hyde had smoked marijuana together, and expressed displeasure about that fact at my trial. Trial Tr. pp. 96,97. My enquiries left no doubt in my mind that Hyde dealt drugs out of Edwards' and Grubb's trailer before and after June 25, 2007. Answer to Paragraph "8" of the Complaint. Edwards testified that she didn't know why she called and told me about their planned excursion. Here is the text of an exchange between me and Lisa Edwards at my trial:

Q Why did you call me up about noon on June the 25th 2007 and say we're going to buy some weed from Pablo in an hour?

A I'm not sure what my intentions were really.

Trial Tr. p. 95.

. Brandon Hyde was not a dangerous person. He was overweight and appeared to be in poor physical condition. His manner was not at all assertive or domineering. To my

knowledge, he possessed no weapons. With respect to Grubb and Edwards, he was like part of the family. The uncontroverted testimony at my trial was that the juvenile stayed in the car while Edwards and Grubb went inside Hyde's residence.

I am not insensitive to the plight of a fifteen-year-old boy with role models such as Hyde, Grubb, and Edwards. I could not have helped him by abandoning my efforts on behalf of Chad Pemberton, who was facing at least a decade in prison. The group was on its way to Brandon Hyde's residence. They detoured briefly to meet with me, but there was nothing I could have said to keep them from proceeding to Brandon Hyde's residence.

Counsel for the Disciplinary Commission wrote in "RECOMMENDATION OF THE HEARING OFFICER": "Asking a 15 year old to buy pot for any purpose is profoundly wrong, but intentionally asking him to tape record a transaction with a known drug dealer is unfathomable. Drug dealing is a dangerous activity at any level." Findngs, etc. p. 17. I didn't ask a fifteen-year-old boy to buy pot, nor did I ask a fifteen-year-old boy to tape record a transaction with a known drug dealer. These are fabrications. Saying these false statement find support in "Court of Appeals Opinion, R. 35-37; Admitted in Answer to Verified Complaint" is another fabrication.

as places where evidence of this exists. He doesn't cite the record or any authority for the proposition that drug dealing "is a dangerous activity at any level." Maybe he didn't make that one up; maybe he got that from watching gangster movies and police dramas on TV. It might surprise him to learn that some very gentle people are

involved in the distribution of psilocybin mushrooms, LSD, marijuana and even cocaine and heroine. The drug dealers I have encountered in my profession are mostly people who crave drugs and sell them in order to maintain a supply for themselves. All kinds of people do this, including idealists, vegans, and pacifists.

12. Edwards inquired of the respondent whether she could get in trouble for buying drugs and Respondent replied that they would not. (Admission in Answer to Verified Complaint; R. 37)

I told Edwards, based on my reasonable, good faith belief, that if she handed all of the marijuana she acquired over to the police it would be outrageous for the authorities to retaliate against her. I truly believed that her actions would be lawful, as I explain in the Brief of Respondent. Comment "3" under Rule 8.4 of the Indiana Rules of Professional Conduct seems relevant. It says, "A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law."

13. Edwards and Grubb then left and later told the Respondent they had purchased $200 worth of marijuana from Hyde. They handed Respondent a folded newspaper that they represented (falsely it turns out) to contained the drugs. (Court of Appeals Opinion- Ex. 3; R. 38)

14. Respondent told Grubb and Edwards that because he was Pemberton's lawyer, he did not "want to be in the chain of custody" and therefore had them hold on to the drugs while he arranged with law enforcement to take possession of it. (R. 45)

15. Edwards testified subsequently at Respondent's criminal trial that she had purchased only $50 worth of marijuana, smoked it, and kept the rest of the money. (R. 44; Court of Appeals Opinion- Ex. 3)

16. Respondent could not find any law enforcement officers to take possession of the drugs and sought assistance of the court in the Pemberton case. (R. 45-46; Court of Appeals Opinion- Ex. 3; R. 50)

Respondent's criminal charges/ conflict with Pemberton case

17. On April 30, 2008, Respondent was charged with attempted possession of marijuana, a Class D Felony and Attempt to Possess Marijuana, a Class A misdemeanor, under Cause No. 53C05-0805-FD-000402 ("Respondent's criminal case"). (Admitted in Answer to Verified-Complaint, R. 49; See Ex. 2- Chronological Case History) The charges were based upon the transactions with Edwards, Grubbs and Hyde described above.

18. Respondent's own criminal case was pending at the same time his client Pemberton's case was pending. (R. 49)

19. The presiding judge in the Pemberton case (Judge Kellams) held a hearing to determine whether the Respondent could remain as Pemberton's lawyer or whether he was disqualified due to a conflict of interest. (R. 50)

20. Subsequently, Judge Kellams determined that Respondent had a conflict of interest and disqualified him from representing Pemberton. Although the Hearing Officer cannot speak for Judge Kellams, it is noted that because Respondent had been charged with a crime involving his representation of Pemberton, and because his undercover sting operation made him a material witness, there were at least two

reasons to disqualify him as Pemberton's lawyer.

COMMENT: Chad Pemberton had absolutely nothing to do with the attempted sting operation on Brandon Hyde. He told a detective all he knew about it, and it was nothing. The detective falsely swore in the probable cause affidavit (assuming he read the affidavit before signing it) in the case against me that Pemberton said he and I planned the sting operation. The detective recorded his interview of Chad Pemberton. I obtained the recording and played it at the detective's deposition, showing conclusively that the allegation in the probable cause affidavit was the opposite of the truth. There was no conflict of interest.

21. Subsequently, with different counsel representing him, Pemberton pleaded guilty to his methamphetamine charges. (R. 57)

22. Sometime after Pemberton had been convicted, the respondent reappeared as his attorney and filed a Petition for Post-Conviction Relief. (R. 57-58).

23. The Petition for Post-Conviction Relief was unsuccessful and Respondent appealed on behalf of Pemberton. (R. 58-59)

24. The Court of Appeals affirmed the denial of Post-Conviction relief, without prejudice, but disqualified the respondent from representing Pemberton due to the conflict of interest that Judge Kellams had identified in the case. (R. 59)

25. The attorney for the Disciplinary Commission sought to clarify what type of ruling the Court of Appeals made to which the respondent made the following answer:

"Yeah, it was arbitrary, capricious, contrary to law.It was--" (R. 59)

COMMENT: It was a travesty. I asked for a hearing in the trial court so I could prove there was not conflict of interest. The rules entitled Chad Pemberton to a hearing. When the trial court refused to conduct a hearing and arbitrarily denied Pemberton's petition, I filed an appeal on his behalf. I expected the case to be remanded so evidence could be developed and a record made in case it was necessary to take the matter up on appeal. Instead of remanding for an evidentiary hearing, the Court of Appeals arbitrarily decided the case against Chad Pemberton. The case was remanded with instructions to dismiss it without prejudice, allowing Chad Pemberton to re-file it without counsel or with new counsel. The Court of Appeals ruled that I had a conflict of interest and was disqualified from representing Chad Pemberton in any further proceeding. Whether or not there was a conflict of interest was the issue on which Chad Pemberton's case would turn. There was no reason to re-file the case because the issue had been arbitrarily decided by the Indiana Court of Appeals.

Two of the judges on the Pemberton panel ended up on the panel in my case. The Pemberton opinion implied that I committed a criminal offense on June 25, 2007. I would have presented evidence and argument demonstrating why I am sure I did not

break the law, if only the panel had remanded Pemberton's case for an evidentiary hearing.

26. Respondent agreed to waive jury trial in his own criminal case in return for dismissal of the Felony count. On November 17, 2009, a bench trial was held on the Respondent's criminal case (misdemeanor attempt to possess marijuana) and the court found the respondent guilty. (Admitted in Answer to Verified Compliant; R. 62, 65; Ex. 1)

27. Prior to sentencing, Judge Robbins ordered the probation department to prepare a presentence report. (R. 66) He also ordered as part of that report a referral to the Judges and Lawyer's Assistance Program (JLAP) (R. 66)

28. After sentencing, Judge Robbins sent a letter to the Disciplinary Commission. (Ex. 5, admitted, but submitted under seal). The letter pertains to his observations relevant to the sanction to be imposed in this case.

29. Respondent appealed his conviction. On February 28, 2011, the Court of Appeals affirmed the conviction. (R. 62; Court of Appeals Opinion -Ex 3.) Respondent moved for reconsideration. It was denied.

30. The Respondent filed a Petition for Transfer to the Indiana Supreme Court. It was denied. (R. 88)

31. The Disciplinary Commission filed its Verified Complaint for Disciplinary Action against Respondent on April 28, 2011. (See Verified Complaint, part of the Court's record)

Contentions of the Parties

32. It is the contention of the Commission in its Verified Complaint that the Respondent violated Rules 8.4(b) and 8.4(d) of the *Rules of Professional Conduct* as a result of his criminal conduct. It is also the contention of the Commission that there are aggravating factors associated with this matter that should result in a more severe sanction. It is also the contention of the Commission that Respondent lacks insight into his own misconduct, the standards expected of lawyers, the use of the legal process and other factors that should result in a sanction without automatic reinstatement. Facts supporting the Commission's contentions are set out below.

33. It is the contention of Respondent, in his Answer to the Verified Complaint, in various submissions to the criminal courts and other submissions in this proceeding, that he has not violated the *Rules of Professional Conduct* because he committed no crime. Despite having been convicted and having all of his appeals denied, Respondent insists that he was lawfully permitted to purchase (or have others purchase) drugs from Brandon Hyde as part of his defense of his client. Respondent also contends that his criminal charges were not only lawful, but were filed in retaliation by law enforcement for Respondent's challenge to the "narc squad." (See Answer to Verified Complaint; Report to Hearing Officer -Ex. 10, p. 8).

COMMENT: I contend that I did not violate the Rules of professional conduct by

committing a crime for two reasons. The first is that I reasonably and sincerely believed on June 25, 2007 that my actions were lawful. The Opinion published in *Schalk v. State*, 943 N.E.2d 427 (Ind. Ct. App. 2011), trans. denied. I know I acted in good faith, and the opinion reinforces my belief that my legal analysis at the time was reasonable. That is because I could not have anticipated the rationale given in the Opinion for the illegality of my actions. Prior to the publication of *Schalk, Id.,* the definition of "law enforcement officer" in conjunction with other statutory provisions, bestowed specified powers upon law enforcement officers, created a duty to sometimes obey law enforcement officers (Ind Code § 35-44.1-3-3), and increased the level of offense for transgressions against them. I, and I would think every other attorney in Indiana, would have thought that the definition of "law enforcement officer" had force and effect only when read in conjunction with another statutory provision or regulation implementing a statutory provision. *Schalk, Id.*, is still unique among the opinions published by our appellate courts in holding, in so many words, that a definition standing alone is a declaration of substantive law. The Opinion also seems to say that the police have extraordinary powers, exclusive only to them and others included in the definition of "law enforcement officer, that are not written anywhere in our statutes or regulations. I couldn't have foreseen this.

If the hearing officer means, "Respondent also contends that his criminal charges were not only **unlawful**, but were filed in retaliation by law enforcement for Respondent's challenge to the "narc squad" then he is mistaken. The charges were lawfully brought, but not to further the purposes of the marijuana prohibition. My actions were intended to remove some marijuana from the stream of commerce. I am

not sure how the decision was made to prosecute me. The police and some depupty prosecutors were mad at me for a while, but that had died down considerably. The charges were filed on May 5, 2008, just 18 days after I filed a petition for post-conviction relief on behalf of Chad Pemberton alleging that he and I had no conflict of interest and, therefore, there was no good reason to replace me and cause him to be deprived of the speedy trial he had requested. I don't have enough information on which to base a firm opinion as to why I was prosecuted. All I know is that it couldn't have been to counter the evil our legislature wanted to discourage when it prohibited the possession of marijuana.

> The Findings, etc. suggest that I lack insight into the fact that my actions were illegal. I therefore want to clarify my statement, "I did not think my conduct was illegal and now I am even more confident, if that is possible, that it wasn't." In light of the failure of the Court of Appeals to provide a sensible rationale for affirming my conviction, and its ignoring the argument I made, substitution one so lacking in merit that it would not have even occurred to me, I am convinced more than ever that my case was wrongly decided. To some extent at least, the opinion even proclaims a police state in Indiana. Moreover, if I am correct in thinking the Court of Appeals in Schalk created a new law, applying it to me *ex post facto*, then I didn't break a law that existed on June 25, 2007. And, if I am not mistaken in believing that my credentials as a duly appointed and sworn deputy sheriff who shall remain a deputy sheriff until "a successor shall have been duly appointed and qualified to office" have been in full force and effect since I took my oath and was appointed by Monroe County Sheriff Jim Young in 1985, then the *Schalk* opinion granted me, ex post facto, the authority to lawfully do as I did. Deputy sheriffs are included in the statutory definition of "law enforcement officer."
>
> However, I do not consider my misdemeanor conviction to be a nullity. I would very much like to see it reversed someday. If this honorable Court reconsiders its decision not to grant transfer, it could happen this year. A statement in the Court's Order in this matter saying the prohibition against possession marijuana was void for vagueness as applied to me on June 25, 2005, I could return to the trial court for post-conviction relief. For now, it is a fact that I am a convicted criminal, convicted on the basis of admitted facts. The Opinion that says those facts constitute a crime is the law of Indiana, and the conclusion that I committed a crime is an established fact.
>
> This seems more like existential philosophy than legal analysis. I just want the Court to know that my insight into the issue of my committing a crime is

reasonably acute. I am a convicted criminal, hoping my status will soon revert to the clear record I used to take for granted.

Aggravating Factors and Lack of Insight

34. In his Answer to the Verified Complaint for Disciplinary Action (Ex. 4), Respondent set forth a "Preface" consisting of criticisms of the prosecutor, trial judge, Attorney General and the Court of Appeals because of each of their failures to accept his "legal arguments" in his criminal case. The Preface begins as follows:

"It is very disheartening to have my professional conduct called into question by the filing of the formal complaint in this matter. At my trial, the judge and prosecutor did not address my legal argument, nor would they offer one of their own. On appeal, the Attorney General's argument was ridiculous and was not even mentioned by the Court of Appeals, which however published an Opinion with equally nonsensical justifications for affirming my conviction. The Court of Appeals crated new law by judicial fiat, but there is no way I or anyone else could have anticipated that the definition of "law enforcement officer" is actually an exclusive list of people who are authorized to enforce laws...The Court of Appeals Opinion is even more absurd than that...." (Ex. 4)

COMMENT: I have to wonder if counsel for the Disciplinary Commission thinks the best way for him to win approval for his work on this case is to fiercely defend the Court of Appeals and attack me for saying why it would have been impossible for me to anticipate that my actions would be said to be unlawful for the reasons given by the Attorney General or the Court of Appeals. Instead of providing conclusions of law which point out a flaw in my legal analysis, counsel just says it was an aggravating factor for me to state my case. "Ridiculous" and "nonsensical" would be inappropriate

exaggerations in some context. In my case, they I conveyed the reality of the situation precisely. Would “utterly devoid of merit” have been any better? Article 1, § 9 of the Constitution of Indiana states: “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” I stated by case to the Disciplinary Commission concisely and plainly, and instead of answering me in an intelligent way, counsel for the Disciplinary Commission attacks me for defending myself and seeks disciplinary sanctions.

35. In paragraph 4 of the Verified Complaint for Disciplinary Action, it was alleged that: "Pemberton discovered the identity of the informant and told the respondent, who then participated in a scheme to purchase drugs from the information, ostensibly as a means of discrediting him." (See Verified Complaint for Disciplinary Action)

36. In his Answer to the Verified Complaint for Disciplinary Action, Respondent replied to this accusation by stating "Deny" (which would have been a satisfactory response had it stopped there) but then proceeded to set forth personal conclusions and accusations against everyone connected with his criminal case. For example, Respondent stated:

"There is misconduct in this case, and it relates to the vindictive prosecution of me for doing my duty for my client. I broke no law and acted consistently with my oath as an attorney. ..It did not surprise me to be attacked by the local police, prosecutor and presiding judge in the Pemberton case. I am dismayed by what the Court of Appeals published in its Opinion. I deserve praise of the Disciplinary Commission..."(Ex. 4, p. 4-5)

COMMENT: Rule 8(B) of the Indiana Rules of Trial Procedure says, “A responsive pleading shall state in short and plain terms the pleader’s defenses to each claim asserted and shall admit or controvert the averments set forth in the preceding pleading.” Pemberton did not discover the identity of the informant. But this was a two part question, the second part being the allegation that I “participated in a scheme to purchase drugs from the information, ostensibly as a means of discrediting him.” “Scheme” is pejorative and “ostensibly” implies an ulterior motive. I let the commission know that I did not things the facts could be accurately understood in such a light. Often, a simple “Admit” or “Deny” are both uninformative or misleading. It amazes me that counsel for the Disciplinary Commissions repeatedle finds my defending myself to be an aggravating factor. I know he wanted me to negotiate an agreement with him, but that I could not do.

37. On or about May 11, 2012, Respondent submitted a "Report to Hearing Officer" during the pendency of this discipline proceeding. (Ex. 10; R. 69-70)

38. The "Report to Hearing Officer is does not address any particular procedural or factual assertion of the Commission and seeks no specific relief. However, Respondent made several statements intended merely to impugn the integrity of judges dealing with his cases. Respondent stated:

"I do not expect to call any witness to disprove the false hearsay evidence I expect to hear. For almost five years now, the retaliation against me for exposing the ongoing drug- dealing of Brandon Hyde has not involved criticizing me for what I actually did, but instead has been characterized by things such as (1) Judge Kellams imaginary conspiracy and related non- existent conflict of interest in my

representation of Chad Pemberton... (5) a strangely reasoned and illogical appellate decision containing factual errors tending to support the local imaginary conspiracy theory, an opinion authored by a Bloomington resident and joined in by two other judges who had already made up their minds in the Pemberton case; (6) and now these proceedings in which I am told the appellate decision in *Schalk v. State*, 943 N.E.2d 427 (Ind. Ct. App. 2011), trans. denied. is conclusive evidence..." (Ex. 10; R. 72)

COMMENT: This paragraph begins by saying my report "does not address any particular procedural or factual assertion of the Commission" The commission does not address the merits of the case I made in the "Report to the Hearing Officer" and elsewhere explaining why I say I did not violate Rules 8.4(b) and 8.4(d) of the Rules of Professional Conduct.

With respect to the two judges who had already come to the conclusion that my actions were criminal in the Pemberton opinion, counsel for the Commission could have pointed out that I said, "Now, I didn't say they didn't put a lot of deep thought into reconsidering it, but on the other hand I have no reason to think they did." Tr. p. 73. I also said, "They made up their minds once. I'm not saying they didn't reconsider. I don't know if they did or didn't, but they had already opined without hearing my arguments, without acknowledging them, that my actions were criminal." Tr. p. 74. Now, upon further reflection, I still think this is worth noting. I hoped the Commission would gain some insight into how all of this looks to me, and to other observers who think I have been treated unfairly but should have known: "You can't fight city hall."

39. Asked who the Bloomington appellate author was, Respondent replied “Ted Najam." (R. 73)

COMMENT: That is how I hear people refer to the Honorable Theodore Najum down here in Bloomington. No offense was intended. I gather from the caption and Paragraph “40” below that counsel for the Commission wants this honorable Court to view this as an aggravating factor.

40. Regarding the above statements, and similar statements made by the respondent in other submissions, the Hearing Officer finds and/or concludes:

a) The statements impugning the integrity of Judge Kellams are false or made with reckless disregard to their truth or falsity, as the Respondent offered no evidence to support them.

COMMENT: I didn’t violate any rules by anything I said with regard to Judge Kellams. It is common to list witnesses before knowing exactly what testimony one is going to elicit from them. It is easier to remove witnesses from a witness as a hearing or trial draws near than it is to add them, so prudent attorneys list witnesses with knowledge of relevant events even when they are less than certain that they will end up calling them. In reading the transcript, I am sad to say that the inquisitional tone of the hearing may have intimidated me at one stage. I am referring to this:

15 Q. Would he have some knowledge about why you were
16 charged with a crime?
17 A. I heard from one attorney that he heard from
18 another attorney over at the Justice Building that my
19 big problem was Judge Kellams and then eventually I got

20 charged, okay, that's all I know. I don't know

21 anything. That's pretty tenuous, pretty far out there,

22 but I've always wondered if he was at all involved in

23 any discussions. I don't know that that would be

24 improper, by the way.

25 Q. So your implication here is Judge Kellams may

1 have had something to do with the decision to file

2 charges against you?

3 A. Well, I didn't mean to imply that. I have to be

4 very cautious about that, but I was just curious and I

5 don't know if I would be crossing any lines by asking

6 him, but that was one of the things I had in mind when I

7 put him down on the witness list. I certainly would've

8 thought of that before I got to the hearing and asked

9 him anything that could get me in trouble for even

10 asking.

Tr. pp. 78, 79. "Get me in trouble for even asking." That is pathetic. That is what happens when one is incessantly attacked for the "aggravating factor" of putting things in context while trying to defend one's self.

b) The statements impugning the judicial integrity of the Honorable Ted Najam, and the other Court of Appeals judges were false or made with reckless disregard to their truth or falsity as the Respondent offered no evidence to support them.

COMMENT: Counsel for the Commission wrote, "Ted Najam." Maybe he should self-

report what he seems to believe is misconduct.

If counsel means that my saying the rationale for affirming my conviction is unprecedented in that it makes substantive law out of a mere definition impugns the judicial integrity of Judge Najum and the other judges on the Schalk panel, how does he then say that the my statement is “false or made with reckless disregard to their truth or falsity as the Respondent offered no evidence.” I cited the case. Is counsel for the Commission saying he knows of a case published before or since that does this? And if counsel is referring to the inconsistency between saying a definition is an exclusive list of categories of persons authorized to enforce the laws of Indiana and then, two paragraphs later, reciting verbatim Indiana’s citizen’s arrest statute which grants vast arrest powers to “any person,” then I would like to point out that he can find the proof in on pages 430 and 431 of *Schalk v. State*, 943 N.E.2d 427 (Ind. Ct. App. 2011), trans. denied. Counsel for the Commission seems to think my explaining why I could not have foreseen the rationale published in *Schalk, Id.*, is attorney misconduct. Neither he nor anyone else has said how I might possibly have foreseen this turn of events.

41. In his Report to Hearing Officer, Respondent stated, among other things: "...Adding insult to injury, the Court of Appeals falsely accused me [of] making the ridiculous argument that my actions are directly covered by the citizen’s arrest statute. That was easy for them to refute. They completely ignored the meritorious argument that I actually made."

42. Regarding the statements that the Court of Appeals made "false accusations" against the Respondent, the Hearing Officer finds and/or concludes that the statement is false or made with reckless disregard to its truth as Respondent offered no evidence to support it.

One need only compare my appellate briefs with the opinion at Schalk v. State, 943 N.E.2d 427 (Ind. Ct. App. 2011), trans. denied. I don't think counsel for the Commission has any doubt that this really happened. It did.

43. In his Report to Hearing Officer, the Respondent, in discussing why he listed on his witness list in this discipline case the three Court of Appeals judges who ruled on his criminal case, the respondent stated, in part:

"I listed the judges on the Court of Appeals as witnesses thinking I would need to cross examine the hearsay witnesses against me ["hearsay evidence apparently referring to the Court of Appeals Opinion in the Respondent's criminal case]...My letters to the judges are going into evidence. As stated in the letters [Written by the Respondent to judges Najam, Bailey and Darden of the Court of Appeals], two of them decided my actions were criminal before the case was even briefed." [Emphasis added] (Ex. 10, p. 7; See also R. 73)

44. As to the statement above that two Court of Appeals judges had already decided the case before it was briefed, the Hearing Officer finds and/or concludes such statements impugning the judicial integrity of those judges are false or made with reckless disregard for the truth. See In Re Wilkins, 777 N.E.2d 714 (Ind. 2002).

COMMENT: It is a demonstrable fact, readily verified by reading *Pemberton v. State*,

909 N.E.2d 517 (Ind. Ct. App. 2009) and noting that two of the judges were on the panel in *Schalk, Id.*

45. In the discovery phase of this discipline case, the Commission tendered Interrogatories to Respondent, who submitted answers under oath. (Ex. 14-1 and 14-2; R. 77).

46. In the Interrogatories, the Commission asked Respondent to set forth the expected testimony of each witness listed by the Respondent in his Witness list. (See Ex. 14-2, Question 2).

47. In response to the inquiry as to the expected testimony of Judge Kellams, whom the respondent had listed as a witness, the Respondent stated, among other things:

"I listed the Honorable Marc Kellams because he presided over the Pemberton case. *I have no direct or compelling circumstantial evidence that he was instrumental in the decision to file criminal charges against me... I have no direct evidence that Judge Kellams exerted an*

improper influence over the special prosecutor, and I am not saying that Judge Kellams is the sort of person who would ever consider doing such a thing. I listed him in order keep my options open, in case evidence supporting my speculation materialized. A captain at the county jail told me Judge Kellams ordered that I not be allowed to visit Chad Pemberton ... After all the work I had done to cause Judge Kellams to stop interfering with my communicating with Chad Pemberton, I was

disappointed to learn that he had resumed his efforts to keep me from visiting Chad Pemberton...My prosecution was an act of retribution carried out by people who seem to sincerely believe it is wrong to challenge the perception that the police enjoy extra-constitutional powers and privileges... (Ex. 14-2, pp. 5-7) (Italics not in the original).

48. The lengthy answer did not actually set forth any expected testimony of Judge Kellams, and therefore was not responsive to the question. However, Respondent stated that he believed ("speculated") that Judge Kellams had something to do with criminal charges being filed against him, but simply did not yet have the evidence to prove it. (See italics, above). The Respondent wanted to "keep his options open" by listing Judge Kellams as a witness for the clear purpose of asking him that very question.

COMMENT: Judge Kellams appointed the special prosecutor. I don't think that he would be precluded from speaking with him. Prior to subpoenaing him to testify, I would have asked Judge Kellams to tell me about any conversations he might have had with the special after I filed Chad Pemberton's petition for post-conviction relief and before. Counsel for the Commission apparently wants this Court to agree that it was misconduct for me to defend myself, or to keep my options open in preparation for the hearing.

49. When asked why he believed Judge Kellams was responsible for the charges, Respondent stated:

"I heard from one attorney that he heard from another attorney over at the Justice

Building that my big problem was Judge Kellams and then eventually I got charged,

okay, that's all I know. I don't know anything. That's pretty tenuous, pretty far out there, but I've always wondered if he was at all involved in any discussions...." (R. 78-80) "I've speculated that he might've had some influence on my getting charge...(R. 83)...I was thinking of fleshing out the picture. I thought maybe I could make a big presentation to show public policy, to show that really happened in this case, but I decided not to do all of that." (R. 83)

50. Based upon the Interrogatory Answer, and in totality with the other evidence, the Hearing Officer finds that the purpose of Respondent's answer was to malign the integrity of Judge Kellams, despite the admitted lack of evidence in support of his statement.

51. In addition to making false implications regarding Judge Kellams' integrity, Respondent admitted that he did not know what testimony to expect from Judge Kellams (R. 80-

81) Therefore, the Hearing Officer finds and/or concludes that listing Judge Kellams on his witness list served no purpose other than to give him the opportunity to ask Judge Kellams questions that had no bearing on this matter.

COMMENT: My conviction is considered by the Commission to be evidence of attorney misconduct. If it stemmed from my dutifully representing the interests of my client, even when it meant risking what I have been subjected to over the past five years, I think that would be relevant.

53. The Respondent listed numerous other witnesses on his witness list who had no evidence relevant to this proceeding. (See Ex. 13; 14-2). When pressed in his testimony regarding his interrogatory answer as to the expected testimony of those

witnesses, the respondent eventually admitted that virtually none of them had relevant evidence and that he had talked to none of them about the discipline case. (Ex. 14-2; R. 79-81)

COMMENT: This allegation is false. It is not supported by Exhibit 14-2 or pages 79, 80, or 81 of the hearing transcript.

54. On his witness list prior to the final hearing in this discipline case, Respondent listed James Kennedy, who is the Monroe County Sheriff. (Ex. 13).

55. In his Interrogatory Answers, Respondent stated that Judge Kennedy could confirm that Respondent was a duly appointed Deputy Sheriff (Ex. 14-2), which was a claim asserted by him and rejected by the Court of Appeals to support the proposition that he had not committed the crime of attempted possession of marijuana.

COMMENT: The part about the Court of Appeals is not true. The Court of Appeals said I waived the issue of my being a deputy sheriff and the Court of Appeals therefore declined to consider it.

56. The Disciplinary Commission sought to take the deposition of James Kennedy, and contacted him to schedule the deposition. (R. 98-105;

Ex. 9-1)

57. Sheriff Kennedy planned to attend some business in Indianapolis on a certain day and asked to have the deposition scheduled while he was in Indianapolis. **(R. 102)**

58. The Commission issued the Notice of Deposition for the date, time and place requested by Sheriff Kennedy. (Ex. 9-1)

59. Without contacting Sheriff Kennedy or the Disciplinary Commission to determine why the deposition was scheduled to be held in Indianapolis, the

Respondent sent a letter to Sheriff Kennedy on April 11, 2012 in which he offered to represent him to get the deposition moved. (Ex. 9-2; R. 97-98)

60. In his letter to Sheriff Kennedy, the respondent stated, among other things: "Dear Sheriff Kennedy:

I am sorry that Seth Pruden of the Disciplinary Commission has subpoenaed you to be deposed in Indianapolis. I looked up Rule 45 of the Indiana Rules of Trial Procedure...we don't have to go to Indianapolis for your deposition. I will gladly enter my appearance on your behalf and get the location of the deposition changed to your headquarters in Bloomington. Just say the word. I would be adequately compensated by not having to drive to Indianapolis and find a parking garage next Wednesday.

I don't think there is any good reason for taking your deposition....

Please let me know as soon as possible if you want me to have the deposition location changed..."

61. The Hearing Officer finds and concludes that, in light of the fact that Sheriff Kennedy was listed as a witness by the Respondent, telling that witness he would appear for him to affect the subpoena, in conjunction with his statement that there was "no good reason" to take the deposition, Respondent improperly attempted to get the witness to be uncooperative with the Commission.

COMMENT: I didn't want to drive to Indianapolis for the deposition and I thought it might also be inconvenient for Kennedy. I reminded him that Rule 45 (D)(2) of the Indiana Rules of Trial Procedure gave him the right to insist on the deposition being conducted in Monroe County and offered to have the location changed if he wanted

me to do that.

The idea that I might try to persuade Sheriff Kennedy to be uncooperative is absurd. This is from his deposition:

62. When confronted with the suggestion that a conflict of interest might exist by representing a witness in his own case or that he might be trying to interfere with the Commission's right to access to witnesses, the Respondent stated:

"Yeah, to get the deposition moved to Bloomington, I don't see anything wrong with it. don't know, is that improper?" (R. 100)

The following colloquy took place on the same subject:

Q. (Pruden) That's what I was asking. Do you see anything wrong with it...

A. (Respondent) No

Q. ..offering to represent him?

A. No, not in that context. I just said If you want, I'll get the thing moved if you'd like me to, that's all I wanted to do, that's the only purpose of it. If you want to stress the word "represent," I don't really know where you're going with it, but I asked him he wanted me to get it changed to Bloomington I'd be glad to.

Q. You didn't ask for him to get it changed. You said: "I will represent you to get it changed." You'll become his lawyer for that purpose, you'll engage in an attorney-client relationship with a witness in the case, isn't that what you offered to do?

A Not really, I didn't offer to advise him beyond sending him the rule.

Q. Well, you already advised him.

A. Yeah, advised him by sending him the rule. He's a lawyer, you know, I mean...

Q. I do know that.

A. Well, what's the problem? (R.100-101)

COMMENT: The idea that I would attempt to cause Sheriff Kennedy to be uncooperative with the Disciplinary Commission is absurd. All I did is offer to cause his deposition to be conducted in Bloomington so I wouldn't have to go to Indianapolis for it. During his deposition, he testified about his career as follows:

23 A BEFORE I WAS SHERIFF I WAS AT INDIANA UNIVERSITY
24 WHERE I WAS DIRECTOR OF THE UNIVERSITY POLICE. ALSO, I WAS
25 ASSISTANT VICE PRESIDENT FOR ADMINISTRATION.
5
1 Q APPROXIMATELY HOW LONG DID YOU WORK AT IU?
2 A IU WITH INTERVENING PERIODS OF OTHER OCCUPATIONS, 33
3 YEARS.
4 Q AND WHAT OTHER OCCUPATIONS DID YOU HAVE IN THOSE
5 INTERVENING YEARS?
6 A BEFORE THAT I WAS A UNITED STATES MARSHALL FOR THE
7 SOUTHERN DISTRICT OF INDIANA.
8 Q YOU WERE THE DISTRICT'S MARSHALL, CORRECT?
9 A CORRECT.
10 Q NOT A DEPUTY?
11 A NO, I WAS THE MARSHALL.
12 Q IS THAT A PRESIDENTIAL APPOINTMENT?
13 A THAT IS.
14 Q WHICH PRESIDENT APPOINTED YOU?
Page 4
Kennedy_Deposition.txt
15 A BUSH, GEORGE BUSH.
16 Q WHICH GEORGE BUSH?
17 A W.
18 Q WHAT YEAR DID YOU GET APPOINTED?
19 A 2002.
20 Q OKAY.
21 A I SERVED UNTIL 2005 WHEN I RESIGNED. PRIOR TO THAT I
22 WAS AT INDIANA UNIVERSITY. PRIOR TO THAT I WAS CHIEF OF
23 POLICE WITH THE CITY OF BLOOMINGTON.
24 Q WHEN WERE YOU CHIEF OF POLICE?
25 A 1996 TO 2000. AND BEFORE THAT I WAS, AGAIN, CHIEF OF
6
1 POLICE FOR THE INDIANA UNIVERSITY CAMPUSES AND PROFESSOR OF
2 CRIMINAL JUSTICE.

3 Q WHEN DID YOU TEACH CRIMINAL JUSTICE?
4 A 1972 TO 1990.
5 Q WHAT IS YOUR EDUCATIONAL BACKGROUND?
6 A I HAVE A MASTER OF SCIENCE DEGREE FROM INDIANA
7 UNIVERSITY IN BUSINESS, A JD DEGREE FROM INDIANA UNIVERSITY
8 SCHOOL OF LAW IN BLOOMINGTON.
9 Q AND YOU ARE A LICENSED ATTORNEY; IS THAT CORRECT?
10 A THAT'S CORRECT.
11 Q WHEN DID YOU GET YOUR LICENSE?
12 A 1968. RETIRED IN GOOD STANDING.
13 Q DID YOU PRACTICE LAW AT ANY TIME?
14 A YES, I DID. IN HAMMOND, INDIANA FOR THREE PLUS YEARS
15 WITH A FIRM ENTITLED SHROYER EICHORN AND MARLOWE.
16 Q SO OTHER THAN THE THREE YEARS -- OH, ANY MILITARY
17 SERVICE?
18 A YES. I RETIRED AS A COLONEL FROM THE ARMY OF THE
Page 5
Kennedy_Deposition.txt
19 UNITED STATES, 29 YEARS PLUS SERVICE.
20 Q WAS PART OF THE SERVICE RESERVES?
21 A YES, THE MAJORITY. TWO YEARS OF ACTIVE DUTY AND THE
22 REST WAS IN THE RESERVES.
23 Q WHEN DID YOU START YOUR -- I ASSUME YOUR ACTIVE DUTY
24 WAS FIRST?
25 A 1963 TO 1965.
7
1 Q AND YOU RETIRED AS A COLONEL.
2 A THAT'S CORRECT.
3 Q I DON'T NEED ALL OF YOUR MILITARY WORK HISTORY, BUT
4 WHAT WERE THE TYPE OF JOBS YOU HAD IN THE MILITARY?
5 A I WAS A MILITARY INTELLIGENCE OFFICE. I COMMANDED A
6 STRATEGIC INTEL AND ANALYTICAL UNIT BASED PRIMARILY IN
7 EITHER WASHINGTON OR CHARLOTTESVILLE, VIRGINIA.

The idea that anyone who knows Sheriff Kennedy would presume to try to persuade him not to cooperate with a judicial inquiry is truly absurd. I had listed him as a witness. He confirmed that my credentials have not been revoked, and his unsupported legal opinion that they expired is not evidence. He did his best to help the Disciplinary Commission, but showing a deputy card with an expiration date does nothing to prove that my credentials, which on their face say that I shall remain a deputy sheriff until “a

successor shall have been duly appointed and qualified to office," could possibly automatically expire.

63. During the course of the disciplinary case, when the final hearing had been set for a previous date, Respondent issued subpoenas for the appearance and testimony of Judges Najam, Bailey and Darden, the Court of Appeals panel that issued the opinion in Respondent's criminal appeal. (Ex. 8-1, 2, 3; R. 109-110)

64. Despite his claim that he wanted to get the facts straight in the Court of Appeals case, Respondent contradictorily insisted that the Court of Appeals decision did not turn on the facts. (R. 110-114)

COMMENT: "Facts" irrelevant to affirming my conviction were, according to counsel for the Disciplinary Commission, going to be used to prove alleged misconduct. There is no contradiction in what I said.

65. The purpose of the subpoena to the Court of Appeals judges was not to get the facts straight. Rather, it was the Respondent's desire to use the disciplinary case as an opportunity to "cross-examine them" regarding their legal decision in his case. (R. 110-112)

COMMENT: This is not true. I had asked counsel for the Commission how he planned to prove his allegations and he told me the facts stated in the *Schalk* opinion are established facts for purposes of the Disciplinary Commission proceedings.

66. When pressed as to whether he subpoenaed the judges to confront them about their decision he said: "Well yeah, I mean I would've liked to have done that but I've come to understand that that probably wouldn't survive an objection, so I wouldn't get too far on.." (R.116)

COMMENT: The decision to file a disciplinary complaint was based on the Court of Appeals' affirmation of my conviction in the trial court. I was exploring ways of demonstrating that the *Schalk* opinion ought not result in sanctions against me.

67. When asked if he knew whether the Court of Appeals spoke through its orders the Respondent said: "Yeah, but they completely ignored my legal argument..." (R. 117)

COMMENT: Is that supposed to be misconduct too?

CONCLUSIONS OF LAW AS TO RULE VIOLATIONS ALLEGED

68. By his conduct in committing the crime of Attempt to Commit Possession of Marijuana under the circumstances of this case, the respondent violated Rule 8.4(b) of the *Rules of Professional Conduct for Attorneys at Law.*

This is addressed elsewhere in this document and in the Brief of Respondent. I acted in good faith, reasonably believing my actions were lawful and appropriate.

69. By his conduct in engaging others in his misconduct, by making requests of other persons to assist him in his criminal conduct, and thus to place third parties at risk of harm, and for engaging in criminal conduct as part of his "representation" of a client, Respondent violated Rule 8.4(d) of the *Rules of Professional Conduct for Attorneys at Law.*

COMMENT: I did not do these things. The public, to the best of my knowledge, thinks of me as a lawyer who really cares about their clients. It is the authorities in this case who bring disrepute upon our profession.

FINDINGS AND CONCLUSONS REGARDING AGGRAVATING FACTORS AND/OR LACK OF INSIGHT

70. The Hearing Officer finds that Respondent's solicitation of others in committing his criminal act is an aggravating factor. Respondent placed three people at risk of arrest or physical danger due to his misguided attempt to create new evidence in his client's case. The fact that one of the three other persons was a 15-year old juvenile makes this factor even more significant.

COMMENT: As discussed elsewhere, I didn't place anyone in danger. I solicited no one to buy marijuana from Brandon Hyde, other than asking Chad Pemberton's sister if she would do so under police supervision. The three people mentioned were going to Brandon Hyde's residence regardless of anything I might have said. The fifteen year old, according to uncontroverted testimony, stayed in the car during the visit. I did not ask him to do anything.

71. The Hearing Officer finds that Respondent has no appreciation for the wrongfulness of his conduct and has no understanding or recognition that it was wrong. Indeed, Respondent stated the following when asked why he thought he deserved "praise" of the Disciplinary Commission for his actions:

"I hope I get it. Criminal defense attorneys in Indiana need all the encouragement they can get and they certainly don't need to see this happening to me for trying to defend Chad Pemberton,. As I can explain, I didn't break any law but the Court found that I did. What I did was I tried to prevent a fraud upon the court. I had good reason to believe that the police and Brandon Hyde were going to lie about his ongoing drug dealing and I just wanted the jury to know that. I think that I have endured so much in retribution, really, for my efforts on behalf of my client. I know most attorneys wouldn't do what I do, but I'm glad I am who I am." (R. 95)

Respondent's failure to appreciate the unlawfulness of his acts, not only at the time but to the present day is an aggravating factor and shows a profound lack of insight.

COMMENT: I discuss and refine my statement about breaking the law in the Brief of Respondent. I respect the judgment of the trial court and the Court of Appeals. Their judgments are not nullities. I am a convicted criminal, hoping to regain my former status as a person with a clean record.

72. The Hearing Officer finds and concludes that throughout the criminal appeal of his criminal case and throughout the course of the disciplinary case, Respondent made false statements or statements with reckless disregard for their truth as to the integrity of Judge Kellams and the Court of Appeals. Such conduct is an aggravating factor.

COMMENT: This is false. My criticisms are well documented, mostly in the Opinions themselves. I said what I needed to say to show I could not have anticipated the Opinion in Schalk, Id.

73. The Hearing Officer finds and concludes that Respondent's numerous assertions that the criminal prosecution was based upon vindictiveness by law enforcement authorities has no basis in fact and is frivolous. He has presented no evidence in support of his assertions and simply cannot accept the fact that he is guilty of criminal conduct.

COMMENT: I tried to remove some contraband from the stream of commerce. That is consistent with the prohibition against possessing marijuana. I was not prosecuted to further the ends of the prohibition. The police certainly resented my peeking behind the curtain that conceals the nefarious activities of some of their confidential

informants. I don't think my suspicions are frivolous.

74. The Hearing Officer finds and concludes Respondent engaged in conduct during the disciplinary case intended to improperly interfere with the discovery process, including, but not limited to:

a) The failure to respond directly to Interrogatories;

b) The attempt to become the attorney for a witness in the case;

c) The attempt to get a witness to be uncooperative in the discovery process;

d) The submission of irrelevant diatribes regarding the conduct of judicial officials in the criminal case.

Respondent's letter to Sheriff Kennedy was simply bizarre. He was a witness listed on Respondent's witness list and yet, he tried to convince Sheriff Kennedy not to cooperate with the Commission and that Respondent would actually represent him in that effort. The solicitation of Sheriff Kennedy as a client to confound discovery is a serious aggravating factor. The lack of insight is very troubling.

Respondent's "Report to Hearing Officer" was bizarre. It mostly contained a self-indulged speech directed against the judicial officials that charged him or found him guilty.

Respondent's "Answers to Interrogatories" were unresponsive and he used them to make the same indulgent speech as his "Report to Hearing Officer."

Respondent made admissions of certain facts in his Answer to the Verified Complaint and then at times sought to make denials to the same facts.

Respondent intended to use the subpoena power to force appellate judges to explain their rulings.

All of the above findings lead to the conclusion that the overarching problem is Respondent's lack of insight into his own behavior and to the standards required of lawyers.

COMMENT: This is nonsense. My responses were geared toward helping counsel for the Commission understand what I was doing. The witness if a very capable attorney, teacher, law enforcement leader, and military officer. I just offered to have his deposition location changed to Monroe County. I certainly did not try to get Sheriff Kennedy to be uncooperative in this process. I named him as a witness and his testimony was helpful to me. There were no diatribes, and I said nothing irrelevant to the allegations made against me. The letter speaks for itself. This irrational diatribe, coming from someone who has proven himself to be deceptive and without compassion or insight, is disgraceful in my opinion.

75. The profound lack of insight is an aggravating factor and is cause of the imposition of a sanction requiring Respondent to prove fitness at some future date before he can be trusted to practice law. Matter of Rocchio, 943 N.E.2d 797 (Ind. 2011); Matter of Rasely, 918 N.E.2d 302 (Ind. 2009)

COMMENT: It is counsel for the Commission who lacks insight, and whose false statements and phony citations have brought much disgrace upon himself.

RECOMMENDATION OF HEARING OFFICER

In Attorney Discipline Cases, the sanction to be imposed is determined by numerous factors, including "the nature of the misconduct, the lawyer's state of mind which underlines the misconduct, actual or potential injury flowing from the misconduct, the duty of the Supreme Court to protect the integrity of the profession, the risk to the

public in allowing the attorney to continue in practice, and any mitigating or aggravating circumstances." In re Ryan, 824 N.E.2d 687 (Ind. 2005).

Respondent's crime was "attempt possession of marijuana," normally a low level offense. In this case, however, the crime was committed, not to seek some marijuana to smoke; rather, it was committed to illegally gather evidence against a witness in a criminal case, ironically involving the illegal possession of drugs. What integrity would exist in the judicial process, or perception of integrity to the public, if this matter were viewed simply as a guy wanting to buy some pot? Respondent did not want pot. He wanted evidence. He engaged in his own undercover operation and solicited complete strangers to help him commit a crime and had no concern as to their safety. Asking a 15 year old to buy pot for any purpose is profoundly wrong, but intentionally asking him to tape record a transaction with a known drug dealer is unfathomable. Drug dealing is a dangerous activity at any level. Respondent knew Brandon Hyde was a drug dealer and had sold his client methamphetamine. What if the three people solicited for this stunt were found out while the transaction was ongoing?

The state of mind of Respondent has two parts. The first part is his laudable goal of trying to help his own client. Unfortunately, he believes that justifies every other action he has taken. The second part is that Respondent believes that because he is zealously representing a client, the laws limiting his conduct do not apply. This is the type of thinking that resulted in his criminal misconduct, his statements maligning the judiciary, and his attempts to interfere with witnesses.

The Supreme Court has a duty to safeguard the profession. To do that in this case,

assurances that Respondent will follow rules of conduct cannot be given without substantial evidence that changes are made in Respondent's thinking.

THEREFORE, it is the recommendation of the Hearing Officer that Respondent be suspended from the practice of law for a period of no less than 180 days, without automatic reinstatement, after which he must be able to satisfy the requirements for reinstatement under Indiana Admission and Discipline Rule 23, Sec. 4.

COMMENT: I have addressed this nonsense elsewhere in this document and in the Brief of Respondent. The Disciplinary Commission, the Indiana Supreme Court, and the people of Indiana deserve better than they have gotten in this case from Mr. Seth Pruden and Hon. Wayne S. Trockman.

DATED: 9/27/2012

Wayne S. Trockman, Hearing Officer

Concluding Remarks

I deleted ten pages of explanations from this document. I hope the Court will grant my request for oral argument so I can answer questions which I might not have addressed in this document and the Brief of Respondent.

Respectfully submitted,

David E. Schalk

David E. Schalk
Attorney Number 15551-53

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2013 I served a copy of this document by U.S. Priority Mail, postage pre-paid, and also as email attachments, upon the following people:

Hon. Wayne Stuart Trockman
Courts Bldg. Room 116
825 Sycamore Street
Evansville, IN 47708

Mr. Seth Thomas Pruden
Supreme Court Disciplinary Commission
30 South Meridian Street, Suite 850
Indianapolis, IN 46204

David E. Schalk
Attorney Number 15551-53

David E. Schalk
Attorney at Law
1706 South Olive Street
Bloomington, IN 47401

812-336-9093
812-360-1655 (cell)
812-336-9970 (fax)

schalk@schalk.net