In the
Indiana Supreme Court

CASE NO. 53S00-1104-DI-244

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

REPLY TO COMMISSIONS RESPONSE

Comes now David Schalk and replies to the Indiana Supreme Court Disciplinary Commissions' (hereinafter, "the Commission") response to his petition for review which was submitted to this Court in two parts, one captioned "Response to Hearing Officer's Findings, Conclusions, and Recommendations and other captioned "Amended Brief of Respondent."

Insight and Integrity

It is ironic that the counsel for the Commission's meritless accusations accusing me of lack of insight and of wrongfully impugning people's integrity exposes such lack of insight on his part. Seth Pruden is counsel of record in the matter. It seems that by now, after being repeatedly told and challenged to respond, he would know that my position with respect to the lawfulness, or lack thereof, of my actions on June 25, 2007 is that I reasonably believed that I was acting lawfully to save Chad Pemberton from a tragic fate. It turns out that the statutory definition of "law enforcement officer" is, for now anyway, actually substantive law which, by omitting defense attorneys, prohibits defense attorneys from encouraging or facilitating sting operations on drug dealers for the purpose of obtaining evidence of their dealing. Who could have known?

In Mr. Pruden's defense I acknowledge that the Opinion in *Schalk v. State*, 943 N.E.2d 427 (Ind.App. 2011), *trans. denied*, is, to put it mildly, misleading with respect to my position. The

Court of Appeals did not acknowledge my meritorious arguments, which would have surely carried the day had they been addressed, and proceeded to tarnish my reputation by attributing to me ridiculously stupid arguments that would not even have occurred to me, while implying that I had nothing intelligent to say for myself. The Court of Appeals should have granted my petition for rehearing and admitted that I did not say *Loudermilk* or the citizen's arrest statute were controlling precedent and law, and then acknowledged the gist of my arguments. The Court of Appeals could have then proceeded to affirm my conviction on the basis of the definition of "law enforcement officer" and my waiver of arguing that being a deputy sheriff gives me unwritten privileges and immunities. I digress here because I am deeply offended by the way I have been treated, and because setting this right for me would be very beneficial to the State of Indiana. It would reaffirm the rule of law, particularly the rule that the police are not above the law, while confirming that the appropriate role of defense counsel is to vigorously defend their clients even when doing so causes them personal embarrassment or difficulty.

Confusing pronouncements by the Court of Appeals notwithstanding, Mr. Pruden has been told – most recently in the briefing of this matter – the true nature of my legal position. He should know that I don't think this case turns on whether or not I committed a criminal offense on June 25, 2007.

I do happen to think that a judge-made law was applied to me *ex post facto*. If I am correct about that, one could question whether or not I committed a crime on June 25, 2007, before actions such as mine had been declared to be criminal. Did the tree make a sound if no one heard it fall? Philosophers and college sophomores will continue to amuse themselves with such matters, but a discussion of whether or not I broke the law if I did something that was lawful when I did is mostly a distraction in these somber proceedings.

Since the issue of whether or not I broke the law has been raised, I will point out for the sake of completeness that the Court of Appeals acknowledged, correctly I believe, that law enforcement officers may lawfully encourage and facilitate the purchase of marijuana for use as evidence. The Court of Appeals wrote: "But Loudermilk merely sets out the law defining constructive and actual possession of contraband and does not, in any way, support the notion that private citizens have the same authority to participate in controlled drug buys as law enforcement officers. Schalk's reliance on *Loudermilk* is misplaced." *Schalk*, Id., at 430. *Emphasis added.* Saying that I relied on *Loudermilk* is a defamatory affront. It makes me appear to be stupid. What the Court of Appeals wrote is all the more disheartening in light of the fact that my intent in mentioning *Loudermilk* was to be helpful to the Court of Appeals, suggesting that the Court of Appeals could either hold that the plain words of the statute prohibiting the possession of marijuana do not fully describe the prohibition; or the Court of Appeals could hold that the prohibition is completely stated within the four corners of the text of the enactment only with the understanding (here is where *Loudermilk* came in) that "possess" in its context has to include the right to use or dispose of it as one might choose. I wasn't promoting either interpretation. Apparently the Court of Appeals adopted the first option, finding that there is more to the statute than one sees in its plain words. In any case, the Court of Appeals did affirm that the police do not transgress the prohibition while they and their helpers go about their business of gathering evidence of drug dealing. In light of the citizen's arrest statute and the unseemliness of making it convenient for the police to shield their informants from scrutiny, even by defendants in criminal cases, I think it would be very unreasonable to impute to the legislature any intent to exempt only the police. Be that as it may, I am a duly appointed, sworn and credentialed deputy sheriff whose appointment is for an indefinite term and

whose appointment has not been revoked. Concluding that I did not break the new judge-made law is like putting two and two together and coming up with four.[1]

David Schalk Actual Position In This Matter

Here is what the Disciplinary Commission is unwilling to acknowledge: **My position is that I acted in good faith on June 25, 2007, reasonably believing that my actions were lawful, and what I did that day my conscience would not have allowed me to turn away from. I did not commit a criminal act that reflects adversely on my honesty, trustworthiness or fitness as a lawyer in other respects; nor did I engage in conduct that is prejudicial to the administration of justice.**

I think it is safe to assume that the public would disapprove of prosecuting attorneys, judges, and Supreme Court Disciplinary Commission officials, through their harsh attacks on me, inadvertently shielding the protected police informants around the state who are engaged in ongoing criminal enterprises; shielding them from scrutiny by defendants and juries who must decide those defendant's fates. I think most of the public would disapprove of defense attorneys and their investigators being prohibited from obtaining evidence of drug dealing by informants through sting operations, even while the authorities use those very same methods against their clients while concealing the nefarious activities of their own informants. The public would not think my actions were dishonorable or disgraceful, though the public might think me naïve for trusting that the Indiana Court of Appeals would give me any relief. The public might find it interesting that one judge on the Schalk panel was a Bloomington resident and the other two had

[1] There is more about my appointment to the office of deputy sheriff in my letter to Sheriff Kennedy, which the Commission offered into evidence which was accepted by the hearing officer without objection.

already opined in the Pemberton case, while prohibiting me from presenting evidence or arguing the merits of the case, that my actions on June 25, 2007 were unlawful. I think it was just my bad luck, but the public might think, reminiscent of Marcellus' remark to Horatio in Shakespeare's *Hamlet*, "there is something rotten in the state of Indiana." I am not here before this honorable Court to cast aspersions on anyone, or to belittle the Court of Appeals, but I have been dragged here to say whether I think I have violated the Rules of Professional Conduct and my answer is emphatically no, I am certain that I did not. I acted in good faith to help a fellow human being in trouble. It is not I who has disgraced out profession.

Lack of Subtlety

The distinction between the Court of Appeals' affirming a conviction and saying someone is guilty of the crime for which the person was convicted are two different things. My case illustrates this. I mentioned in the "Issues" section of my appellate brief that I happened to be a deputy sheriff but I would not and did not argue that I have unwritten powers and privileges related to my status as a law enforcement officer. Footnote "2" of the Schalk Opinion states: "Further, as the State points out, some of the issues set out in Schalk's Statement of the Issues are not addressed at all in the Argument section of his brief on appeal. We consider only contentions raised and supported by cogent argument in the Argument section of an appellant's brief. See Ind. Appellate Rule 46(A)(8)(a)." In deciding criminal appeals, Indiana's appellate courts repeatedly say that they consider only the evidence most favorable to the verdict. I have freely admitted to sufficient facts to support each of the factual allegations of the Information, so this isn't even an issue here. Still, it should be mentioned that the Commission's spurious arguments and mischaracterized citations to cases from other jurisdictions do not establish that "the facts" of appellate cases are established for purposes of collateral estoppel. Facts admitted, stipulated

to, or specifically decided sometimes yes, but not the facts most favorable to the verdict or gratuitous "facts" which do not support the verdict or the appellate decision.

Discussion

I could make the case that I committed no crime, but that would miss the point. The point is that I acted in good faith, reasonably believing that my actions were lawful. My reasonable belief has been tremendously reinforced by the inability of anyone to tell me how I might have gotten it wrong. The trial court and the prosecuting attorney could find no flaw in my argument. The Attorney General couldn't come up with anything. The Court of Appeals demonstrated a complete lack of ability to find any flaw in my analysis. I didn't think it could. I was, however, naïve in thinking the Court of Appeals would thoughtfully address my arguments. Counsel for the Commission and the hearing officer made not even the slightest attempt to address or even acknowledge the existence of my legal analysis. I don't think there is any need to invoke the rule of lenity or the void for vagueness doctrine, but if there is reasonable doubt about the lawfulness of my actions, I am vindicated. But I am asking for more than mere vindication. This is an opportunity for the Indiana Supreme Court to reaffirm the rule of law and the importance defense attorneys vigorously defending clients who have been accused of crimes.

The Commission Has Not Even Attempted To Refute My Analysis

My conviction at trial was very entirely arbitrary. Neither the judge nor the special prosecutor would say why they thought only the police were entitled to perform sting operations to obtain evidence. It was eerie to hear men in their positions affirming the existence of an extra-constitutional police state in which law enforcement officers do what is forbidden to others without anyone being able to, or even being at all motivated to say from where the police derive their extraordinary powers.

The Indiana Court of Appeals ratified this concept of unwritten police powers. Nobody knows what powers are entailed in being included in the definition of "law enforcement officer" other than the legal right to possess and encourage others to possess contraband in sting operations. Maybe anything goes in the police state recognized by a trial court and affirmed by the Indiana Court of Appeals. This is an opportunity for the Indiana Supreme Court to set things back on track.

I asked the Commission's attorney and the hearing officer to say, if they could, how I might possibly have been expected to foresee the legal analysis contained in the unprecedented, irrational, and internally inconsistent Opinion in *Schalk v. State*. That analysis doesn't make any more sense than the argument presented to the Court of Appeals by the Indiana Attorney General, an argument which the Court of Appeals mercifully ignored. It was not foreseeable that such an opinion would issue from our Court of Appeals. It is very unfair to accuse me of misconduct, and to say I lack insight for not knowing that I was breaking the law on June 25, 2007. My point is not that I am innocent, as the Commission would like for this Court to believe. I am, after all, convicted of the offense. My point is that I acted in good faith, reasonable believing that the police had no special powers not conferred upon them by our legislature, and reasonable believing that I was conducting myself in a lawful manner on June 25, 2007 on behalf of a good hearted man, a suffering soul whose life was about to be trashed by the state. My conscience would not have permitted me to abandon Chad Pemberton when an opportunity to help him unexpectedly presented itself on that day in June of 2007. It is my bane as well as a source of contentment for me that I am at the opposite end of the scale which has sociopaths at the opposite end. I care deeply about the people I encounter in life, and my heart goes out the victims of our society's so-called "war on drugs." Quite reasonably thinking my

actions were lawful, I tried to follow up on a phone call I received on June 25, 2007, hoping to keep Chad Pemberton from being unjustly imprisoned for decades.

I hope I will be forgiven for writing so much. It is so frustrating to read in Section "II" of the Commission's response the implication that this case turns on whether or not I committed a criminal offense, their bald statements that I have provided no cogent legal explanation for why I might not have committed a criminal offense, and the implication that I have not adequately presented a case explaining why I am so sure I did not violate the Rules of Professional Conduct.

Reply to Section "II"

Counsel for the Commission's constant refrain, "the hearing officer correctly concluded," rings hollow in my ears. The difference between the hearing officer's proposed findings, conclusions, and recommendations and the document signed by the hearing officer consisted of, as far as I could ascertain, correction of one formatting glitch. Other typos and references to the record which turned out not to support untrue statements were left intact.

I often recall these days the words from my childhood: "There but for the grace of God go I." It saddens me that the hearing officer did not confront this case head on and engage me in dialogue about my conduct on June 25, 2007, and my reason's for thinking I acted appropriately on behalf of Chad Pemberton. I hope he understood what was happening in the hearing room, but that isn't clear that he did.

I think counsel for the Commission grossly underestimates the integrity and cognitive abilities of the Indiana Supreme Court's five members and staff. He offered no explanation or apology in his response for the false allegation with references to the record which did not support them. Instead, he continues to say (or says the hearing officer correctly concluded) that I solicited or tried to recruit a youth to do something illegal and dangerous. I did no such thing

and there is no excuse for his saying that. I did not expect the fifteen-year-old boy to accompany Lisa Edwards to our meeting at Arby's in Ellettsville on June 25, 2007. I didn't even know he existed. I didn't ask him to do anything. He knew Brandon Hyde well, and had smoked marijuana with him. Lisa Edwards, Roger Grubb, and John Grubb were on their way to Brandon Hyde's abode and their excursion had absolutely nothing whatsoever to do with me. Lisa Edwards doesn't know why she told me she was going get some marijuana from Hyde in one hour. Chad Pemberton is the father of her sister's then two-year-old daughter, and Brandon Hyde was frequently at her trailer and seems to have been almost part of the family. She was caught in the middle. She denied that Hyde resided at her home or that she knew of Hyde's drug dealing drugs from there but it is certain that they were all quite familiar with one another. The uncontroverted evidence from the trial is that John stayed outside while Roger and Lisa went into Hyde's dwelling. I could not have prevented the group from proceeding on their way to Hyde's abode and I don't comprehend why counsel for the Commission thinks it is alright for him to tell this honorable court otherwise.

It was never misconduct for me to say that my prosecution was vindictive. I wrote about it at some length in a letter to the Commission in 2007. I asked for a special prosecutor to look into the matter later that year. The deputy prosecutor handling drug case and some police detectives were already angry at me for seeking information on my own, sometimes knocking on doors to talk with informants. They wanted me to confine my investigations to formal discovery. I have it on very good authority that some people in authority wanted me put out of business. What happened to me has sent a message to all attorneys in and around Monroe County that peering behind the curtain of secrecy that conceals the nefarious activities of some police informants can be dangerous. My adversaries saw an opening and attacked. I mention this only in passing but it

has become an issue, at least in the mind of counsel for the Commission, because he says he thinks it is misconduct for me to say anything about it. He forgets that we live in a free country, with freedom of expression about almost everything and certainly about the workings of government.

If counsel for the Commission is right about this Court, and I am going to be sanctioned in any manner for my actions in 2007 or for freely expressing myself during these proceedings, then I never want it to be said that I was too timid to tell it like it is. I don't know if my being charged with a criminal conspiracy only weeks after filing Chad Pemberton's petition for post-conviction relief was a mere coincidence, or was related. I do know that the probable cause affidavit that was filed contained blatant and easily demonstrated perjury. The detective who signed it swore that Chad Pemberton told him that we discussed purchasing drugs from Brandon Hyde but the recording of the only interview preceding the filing of the affidavit showed that Pemberton simply had no idea what the detective was talking about. The same goes for Pemberton's sister. The detective had even written a supplement to his investigation report saying that she said I did not ask her to buy drugs but in the probable cause affidavit, the detective swore she said I did. I told the Monroe County Sheriff and he didn't seem to care.

I was told when I first started practicing law that panels of the Court of Appeals decide what they want to do with cases and then have clerks write up the explanations. If that is how the opinion in Schalk came to be written, the clerks had a very hard job. I would be disturbed if I thought the panels in Pemberton and Schalk intentionally decided the cases wrongly, but I am much more disturbed by what I think actually happened. In my case, I think the panel members share the pervasive, though happily not universal sense that the police have, well, perhaps not mystical, and not magical, but more than just super-constitutional powers. This kind of thinking

came out to some extent in the *Barnes v. State*, 953 N.E.2d 473 (2011). I thought the common law castle doctrine had long before been superseded by Ind.Code § 35-41-3-2(b). The statute did not say police officers unlawfully entering or remaining in a dwelling were not on exactly the same footing as any other intruder. Justice Rucker wrote:

> There appears to be some tension between Ind.Code § 35-42-2-1(a)(1)(B) making it a criminal offense to commit battery on a law enforcement officer "while the officer is engaged in the execution of the officer's official duty," and Ind.Code § 35-41-3-2(b) providing persons the right to use "reasonable force ... if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling."

There is tension only if an officer can unlawfully enter a dwelling while engaged in the execution of his official duties. If he is not so engaged, touching him in a rude, insolent, or angry manner is only a misdemeanor. Either way, it is battery and battery is a crime. A defense to a charge of battery is that the touching was necessary to prevent or terminate the other person's unlawful entry or attack on the person's dwelling. This doesn't strike me as being at all complicated, yet the fact that the police were involved conjured up all sorts of extraneous thoughts. The case was not argued well at trial, nor was it briefed appropriately in the Court of Appeals, and this Court issued an opinion on the basis of its right to revise the common law. I congratulate the Indiana Supreme Court for recovering well, not embarrassing all Hoosiers by admitting to a mistake but gracefully and without reservation passing the matter to the legislative branch of government. That is surely where any rules for sting operations and so-called "controlled buys" should be debated, drafted, and enacted. It is where I intend to make sure that our legislators know what atrociously bad public policy it would be to prohibit defense attorneys and their investigators from gathering evidence in the same manner their counterparts in law enforcement do.

More On Motives

I don't attribute bad motives to Seth Pruden or the hearing officer. He seems to think it is his duty to stifle criticism of the judiciary. I hope one outcome of this case will be the encouragement of constructive criticism of our judiciary. There are many Indiana attorneys who perceive problems with our Court of Appeals but who, like the people in *The Emporerers New Clothes*, act as though they don't see because of men such as Seth Pruden. He will dutifully change whenever this honorable Court signals that it wants him to change.

Matters Not In Evidence

I am positive that on May 11, 2012 the hearing in this matter was re-scheduled for May 25. I did not realize that the Supreme Court received an order on May 16, 2012 saying May 21 was confirmed. That is not what was said over the phone on May 11. I received the order on Saturday, May 19, 2012 and thought it was a mistake. I proceeded to the hearings I had previously scheduled in Lawrence County on Monday morning; hearings which the hearing officer had so graciously permitted me to keep on my calendar after I said I would call no witnesses and we could easily conclude the evidentiary hearing in one day. It was clear during our telephonic conference that the 25th of May was completely clear on my calendar and I would not need to continue any of the hearings I had scheduled for May 21 and May 22, 2012. On May 21, 2012, I took the hearing officer's call while in the courthouse in Bedford, Indiana. I told him I needed to go across the street and talk with the prosecutor and court personnel about cancelling pretrial conferences and then it would take me ninety minutes to get to the hearing room in Indianapolis. The hearing officer said he would expect me to arrive in ninety minutes, so I had to explain it to him again. I did not have time to pick up the exhibits which I had started to

organize at my home office. I asked the hearing officer to take notice of at least some aspects of the Pemberton and Schalk matters. I also mentioned in my brief the matter of *Casady v. State*.

Conclusion

I hope the members of this Court will want to understand what I do and what I stand for. I revere our constitutions and it pains me to encounter lawlessness in official circles. Now I have tasted the bitterness of it in my own personal life. I think the "war on drugs" is vicious and very counter-productive. I urge everyone to get familiar with L.E.A.P, Law Enforcement Against Prohibition, and start getting information directly from people who know firsthand the cruelty of what we are doing to our own people, including the thousands of children whose parents are languishing in prisons. Perhaps this Court will, for just a moment, see Chad Pemberton's predicament through my eyes. A terrible, heart-wrenching tragedy was about to take place when Lisa Edwards called on June 25, 2007, and showed me a glimmer of hope. I have suffered much since then, but Chad Pemberton ended up with an eight year sentence instead of the thirty or forty years he was looking at, and he has grounds for getting that conviction reversed. Now, almost six years later, I am sixty-five years old and raising my eleven-year-old son by myself with nothing saved for retirement. I am a convicted criminal, unable to network with attorneys to start practicing patent law, which I would like to do. Intellectually, I am as sharp as ever, but if this Court does not help me now, I do not know what will happen. I sincerely believe that helping me, giving me grounds for post-conviction relief, is the right thing to do for Indiana.

Respectfully submitted,

David E. Schalk
Attorney Number 15551-53

CERTIFICATE OF SERVICE

I hereby certify that on , I served a copy of this document by U.S. Mail, postage pre-paid 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