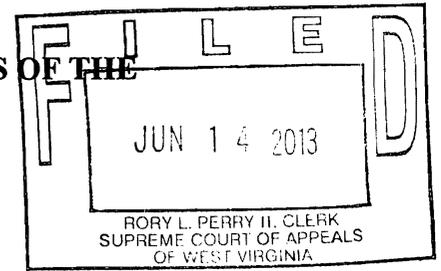


**BRIEF FILED
WITH MOTION
BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0729

WENDELYN A. ELSWICK,

Respondent.

BRIEF OF THE RESPONDENT, WENDELYN A. ELSWICK

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This proceeding arises out of two complaints filed against Respondent. The first complaint was filed by George Castelle on May 6, 2009. On or about May 18, 2009, Complainant Dana December Smith filed a second complaint against Respondent.

The Office of Disciplinary Counsel conducted an investigation and, on April 28, 2011, formal charges were issued against Respondent Wendelyn Elswick. Respondent filed a response to the charges on June 2, 2011. A scheduling order was entered on May 27, 2011. The parties exchanged mandatory discovery.

Thereafter, the matter proceeded to hearing in Charleston, West Virginia on August 25, 2011 and August 26, 2011 (Referenced below as "Day 1" and "Day 2," respectively). The Hearing Panel Subcommittee was comprised of David Jividen (Chair), Paul Camilletti, Esq. and Larry Stricker, layperson. Rachael L. Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of Office of Disciplinary Counsel. Respondent appeared in person and by her counsel, Mark W. Kelley. The Hearing Panel Subcommittee ("Hearing Panel") heard testimony from Jane Anne Brumfield (now Glaspell), Greg Ayers, Margaret "Peggy" Longwell, Mark Timothy Koontz, George Castelle, Dana December Smith (via video conference), and Respondent. At the conclusion of the August 26, 2011, Respondent requested that the Public Defender's Office conduct an IT search to determine to what extent additional emails might exist that could be relevant to this case. Such a search was conducted and emails (later redacted by agreement to exclude purely personal matters) were submitted and are attached as *ODC Exhibit*

44.¹ Also, subsequent to this hearing, two of the witnesses in this matter, Peggy Longwell and George Castelle, submitted additional material to counsel, and based upon the submission of this additional material, the Hearing Panel reopened the evidence in this matter, and another hearing was convened in Charleston, West Virginia on May 1, 2012 (Referenced below as "Day 3"). Along with the hearing panel, Ms. Cipoletti appeared on behalf of the Office of Disciplinary Counsel and Respondent appeared in person and by her counsel, Mr. Kelley. The Hearing Panel heard testimony from Ronnie Sheets, Ms. Brumfield (now Glaspell), Ms. Longwell, Mr. Castelle, and Respondent.

At the conclusion of the hearing before the Hearing Panel Subcommittee, the Subcommittee issued its recommendation and filed with the Supreme Court the *Hearing Panel Subcommittee's Findings of Fact, Conclusions of Law and Recommended Sanctions*, finding that the evidence established that the Respondent violated Rules 5.3; 3.3; 8.4(c); and 8.4(d) of the Rules of Professional Conduct with regard to Counts I and Rule 1.7(b) of the Rules of Professional Conduct with regard to Count II. The Subcommittee also denied the Respondent's motion to dismiss based on her statute of limitations argument.

Subsequently, on or about March 18, 2013, the Respondent filed her *Respondent's Objection to Hearing Panel Subcommittee's Findings of Fact, Conclusions of Law and Recommended Sanctions*. Following that, the ODC filed its no objection letter with the Court. This Court thereupon ordered all parties to file briefs pursuant to Rule 3.13 of the Rules of Lawyer Disciplinary Procedure and set the matter for oral argument pursuant to Rule 20 of the

¹According to Ronnie Sheets, the Public Defender's Office does not as a matter of course keep back-ups of emails. However, any emails that had not otherwise been deleted were retrieved.

Revised Rules of Appellate Procedure.

B. STATEMENT OF FACTS²

Wendelyn Elswick (hereinafter "Respondent") is a lawyer practicing in Charleston, Kanawha County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on September 29, 1999.

Charges, ¶ 1; *Response* ¶ 1 .

On or about December 30, 1992, a Kanawha County petit jury found Dana December Smith guilty of two counts of murder. *Charges*, ¶ 2; *Response* ¶ 2. Upon his conviction, on or about January 23, 1993, Mr. Smith was sentenced to life imprisonment without the possibility of parole. *State v. Dana December Smith*, No. 92-F-11, Circuit Court of Kanawha County, West Virginia. *Charges*, ¶ 3; *Response* ¶ 3 . On or about September 9, 1994, the Supreme Court of Appeals of West Virginia refused Mr. Smith's direct appeal. *State v. Dana December Smith*, No. 940606. *Charges*, ¶ 4; *Response* ¶ 4. Upon denial of Mr. Smith's direct appeal, he filed several pro se petitions for writ of habeas corpus. *Charges*, ¶ 5; *Response* ¶ 5.

In or about 2003, his retained counsel, Attorney M. Timothy Koontz, filed an *Amended Petition for Writ of Habeas Corpus and Memorandum in Support*. *State ex rel. Dana December Smith v. Trent*, No. 97 Misc. 43, Circuit Court of Kanawha County. *Charges*, ¶ 6; *Response* ¶ 6.

On or about January 20, 2004, the Circuit Court of Kanawha County appointed the Kanawha

²The facts set forth herein are generally applicable to both counts, as well as Respondent's affirmative defense of statute of limitations. Where facts are undisputed, citations are to the *Statement of Charges* ["Charges"] and *Wendelyn Elswick's Response to Statement of Charges* ["Response"].

County Public Defender's Office to represent Mr. Smith in pursuit of his writ of habeas corpus.

Attorney Koontz remained as co-counsel. *Charges*, ¶ 7; *Response* ¶ 7.

The Kanawha County Public Defender's Office assigned Mr. Smith's case to Respondent, who at that time, was a lawyer in the appellate division. *Charges*, ¶ 8; *Response* ¶. Due in large part to the passage of time the evidence was conflicting as how involved George Castelle intended to be in the case. For his part, Mr. Castelle was equivocal about his level of involvement in the case.

And I wasn't co-counsel in the case in the beginning. I was just – I agreed to be involved in the case to – for the forensic science purposes, and involved wasn't even defined at that stage. It could end up being co-counsel. It could end up just advising Wendy or being available to consult. But I agreed to participate in the case to focus on – to assist with the forensic science issues.

Day 2 Transcript, pp. 93-94. Tim Koontz clearly believed that Mr. Castelle had a much greater initial involvement.³

At the time of Respondent's appointment to the Smith habeas matter, in January 2004, she had only recently transferred to the Appellate Division of the Public Defender's Office. *Day 2 Transcript*, p. 199-200. Prior to transferring to the Appellate Division, Respondent had worked for the Trial Division of the Public Defender's Office upon her graduation from law school in 1999. *Day 2 Transcript*, pp. 198-199.

³Mr. Koontz described his continuing role in the case as being "the chief" and "handling the bulk of the litigation" but that "the paperwork would be done by George [Castelle]" *Day 1 Transcript*, pp. 228-229. Mr. Koontz describe numerous "strategy sessions" which were "primarily" with Mr. Castelle. *Id.* at pp. 230-231. Mr. Castelle, on the other had, described Mr. Koontz' role as this: "Tim Koontz -- in fact, the reason we were appointed to the case, in addition to Tim Koontz, is Mr. Smith's -- Dana December Smith's dissatisfaction with the amount of work that Tim had done, he had been relatively inactive for a relatively long period of time." *Id.* at p. 354.

Upon assignment to the case, Respondent began investigating one of the new grounds raised in Mr. Smith's habeas which was the newly discovered evidence that another person, Tommy Lynn Sells, had confessed to the murders for which Mr. Smith had been convicted. *Charges*, ¶ 9; *Response* ¶ 9. Respondent contacted the television show 48 Hours to request a copy of the episode in which Mr. Sells confessed to the murders for which Mr. Smith had been convicted. *Charges*, ¶ 10; *Response* ¶ 10.

Respondent then contacted the Texas Rangers to discuss and secure the confession of Mr. Sells that occurred on or about April 12, 2000. *Charges*, ¶ 11; *Response* ¶ 11. Respondent also verified with the Prosecutor from Del Rio, Texas, that he listed the West Virginia murders in question as 404(b) evidence against Mr. Sells. *Charges*, ¶ 12; *Response* ¶ 12.

Respondent sent several letters to Mr. Sells' attorney requesting permission to speak with his client about the West Virginia murders. *Charges*, ¶ 13; *Response* ¶ 13. Respondent contacted and spoke to the author of a book written on Tommy Lynn Sells which contained a paragraph about the confession to the West Virginia murders. *Charges*, ¶ 14; *Response* ¶ 14. Respondent also spoke to the West Virginia Division of Corrections to determine whether Mr. Sells and her client were ever incarcerated at the same time and place in West Virginia. *Charges*, ¶ 15; *Response* ¶ 15.

By letter dated April 20, 2004, Respondent wrote to Mr. Sells about coming to speak with him about "the deaths of two women in Cabin Creek, West Virginia." Respondent indicated that she represented the individual who was convicted of these murders and that she believed he could provide "great insight into what occurred." *Charges*, ¶ 16; *Response* ¶ 16.

On or about May 9, 2004, Respondent and her assigned legal assistant, Ms. Jane

Brumfield, flew to Texas to meet with and take a recorded statement of Mr. Tommy Lynn Sells.⁴

⁴As an example of how the passage of time between these events and the *Charges* has dulled the memories of the principals, Mr. Castelle and Mr. Koontz had markedly different recollections of the events leading up to the decision to send Respondent to Texas, both for the initial interview and the subsequent deposition. Mr. Koontz related that he was opposed to sending Respondent to Texas because of her inexperience, at least unless he went along as well. "And I had some very serious reservations about a young lawyer with six years of experience going down and handling the key witness in this case, who was highly manipulative and in my mind was the personification of evil." *Day 1 Transcript*, p. 232. "And George and I had a very, very spirited debate over someone with her level of experience going down and interacting with this individual, especially where he was the cornerstone of our case, and I insisted on going down with her." *Id.* at 233. "And I was very critical -- as much as I love and respect George Castelle, there were some very animated disagreements about sending her down there. And I thought it was, again, a horrible idea for neither me nor George to accompany her down to this deposition." *Id.* at 246. Koontz ultimately did not go to Texas, claiming that Respondent went behind his back to Mr. Smith's mother. *Id.* at 233.

For his part, Mr. Castelle has no recollection of this "spirited debate":

- A We had discussions. I don't remember them as being heated. I don't think they were.
- Q Probably easier to remember that if it hadn't happened seven years ago, wouldn't it?
- A It would be easier to remember if it was more current?
- Q It probably -- yes.
- A Well, sure.
- Q Okay.
- A But I remember it, and I remember it distinctly.
- Q Well, you said, I believe, that the ultimate decision to send Ms. Elswick to Texas was because she had done most of the work on the file?
- A Well, she had done most the work on that portion of the case, yes.
- Q Mr. Koontz testified that the decision that you made -- that you apparently told him that you'd prefer a woman to go because you thought a woman -- Mr. Sells would be more likely to open up to a woman. [*See Day 1 Transcript*, p. 323]
- A I don't think so.
- Q Okay
- A I mean, I'm saying I don't think that's correct.
- Q Okay. You don't think that fact is correct, or you don't think you told Mr. Koontz that?
- A I don't think I told Mr. Koontz that.
- Q Okay.

Contrary to the allegation in Paragraph 17 of the *Charges*, Respondent did not take a “sworn” statement of this meeting with Mr. Sells. *See generally ODC Exhibit 35, Record*, pp. 2086-2098.

On or about May 10, 2004, Respondent and Ms. Brumfield met with Mr. Sells on death row in the Polunsky Unit in Livingston, Texas. *Charges*, ¶ 18; *Response* ¶ 18. During that meeting, Respondent and Ms. Brumfield were in separate rooms. Both could see Mr. Sells through glass, but Ms. Brumfield could only see the back of Mr. Sell’s head. Ms. Brumfield could hear what Mr. Sells said, but could not hear Respondent’s portion of the interview. *See Day 1 Transcript*, pp. 99-103.

During that initial interview, Respondent took hand-written notes and a portion of the same stated:

“...Talked to ▲ @ St. Albans other side of it...A bar had a few drinks ▲ bought drugs off Tommy-Became acquainted ▲ told Tommy about another place where he could get drugs w/o worrying about police Met Pamela @ another bar-was partying, dancing, flirting-med. height, darker brown hair, drinking longneck-was a slut...”

Charges, ¶ 19; *Response* ¶ 19.

With respect to the notes taken by Respondent:

1. Only one page of notes was attached by Mr. Castelle to the complaint he filed with the ODC. *ODC Exhibit 1, Record* p. 46;

2. Respondent testified both during her sworn statement taken on July 21, 2010,

A And the reason I say that is it's just not consistent with the way we assign work within the office.

Day 2 Transcript, pp. 95-96.

ODC Exhibit 13, Record pp. 674-675 and 680-682, and during her hearing testimony that she believed more notes of that meeting existed. *Day 2 Transcript*, p. 234-235, 240-241, 252.

3. Respondent also testified that despite what the printed portion of the notes say, she does not recall Mr. Sells ever telling her that he knew Mr. Smith. *ODC Exhibit 13, Record* p. 675, *Day 2 Transcript*, p. 241.

4. When asked about the apparent discrepancy between her notes and those of Ms. Brumfield, *see infra*, Respondent testified during her sworn statement: “Either I screwed up – but then I see what her notes say – or he [Mr. Sells] told us one thing and then backed up and said, ‘No, no, that’s that true.’ I’m getting it confused.” *ODC Exhibit 13, Record* p. 678.

5. During her sworn statement and hearing testimony (and without having the benefit of seeing the rest of her notes) Respondent posited that she may have transposed the symbol “[]” symbol for the “▲” symbol, *ODC Exhibit 13, Record* p. 676, *Day 2 Transcript*, p. 241, and that she really meant the ▲ to refer to one of the victims.

6. Following the initial hearings on August 25, 2011 and August 26, 2011, witness Peggy Longwell wrote a letter to counsel dated October 13, 2011 in which she disclosed that there are in fact five additional pages of notes from that first interview of Mr. Sells. *ODC Exhibit 46, Record* pp. 3276 and 3286-3291. These additional notes contain a notation “Before 92, met [symbol, appears to be “[]”] Met her in a bar”. *ODC Exhibit 46, Record* p. 3289. This notation not only appears to be inconsistent with the notation on the first page of the notes, but suggests that she did refer to the victim with a [] symbol and further bolsters her belief that she may have transposed the symbols.

7. When questioned at the August 26, 2011 hearing about whether there was

more than one page of Respondent's notes from the first interview, Mr. Castelle testified as follows:

Q Do you know when you were going through the file in 2008 and 2009, even preparing to file the ethics complaint, was this the only page of notes that you could discern that went with this interview?

A No. In fact, the reason that I recognized this when I ultimately saw it and realized what it was because it paralleled something that I had previously located in Jane Brumfield's files.

Q Okay. But was this the only page of notes you could find in Ms. Elswick's handwriting that would have been from her interview?

A Oh, from that interview, yes.

Q Okay. So there aren't other pages to her notes?

A Oh, it's possible that there were other pages. I don't know that it ended on this page. This looks like the page that I had copied myself, and the circle on this page, the four or five lines near the top, I think is the circle that I drew to highlight what was significant. It's possible that there are other pages that went with this. I just don't remember.

Day 2 Transcript, pp. 21-22.

8. Mr. Castelle would later acknowledge, in the May 1, 2012 hearing, that he had access to all six pages of these notes when he filed his ethics complaint, but chose only to attach the first page of such notes. *Day 3 Transcript*, pp. 155-156. In fact, Ms. Longwell's letter of October 13, 2011 indicates that the full six pages of notes were included in a letter Mr. Castelle has written to Magistrate Judge Mary Stanley in response to a order issued by her in June 2009, just two months after Mr. Castelle has filed his ethics complaint against Respondent. *ODC Exhibit 46, Record* p. 3276.

Ms. Brumfield also took notes in both short-hand and long-hand which stated in relevant part that:

"....Cabin Creek----St. Albans----other side of it----Met Dana there----bought drugs off me- acquainted-"

Charges, ¶ 19; *Response* ¶ 19.

With respect to the notes taken by Ms. Brumfield:

1. Like Respondent, Ms. Brumfield testified that, despite what her notes appear to say, she does not recall Mr. Sells saying at the initial interview that he met Mr. Smith at a bar. *Day 1 Transcript*, pp. 49-50.

2. Unlike Respondent, Ms. Brumfield testified at the August 25, 2011 hearing that the one page of notes was all she took, *Day 1 Transcript*, p. 91, but Ms. Longwell's letter of October 13, 2011 disclosed for the first time that Ms. Brumfield's notes from the initial meeting with Mr. Sells consist of three pages, the last of which contains the following notation: "Call's him Danea (sp?) - never housed - Never had conversation w/him". *ODC Exhibit 46, Record* p. 3294.

On or about May 11, 2004, Respondent and Ms. Brumfield returned to death row in the Polunsky Unit in Livingston, Texas to take a tape-recorded statement from Mr. Sells. *Charges*, ¶ 21; *Response* ¶ 21. Ms. Brumfield asked the questions of Mr. Sells. She recalls there being a list of questions that she was supposed to ask. *Day 1 Transcript*, p. 45.

During her sworn statement, Respondent testified that she believed that Mr. Castelle "wrote out a list of questions" and "gave us a list of questions". *ODC Exhibit 13, Record* pp. 670-671 (sworn statement). At the hearing, she attempted to clarify that "I'm not sure if he wrote it out and handed it to me or if we sat there and I wrote out the questions as we talked." *Day 2 Transcript*, pp. 226-227.

Mr. Castelle denied ever giving Respondent a "script" but the record reflects that several years later, when he was going to take Ms. Brumfield's testimony in the habeas proceeding, he

indeed drafted and presented Ms. Brumfield with a list of questions he intended to ask her. *Day 2 Transcript*, p. 123. Mr. Koontz, on the other hand, believes that there was a script of questions of some sort. *Day 1 Transcript*, pp. 326-327.

Ultimately, whether Mr. Castelle did or did not provide a list of questions to be asked, this factual disagreement is not dispositive of any of the charges against the Respondent. After all, all three parties to this factual dispute are testifying from memory as to events that occurred in 2004. Indeed, if one reads through the entire transcript, the number of times that the various witnesses could not recall events because of the passage of time are numerous.

During the recorded statement that was conducted by Ms. Brumfield in Respondent's presence, Mr. Sells again confessed to the murders to which Mr. Smith had been convicted. *Charges*, ¶ 22; *Response* ¶ 22. Despite the discussion documented in Ms. Brumfield and Respondent's hand-written notes on their prior date regarding Mr. Smith and Mr. Sells' relationship, no questions were asked with respect to the prior relationship. *Charges*, ¶ 23; *Response* ¶ 23. Mr. Castelle would later assert that the "key question" in the case was whether Sells and Smith knew each other, yet he admitted that he did read read transcript of the initial interview and never objected to the fact that this question was not asked. *Day 2 Transcript*, pp. 101-102.

Prior to leaving death row, Mr. Sells inquired if he could mail Respondent and Ms. Brumfield his hand-written poems. Respondent agreed to re-type the same for Mr. Sells. *Charges*, ¶ 24; *Response* ¶ 24. Upon Respondent's return from Texas, Mr. Sells began writing to Respondent at the Office of the Public Defender. *Charges*, ¶ 25; *Response* ¶ 25. Ultimately, the number of letters that were exchanged between the two number approximately 61. *ODC Exhibit*

1, *Record* pp. 109-395. It is undisputed that these letters were contained in an unmarked folder that was not with the main case file. In his “investigative notes”, *ODC Exhibit 40*, his complaint, *ODC Exhibit 1*, and his testimony, *See generally, Day 1 Transcript* and *Day 2 Transcript*, Mr. Castelle would refer to the folder containing these letters as a “concealed file.” The evidence does not support the conclusion that this file was intentionally “concealed”.⁵ Moreover, there is

⁵It is undisputed that the folder containing the letters was not with the main portions of the file. It is also undisputed that the 61 letters remained in the Public Defender’s Office after Respondent left the Public Defender’s Office for another job in early 2006.

It is also evident that “the file” was never really organized at all. “The file was in almost complete disarray when [it] came [to the Public Defender’s office].” *Day 1 Transcript*, p. 28 (Jane Brumfield). The file was generally housed in Respondent’s office, but “pieces” would be in Jane Brumfield’s office. *Day 1 Transcript*, p. 74 (Jane Brumfield).

The Public Defender’s office has no particular protocol as to how a file is be organized. *Day 2 Transcript*, p. 92 (George Castelle: “no, that’s up to each lawyer, individual lawyer, individual case[;]” it “would not be unusual” to come across a file that is disorganized; it would not be “unusual” for a portion of a file to be somewhere other than where the main file is located); *see also Day 1 Transcript*, pp. 162-163 (Greg Ayers: attorneys can organize files as they see fit); *see also Day 1 Transcript*, p. 73 (Jane Brumfield). It is not uncommon for one file to be split up from time to time as different people in the office are working on it. *Day 1 Transcript*, p. 205 (Peggy Longwell). *See also Day 1 Transcript*, pp. 163-164 (Greg Ayers).

There was a fire in the public defender’s office around the year 2005 that required extensive cleaning. *Day 2 Transcript*, pp.83-84 (George Castelle). When the second floor was cleaned, “everything”, including “documents, pencils, paper clips” were boxed up and taken away. *Day 1 Transcript*, pp. 76-77 (Jane Brumfield). Jane Brumfield does not know if the entire file was kept on the second floor (where her office and Respondent’s office were located) after the fire. *Day 1 Transcript*, p. 76. Moreover, Respondent never told Jane Brumfield to conceal the letters. *Day 1 Transcript*, p. 77.

Ms. Brumfield doesn’t know how the letters got in her filing cabinet as opposed to the main file. *Day 1 Transcript*, p. 77. Ms. Brumfield thought she had given Peggy Longwell everything in the file. *Day 1 Transcript*, pp. 61-62. She does not remember the file with the 61 letters being in her office. *Id.*, at 62. Ms. Longwell testified that when she “discovered” the letters, they were laying by themselves in the bottom of the file cabinet with nothing of top of them. *Day 1 Transcript*, p. 192. The filing cabinet was an unlocked cabinet in Ms. Brumfield’s office that was accessed by other persons in the office. *Day 1 Transcript*, p. 192 (Peggy

no evidence that Respondent caused the letters between her and Mr. Sells to not be filed with rest of the Smith file.

Most of the correspondence from Mr. Sells to Respondent have rambling and innocuous content, but some of his letters contain vulgar, violent passages. Others express his “love” for Respondent. On the other hand, Respondent’s correspondence is friendly in nature, not “romantic” as characterized by Mr. Castelle and Mr. Smith in their ODC complaints. *See generally ODC Exhibit 1, Record pp. 109-395.* Respondent further testified that she thought that ignoring Mr. Sells’ inappropriate comments was the correct way to deal with them. *Day 2 Transcript, p. 297.*⁶

When asked why she engaged in this level of correspondence with Mr. Sells, in both her sworn statement and hearing testimony Respondent explained that the Texas Rangers she interviewed had advised her to keep Mr. Sells “engaged” and “keep him up on what’s going on.”⁷ *ODC Exhibit 13, Record pp. 36, 690, 750, and 757, Day 2 Transcript, p. 398.* She also

Longwell).

⁶During her sworn statement, Respondent explained that being a female public defender required her to have a “tough skin” because she had “horrible” things said to and about her. *ODC Exhibit 13, Record p. 713.* Mr. Ayers also testified that “[he] counsel[s] every female attorney that we hire that there may be occasions when male prisoners or witnesses would make sexual advances or hit on them, and, you know, that they need -- she needs to be prepared for that and to be prepared to deal with it, you know, in a professional manner to nip it in the bud and not let it go any further, so that sort of conduct by the witness or client can be deterred, because I know it happens.” *Day 1 Transcript, pp. 146-147.*

⁷Respondent testified that she was informed by Texas Ranger Allen that he had shared with Mr. Sells intimate details of his personal life to help him build “rapport” with Mr. Sells and that by sharing that information it “helped them get further information out of [Mr. Sells].” *ODC Exhibit 13, Record p. 751.* In addition, Mr. Sells’ counsel in his Texas habeas matter also shared intimate details regarding his personal life with Mr. Sells in a letter dated November 8, 2004. *ODC Exhibit 52, Record p. 3345.*

explained that she had been taught in the Public Defender's Office to treat all criminal defendants and witnesses with dignity and respect. *ODC Exhibit 6, Record* pp. 608-609, *ODC Exhibit 13, Record* pp. 741.

One of the letters written by Mr. Sells after his recorded statement was taken, but before his deposition, dated May 28, 2004, contains an excerpt that says, "Please pass this on" and then says the following:

"...i do hope you done what I said he a lieng ass pice of shit. And i do think i could of help more had he keep his word... like C.B. think the Bar was name Route Lounge..the reason i remember Lounge was because that was the name of my Mother's Bar. Maby a VCR the car..Remove ther clothes from below the waist. And i've done deside if you back. After thinking about it, And How nice you was And Jane.. that i would be more up front to the court reporter..for yall not Dane..anyway i'll make yall shin..do my best at less..."

ODC Exhibit 1, Record pp. 109-116.

Respondent testified that when she received this letter, she was concerned about the passage, and she believes she discussed the letter with Greg Ayers, although Mr. Ayers could not recall the conversation. *Day 2 Transcript*, pp. 258-259. She then went on as follows:

- Q Given the gravity of this section of this letter -- and all the other ramblings, but given the gravity of this section of the letter -- did you take a moment to pause before filing the motion for leave?
- A I don't remember. I can tell you what I did as a result of receiving this letter.
- Q Well, I thought you could tell me what you think you did.
- A I can tell you that I turned up the investigation, like I at that point --
- Q I'm sorry. I didn't hear. You did what?
- A I said I turned up the investigation.
- Q Turned up.
- A And by that, what I mean is I realized that we really needed to try to track Tommy's whereabouts and track Dana's whereabouts. I knew that Tommy was rambling and was all over the place, and I know that I also thought that there was an attempt to be a story carrier between Tommy and Dana like, "Please pass this -- I want you to pass this on."

So you go tell Dana and then Dana say, "Well, I want you to tell Tommy that . . ." And I never wanted to put myself in that position.

Q Why would you be asked to be put in that position of two people who you claim told you never knew one another?

A They were both incarcerated. And this whole, "Please pass this on," he was trying -- in my estimation, he was trying to use me to go tell stories to Dana about what Tommy says.

Q Okay.

A And I just didn't want to get involved in that.

Q So in that same, "What you do," and dot, dot, dot, "I do hope you told Dana what I said. He's a lying ass piece of shit." When you read that, did you go back and look at your original notes to see, "Oh, my god, did he say something to me that this came from?"

A No.

Q Did you search your recollection to see, "What did he say to me to pass on to Dana?"

A Oh, yes. I searched my recollection. I didn't go back through my notes. Probably should have. I didn't. I still don't recall him saying what's in my notes.

So I went back through my mind and what I thought was I needed to make sure that I was really adamant about investigating their whereabouts and where they each were at specific times while Tommy was in West Virginia.

And I thought Tommy was screwing with me, trying to get me to start passing stories on to my client, and I didn't want to start doing that.

Day 2 Transcript, at pp. 259-261.

On or about June 9, 2004, Respondent filed a Motion for Leave of Court to Conduct Depositions and Memorandum of Law seeking to have Mr. Sells' confession taken under oath, subject to cross examination and therefore admissible in Mr. Smith's habeas proceeding.

Respondent attached a copy of the transcript of the recorded statement from May 11, 2004.

Charges, ¶ 27; *Response* ¶ 27.

The Court granted Respondent's motion by Order entered July 19, 2004. *Charges*, ¶ 28; *Response* ¶ 28.

On or about September 24, 2004, Respondent returned to the Polunsky Unit in

Livingston, Texas, and again met with Mr. Sells on death row to take his video-taped deposition.

The Kanawha County Prosecutor's Office appeared via video-conference. *Charges*, ¶ 29;

Response ¶ 29.

Respondent elicited the following relevant deposition testimony from Mr. Sells:

Q: Did there come a time when you met a lady by the name of Pamela Castaneda from Cabin Creek?

A: Yes ma'am.

Q: Do you remember where you met her?

A: At a bar.

Q: Do you remember the name of the bar?

A: No ma'am.

Q: Do you remember anything about, like where the bar was located?

A: I've given that a lot of thought since I was last at that neck of the woods. And, if I'm not mistaken, as I stated before, it was not in Charleston. Had it been, I'd probably remember it a little bit better. It was in St. Albans off of Highway 60, I believe.

Q: Tommy, I'm going to switch gears for a minute and ask you if you know Dana December Smith?

A: No personally.

Q: Was Dana December Smith in the house when you killed the two women in Cabin Creek?

A: Not that I know of, don't know - I - I'm being a smart-ass. No ma'am. No, is the answer to that.

Q: --do you know if Dana December Smith was being housed at Mount Olive, as well?

A: Had -I-I would assume yes, but I hadn't - I never run across him. He didn't live in the same housing area I did.

Q: Did you ever have a conversation with Dana December Smith while at Mount Olive?

A: I never had a conversation with Dana that -that I can really remember period.

Q: Did you ever send messages to him through another person?

A: I don't know him to.

Q: Did he ever send messages to you?

A: He don't know me.

Charges, ¶ 30; *Response* ¶ 30.

In or about Spring of 2005, Respondent requested that she be relieved of counsel because

of she was threatened by Mr. Smith. *Day 2 Transcript*, p. 380. Specifically, Respondent testified as follows:

I went up and told George that Dana had threatened to send his ex-wife to my house to beat my bitch ass or to bitch slap my ass, some variation thereof.

And George is right. He did not let me off the case immediately. A couple of days later, I received a phone call from George asking me to come to his office.

I went up to his office, and he said, "I'm going to go ahead and relieve you. I have spoken with Mr. Koontz. Mr. Koontz has spoken with Dana, and Dana has repeated the threat to Tim, and up until this point Tim did not believe that you had been threatened.

Day 2 Transcript, at pp. 380-381.

Mr. Koontz recalled the incident as follows:

I did receive a communication from George saying that Dana had threatened Wendy's life to her, I guess, personally and had indicated that – and I believe she had just had a child or was about to. I forget what the chronology was. But that he had threatened to get people to go do something to her on his behalf. That's what George told me.

Day 1 Transcript, p. 258. Later, he testified as follows:

- Q When George told you that she was getting off the case, was he equivocal about it in any way? I mean, did he seem -- when I say that, did he appear in his conversation with you as if he believed Wendy?
- A Oh, absolutely. And I believed it, too. And I don't want to go into why, but the things that he said -- I mean, he was very disturbed about it. There's no question about it. We were in complete agreement on it. There was no question about whether or not she needed to get out of the case.

Day 1 Transcript, p. 269.

Mr. Castelle's recollection of this event was not as vivid.

- Q When Ms. Elswick asked to get off the case --
- A Yes.
- Q -- she told you that she had been threatened by Mr. Smith, correct?
- A Yes.

- Q And did you believe her?
- A Well, I asked her what the threats were, you know, what he said, and she didn't give --neither she nor Jane gave me the specifics.
- Q She didn't give you any specifics at all?
- A No.
- Q Well, back to Mr. Koontz's testimony yesterday. I believe he recalls that you're the one that called him and explained to him that there had been a threat against Ms. Smith [sic] and -- again these are my words -- that it was serious enough that she needed to get off the case.
- A Well, that's what she said, yes.
- Q Okay. So did you ever talk with Mr. Koontz about that later?
- A You mean --
- Q About the threat.
- A Later?
- Q After you decided that she could be removed from the case, did you ever discuss the fact of that threat with Mr. Koontz?
- A I may have, but not that I recall.

Day 2 Transcript, pp. 104-105.

After Respondent was taken off the case, she stopped writing to Mr. Sells. *Day 2 Transcript*, pp. 387-388.

On or about January 17-18, 2006, evidentiary hearings were conducted in the Kanawha County Circuit Court. *Charges*, ¶ 32; *Response* ¶ 32. At the hearings, Attorney Castelle called Ms. Brumfield as a witness and inquired whether she was able to discover any evidence that Mr. Sells or Mr. Smith had any contact with one another and Ms. Brumfield answered "No." *Charges*, ¶ 34; *Response* ¶ 34. Attorney Castelle also introduced the September 29, 2004 deposition of Mr. Sells taken by Respondent. *Charges*, ¶ 35; *Response* ¶ 35.

On or about January 31, 2006, Respondent resigned from the Kanawha County Public Defender's Office. *Charges*, ¶ 37; *Response* ¶ 37. She resigned the job to accept a position as an administrative law judge. *Day 2 Transcript*, pp. 460-461.

On or about February 7, 2006, Mr. Sells signed a letter which recanted his earlier

confession.⁸ The February 7, 2006 letter states as follows:

In the year 2000, I was in the Val Verde County Jail in Del Rio Texas and waiting for my trial. I received a letter from Indiana. I don't know if this letter was signed or not. The person writing this letter wanted me to take the blame for a murder in West Virginia. A Dana December Smith was already in jail for this murder. The writer wanted me to say that I had committed the murder and they gave me details about the murder. They promised to send me newspapers and magazines while I was in jail. This sounds like a small things but they are big things if you are locked up. They said I would be doing Smith a favor and one more wouldn't hurt me being that I had already admitted to so many murders.

The next day or so I met with the Texas Rangers and I told them I did this murder. I gave them the details that were in the letter. They talked to West Virginia and told me I had made the story up.

After I was on death row I received a letter from Windy Campbell. I received this letter from my attorney Terry McDonald. Windy had written the letter to McDonald and he passed it on to me. The letter was about the murder that Smith was in jail for. The letter gave details about the killing, who was killed and where. Between the two letters I had a lot of details about the murder.

Later Windy Campbell showed up at the prison and talked to me about the murder. Between the two letters and some good guesswork I admitted to the killing and gave he [sic] the details of the killings.

It was kind of like a chess game talking with her and I figured everyone had been messing with me so I messed with them back.

At this time I want to recant my confession. I did not kill these women. I never stayed at their house, I don't know where they lived and I never met them. I've got an execution date and I want to set the record straight.

ODC Exhibit 36, Record pp. 3055-3057.

After receiving this letter with its accusations concerning Respondent, Mr. Castelle reflects, in his complaint, that "it became an immediate priority to search our files for all records

⁸Although both Respondent and Ms. Brumfield have speculated as to why Mr. Sells recanted, such thoughts are merely that – speculation. There is no evidence in the record, other than Mr. Sells' own words, that establish why he recanted his confession.

of communication between our office and Sells.” *ODC Exhibit 1, Record* p. 9. However, Mr. Castelle did not go back and review the file. Rather, he instructed his assistant Peggy Longwell to do so. *Day 2 Transcript*, p. 165, *Day 3 Transcript*, p. 169.

Specific to this request, Mr. Castelle testified as follows:

- Q. You didn’t go back and read the entire file after receiving the recantation?
A. Oh, no. I asked Peggy Longwell, the investigator on the case, to track every piece of communication between our office and Texas. So she did it at my request. I didn’t do it personally.
- Q. Okay, did you ask her to review notes?
A. I asked her to review everything involving communication between us and Texas.
- Q. Okay, so you asked her in 2006 to review everything regarding communications between Elswick – Ms. Elswick and Mr. Sells, and you believe that would have included notes that had been taken at that time?
A. And more than that. It would have included contacting Texas officials to see what records they have of communications.
- Q. Did she deliver that note to you, the one we’ve spoke about this morning from Ms. Elswick’s first trip to Texas?
A. No.

Day 2 Transcript, pp. 165-166.

According to Ms. Longwell, Respondent’s notes from her first meeting with Mr. Sells were always present in the file. *Day 1 Transcript*, p. 202; *Day 3 Transcript*, p. 108. Yet she apparently did not review “everything,” because she never brought the notes to Mr. Castelle’s attention.

The Circuit Court of Kanawha County denied Mr. Smith's writ of habeas corpus by Order entered September 17, 2007. *Charges*, ¶ 41; *Response* ¶ 41. In its Order, the Circuit Court, first found that “Tommy Lynn Sells’ ‘confession’, standing alone, pales when compared with the overwhelming and largely uncontested evidence [against Mr. Smith].” *ODC Exhibit 36, Record* pp. 2752-2753. The court further noted that Sells has recanted his confession on more than one

occasion, and noted that Mr. Sells and Mr. Smith were housed together during Mr. Smith's "highly publicized trial" and later in the West Virginia Penitentiary. Without specifically addressing Mr. Sell's letter of February 7, 2006, the court characterized Mr. Sell's confession as having a "lack of integrity." *Id.*, at 2753-2754.

Attorney Castelle filed a petition for appeal with the Supreme Court of Appeals of West Virginia on or about January 31, 2008. *Charges*, ¶ 42; *Response* ¶ 42. Oral argument was held before the Supreme Court of Appeals on February 24, 2009, and the Court issued its opinion denying Mr. Smith's appeal on March 12, 2009. *State ex rel. Dana December Smith v. McBride*, 224 W. Va. 196, 681 S.E.2d 81 (2009).

It is evident from this Court's decision that this issue of Ms. Sells' confession and his subsequent recantation was not material to the Court's decision in the case. With respect to the recantation, this Court stated that "In view of the record submitted in this case, we are unable to definitively conclude that the trial court considered Mr. Sells' letter." *Id.*, at 224 W. Va. 205, 681 S.E.2d 90. This Court then went on to discuss the confession, but concluded: "In the instant case, the State argues that because of the strength of the evidence against Mr. Smith, Mr. Sells' implausible confession would not bring about a different result at a new trial. We agree." *Id.*, at 224 W. Va. 210, 681 S.E.2d 95.

In its decision, this Court commented on four distinct "inaccuracies" in Mr. Sell's confession, none of which specifically dealt with whether Mr. Sells and Mr. Smith knew each other. The opinion did say that: "The fact that two of Mr. Sells' incorrect statements can be traced to improperly identified trial exhibits indicates that it is very plausible that someone supplied Mr. Sells with information about the murders." *Id.*, at 224 W. Va. 208, 681 S.E.2d 93.

Although nothing in the Supreme Court's opinion leveled any accusations at the Public Defenders' Office, Mr. Castelle nonetheless read the opinion as implying that the Supreme Court was suggesting that Respondent had supplied Mr. Sells with information about the crime, and he set about to "disprove" the unstated "allegation." *Day 2 Transcript*, pp. 36-37.

Mr. Castelle's "investigation" is detailed in his "investigative notes", *ODC Exhibit 40, Record* pp. 3094 to 3127, and his hearing testimony generally. Most of his "investigation" was focused on Ms. Brumfield, whom he ultimately fired, but he did involve Respondent in his investigation, and although she was no longer working in the office, she cooperated with him and responded to his requests for information. *See generally ODC Exhibit 40, Record* pp. 3094-3105, *Day 2 Transcript*, pp. 133-135.

On or about April 13, 2009 Attorney Castelle filed a Petition for Rehearing with the Supreme Court of Appeals of West Virginia. *ODC Exhibit 36, Record* pp. 2974-2995. For the first time on April 17, 2009, Attorney Castelle then read the correspondence from Mr. Sells to Respondent and "discovered" the May 28, 2004 letter. *ODC Exhibit 40, Record* pp. 3105-3106, *Day 2 Transcript*, pp. 59-60.

On or about April 24, 2009, Attorney Castelle submitted a written request to the Supreme Court of Appeals requesting that the consideration of the Petition for Rehearing be held in abeyance. *Charges*, ¶ 55; *Response* ¶ 55. On April 30, 2009, Attorney Castelle terminated Ms. Brumfield as an employee of the Kanawha County Public Defender's Office. *Charges*, ¶ 56; *Response* ¶ 56. The basis for termination was the alleged "concealed file" and her alleged "false" testimony at the habeas hearing.

On or about May 6, 2009, Attorney Castelle filed a Motion to Withdraw Petition for

dismissed by the panel.” All of the charges related to Count I were first brought in a complaint filed by George Castelle on May 6, 2009. All of the allegations contained in Count I relate to events that occurred on May 11, 2004, June 9, 2004, and September 24, 2004, respectively. Absent the invocation of the “discovery rule”, there is no question that the statute of imitation had run long before any complaint was ever filed. Looking at the “discovery rule”, Mr. Castelle’s own testimony and actions (or failures to act) establish that the latest date that by the use of reasonable diligence he should have known of any alleged misconduct was February 2006, and since Mr. Castelle’s complaint was not filed until more than three years later, on May 6, 2009, the charges are barred by the statute of limitations. Nevertheless, the Hearing Panel refused to apply this statute of limitations to this matter, in violation of the Rules and this Court’s holding in *Lawyer Disciplinary Bd. v. Smoot*, 228 W. Va. 1, 716 S.E.2d 491, 493 (2010) *cert. denied*, 132 S. Ct. 94, 181 L. Ed. 2d 23 (U.S. 2011).

Assuming *arguendo* that the statute of limitations is not a bar to the allegations in Count I, the ODC failed to prove the alleged violations by clear and convincing evidence, and the Hearing Panel’s decision must therefore be reversed. The first violation alleged is that: “On or about May 11, 2004, Respondent knowingly and intentionally directed or otherwise permitted a non-lawyer assistant under her direct supervision to elicit a known false statement from a potential witness in a habeas matter.” *Charges*, ¶ 58. However, no such false statement was elicited by Respondent’s assistant. Rather, she apparently stands condemned over the fact that a question was not asked.

The record indicates that May 11, 2004 was the date that Ms. Brumfield took the tape-

recorded statement of Mr. Sells.¹⁰ Paragraph 58 does not detail the specific “known false statement” that Ms. Brumfield is alleged to have solicited, but Paragraphs 19, 20, 26, 30 of the *Charges* deal with whether Mr. Sells ever met Mr. Smith prior to the murders. To the extent that the *Charges* refers to whether Mr. Sells knew, or did not know, Mr. Smith, it is difficult to discern how any question falls within the ambit of a “known false statement.” The only question that could possibly touch upon the issue of whether Mr. Sells and Mr. Smith knew each other was “Were you with anyone else at the bar when you first met her?,” to which Mr. Sells answered only “Next question.” *ODC Exhibit 35, Record* p. 2088. No direct question regarding whether Mr. Sells knew Mr. Smith was ever asked. There simply can be no violation as alleged here when the question was never asked.

The second violation alleged is that: “On or about June 9, 2004, Respondent knowingly and intentionally filed a Motion for Leave of Court to Conduct Depositions and Memorandum of Law and attached a copy of the transcript of the known false statements on May 11, 2004.” *Charges*, ¶ 59. However, contrary to the allegations in the *Charges*, neither the Motion for Leave of Court nor the accompanying memorandum of law **make any reference whatsoever** to whether Mr. Sells and Mr. Smith knew each other.

The third violation alleged is that Respondent violated Rule 3.4 (Fairness to opposing party and counsel) in that: “On or about September 24, 2004, Respondent returned to the Polunsky Unit in Livingston, Texas and knowingly and intentionally elicited false statements from Mr. Sells during his video-taped deposition.” *Hearing Panel Decision*, ¶ 97. However, the

¹⁰¶ 21 of the *Charges* erroneously refers to this as a sworn statement. In fact, Mr. Sells was not sworn in prior to giving this statement. *ODC Exhibit 35, Record* pp. 2086-2098.

evidence is lacking that Respondent “knowingly” did anything. Mr. Sells had confessed and recanted prior to even meeting Respondent, see *infra* at footnote 15. This was known not only to Respondent but to everyone involved in the case. Mr. Sells supposedly told Respondent in their first meeting (according to her notes) that he knew Mr. Smith, but later denied it under oath. Yet two years later, Respondent, who supposedly already “knows” from her initial notes how the two met, is speculating as to how the two might have met.

Finally, the Hearing Panel erred in concluding that Respondent violated Rule 1.7 (Conflict of interest) as charged in Count II of the Statement of Charges due to the fact that Respondent carried on a “pen-pal”-type relationship with Mr. Sells. The Hearing Panel’s conclusion that the denial of Mr. Smith’s habeas petition was “based partly on the discovery of Respondent’s conduct”, *Hearing Panel Decision*, p. 36, is simply devoid of any evidentiary support. Rather, it is evident from this Court’s decision that the issue of Ms. Sells’ confession and his subsequent recantation was not material to the Court’s decision in the case. With respect to the recantation, this Court stated that “In view of the record submitted in this case, we are unable to definitively conclude that the trial court considered Mr. Sells’ letter.” *Id.*, at 224 W. Va. 205, 681 S.E.2d 90. This Court then went on to discuss the confession, but concluded: “In the instant case, the State argues that because of the strength of the evidence against Mr. Smith, Mr. Sells’ implausible confession would not bring about a different result at a new trial. We agree.” *Id.*, at 224 W. Va. 210, 681 S.E.2d 95.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court’s Order of March 22, 2013 set this matter for a Rule 20 argument on September 11, 2013.

V. ARGUMENT

A. THE ALLEGATIONS AGAINST RESPONDENT IN COUNT I OF THE STATEMENT OF CHARGES ARE BARRED BY THE STATUTE OF LIMITATIONS.

Paragraph 58 of the *Statement of Charges* alleges, and the Hearing Panel found, that:

On or about May 11, 2004, Respondent knowingly and intentionally directed or otherwise permitted a non-lawyer assistant under her direct supervision to elicit a known false statement from a potential witness in a habeas matter. Therefore, she has violated Rule 5.3 of the Rules of Professional Conduct which provides as follows:

Rule 5.3. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the persons' conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Paragraph 59 of the *Statement of Charges* alleges, and the Hearing Panel found, that:

On or about June 9, 2004, Respondent knowingly and intentionally filed a Motion for Leave of Court to Conduct Depositions and Memorandum of Law and attached a copy of the transcript of the known false statements on May 11, 2004. Therefore, she has violated Rule 3.3; 8.4(d) of the Rules of Professional Conduct which provide as follows:

Rule 3.3. Candor toward the tribunal.

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

and;

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;

Paragraph 60 of the *Statement of Charges* alleges, and the Hearing Panel found, that:

On or about September 24, 2004, Respondent returned to the Polunsky Unit in Livingston, Texas and knowingly and intentionally elicited false statements from Mr. Sells during his video-taped deposition. Therefore, she has violated Rule 3.4(b) of the Rules of Professional Conduct which provides as follows:

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

Each of the aforesaid charges are barred by the statute of limitations. Count I alleges acts that occurred on May 11, 2004, June 9, 2004, and September 24, 2004, respectively. It must be noted, however, that each of these counts arises from the complaint filed by George Castelle on May 6, 2009. Nonetheless, the violations alleged in Count I were brought in the name of the Office of Disciplinary Counsel.

Rule 2.14 of the Rules of Lawyer Disciplinary Procedure provides that: “Any complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Rules of Professional Conduct, shall be dismissed by the panel.” There exists no rule permitting the Office of Disciplinary Counsel to avoid the statute of limitations when a complaint is otherwise barred by the statute of limitations.

The application of the statute of limitations was recently discussed in the case of *Lawyer Disciplinary Bd. v. Smoot*, 228 W. Va. 1, 716 S.E.2d 491, 493 (2010) *cert. denied*, 132 S. Ct. 94, 181 L. Ed. 2d 23 (U.S. 2011), in which the respondent therein faced the same rules violations alleged in Count I of this case. In *Smoot*, the respondent represented an employer that was challenging an employee’s black lung claim. In 2001, the employer subjected the employee to an examination by a physician of the employer’s choosing. The physician issued a report consisting of “a two page report of arterial blood gas studies, eleven pages reporting results of pulmonary function tests, an ILO-UC form indicating [the doctor] made a reading of an x-ray showing ‘Large Opacities Size A,’ a one-page lab report showing carbon monoxide and hemoglobin levels, an eight-page exercise report of EKG and pulmonary readings, and a five-page narrative summary dated May 16, 2001, that included a finding that [the employee] suffered from complicated pneumoconiosis.” *Smoot*, at 228 W. Va. 1, 716 S.E.2d 495. Later that same year,

the respondent submitted the doctor's findings to an administrative law judge, but removed the five-page narrative from the submission. *Id.* at 228 W. Va. 1, 716 S.E.2d 496. At this time, the employee was proceeding *pro se*.

Later, the employee obtained counsel, who filed discovery requests, and in response to that request, the five-page summary was turned over to the employee's counsel on September 20, 2004. *Id.* at 228 W. Va. 1, 716 S.E.2d 496. On August 30, 2006, a United States District judge entered an order referring the matter of the narrative to the Office of Disciplinary Counsel, and the district court's order and file were delivered to the Office of Disciplinary Counsel on September 1, 2006. The ODC issued formal charges on February 2, 2009. *Id.* at 228 W. Va. 1, 716 S.E.2d 497.

Respondent Smoot alleged that ODC's charges were barred by the statute of limitations because the alleged misconduct was "known" as of September 2004, that the ODC did not bring charges until 2009, and that the employee's counsel was the true "complainant". This Court rejected this argument, finding that:

Because the United States district court brought the alleged misconduct to the attention of the ODC, that tribunal is the 'complainant' for purposes of Rule 2.14. . . . Mr. Smoot has not alleged that the complaint of the United States district court was untimely.

Id., at 228 W. Va. 1, 716 S.E.2d 499.

In the *Smoot* matter, it is likely that respondent did not argue that the district court was the complainant because that court reported the alleged misconduct within two years of the "discovery" of that conduct. Implicit in the *Smoot* decision, however, is the recognition that the ODC cannot simply bring charges in its own name unless the source of the alleged misconduct reports the matter to the ODC within the statute of limitations.

In the instant case, all of the charges contained in Count I derive from the complaint filed by George Castelle, and the evidence is overwhelming that Mr. Castelle failed to exercise reasonable diligence in “discovering” the alleged misconduct.

Mr. Sells signed a written recantation on February 7, 2006, *ODC Exhibit 36, Record* pp. 3055-3056, in which he mentioned Respondent’s name. By Mr. Castelle’s own admission “it became an immediate priority to search our files for all records of communication between our office and Sells.”¹¹ *ODC Exhibit 1, Record* p. 9. Yet, Mr. Castelle did not search the file - he instructed his assistant Peggy Longwell to do so. *Day 2 Transcript*, p. 165, *Day 3 Transcript*, p. 169.

Mr. Castelle’s own testimony established that, as early as February 2006, he was put on notice that a confession that his office was relying on was alleged to have been fabricated by Mr. Sells. Mr. Sells’ letter did not accuse Respondent of any specific wrongdoing, but nonetheless asserted that “it was kind of like a chess game talking with her [Respondent] and I figured everyone had been messing with me so I messed with them back.” *See ODC Exhibit 36, Record* p. 3056. It is at this date that Mr. Castelle was put on notice and had a duty to use “reasonable diligence.” Notwithstanding this “bombshell” recantation, Mr. Castelle did not bother to review the file himself. He simply delegated it to a subordinate, who apparently did not do so thoroughly, if at all.

¹¹Subsequent to the August 25, 2011 and August 26, 2011 hearings, on October 11, 2011 Ronni Sheets of the Public Defender’s office produced an email from Respondent to Mr. Castelle dated June 14, 2005 that stated “Tommy still writes to us, so anything we can provide to you we’d be glad to do.” *ODC Exhibit 36, Record* p. 3183. Mr. Castelle testified that after he received this email he did not ask to review any of the correspondence. *Day 3 Transcript*, pp. 173-175.

Months later, Mr. Castelle would show complete indifference to his own prior directive that “it became an immediate priority to search our files for all records of communication between our office and Sells.” When he was told numerous times by Peggy Longwell that there existed a number of letters between Respondent and Mr. Sells, he waited nearly nine months to review the letters, and even then only reviewed the letters from Respondent to Mr. Sells.¹²

Mr. Castelle’s explanations as to why he did not read the letters immediately are belied by his instructions to Peggy Longwell in February 2006 that “I asked Peggy Longwell, the investigator on the case, to track every piece of communication between our office and Texas.” *Day 2 Transcript*, p. 165, *Day 3 Transcript*, p. 169.

Any reasonable review of the evidence shows that, at the latest, the statute of limitations regarding the allegations in Count I began to run in February 2006, and since Mr. Castelle’s complaint was not filed until more than three years later, on May 6, 2009, the charges are barred by the statute of limitations.

B. THE HEARING PANEL’S FINDINGS AGAINST RESPONDENT ON COUNT I MUST BE REVERSED BECAUSE THEY WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Assuming *arguendo* that the statute of limitations is not a bar to the allegations in Count I, the ODC failed to prove the alleged violations by clear and convincing evidence, and the Hearing Panel’s decision must therefore be reversed.

The Hearing Panel concluded that Rule 5.3 (Responsibilities regarding nonlawyer assistants) was violated in that: “On or about May 11, 2004, Respondent knowingly and

¹²Mr. Castelle did not read the letters from Respondent to Mr. Sells until December 16, 2008. Even then, he did not read the letters from Mr. Sells to Respondent. He finally read those letters on April 17, 2009.

intentionally directed or otherwise permitted a non-lawyer assistant under her direct supervision to elicit a known false statement from a potential witness in a habeas matter.” *Hearing Panel Decision*, ¶ 95. The record indicates that May 11, 2004 was the date that Ms. Brumfield took the tape-recorded statement of Mr. Sells.¹³ Paragraph 58 of the *Charges* does not detail the specific “known false statement” that Ms. Brumfield is alleged to have solicited, but Paragraphs 19, 20, 26, 30 of the *Charges* deal with whether Mr. Sells ever met Mr. Smith prior to the murders. To the extent that the *Charges* refer to whether Mr. Sells knew, or did not know Mr. Smith, it is difficult to discern how any question falls within the ambit of a “known false statement.” The only question that could possibly touch upon the issue of whether Mr. Sells and Mr. Smith knew each other was “Were you with anyone else at the bar when you first met her?”, to which Mr. Sells answered only “Next question.” *ODC Exhibit 35, Record* p. 2088. No direct question regarding whether Mr. Sells knew Mr. Smith was ever asked. There simply can be no violation as alleged here when the question was never asked.

Aside from the failure to prove a false statement, the ODC did not prove by clear and convincing evidence that any such false statement was “known” at the time. The term “know” in the context of the Rules of Professional Conduct “denotes actual knowledge of the facts in question.” Furthermore, “[a] person’s knowledge may be inferred from the circumstances.” *Rules of Professional Conduct, Terminology*. To the extent that the “known false statement” is Mr. Sell’s admission that he committed the murders of the two women, it was already known at that time that there has been instances in the past where Mr. Sells had confessed and then denied

¹³¶ 21 of the *Charges* erroneously refers to this as a sworn statement. In fact, Mr. Sells was not sworn in prior to giving this statement. *ODC Exhibit 35, Record* pp. 2086-2098.

confessing. The “knowledge” that a witness, particularly a convicted felon such as Mr. Sells, had made inconsistent prior statements (or, indeed, later inconsistent statements) simply cannot and should not confer “actual knowledge” that all or part of a witness’ statement is “knowingly false.”¹⁴

The Hearing Panel next concluded that Rules 3.3 (Candor toward the tribunal) and 8.4(c) and 8.4(d) (Misconduct) were violated in that: “On or about June 9, 2004, Respondent knowingly and intentionally filed a Motion for Leave of Court to Conduct Depositions and Memorandum of Law and attached a copy of the transcript of the known false statements on May 11, 2004.” *Hearing Panel Decision*, ¶ 96. However, contrary to the allegations in the *Charges*, neither the Motion for Leave of Court nor the accompanying memorandum of law **make any reference whatsoever** to whether Mr. Sells and Mr. Smith knew each other. *ODC Exhibit 35, Record*, pp. 2066-2072. In fact, the May 11, 2004 interview is referenced in the memorandum as follows:

In an interview conducted by Jane Brumfield at the Polunsky Unit in Lexington, Texas, Mr. Sells once again confessed to the murders for which [Mr. Smith] is convicted (Attachment C). In a taped statement, he was able to describe with specificity the glasses of the elderly victim. He was able to describe what the elderly lady was wearing at the time of the murder, and he knew her body was left in the kitchen.

With respect to the younger victim, he was able to explain that her body was placed between two doorways. He recalled that she was between either a restroom or a bedroom and the day room. When reviewing the crime scene sketch done by one the investigating officer, his description is accurate with the placement of the bodies

¹⁴Indeed, the West Virginia Supreme Court noted in its decision affirming the denial of habeas relief that (1) after Mr. Sells confessed to the Texas Rangers, he later told one of them that he denied the same and asserted that he had a dream about it, and (2) he told Diane Fanning, who wrote about him, he did not kill the women, but later changed his story and told her that he did. These events all occurred before Respondent first traveled to Texas. *ODC Exhibit 36, Record* pp. 3052-3053.

(Attachment D). He was also able to recall that there was a small indoor dog, which is accurate as evidenced by the pictures admitted during the trial. Also, Mr. Sells was able to recall that the attic had both a bedroom and a bathroom upstairs. He also recalled a afghan in the house. For instance, he remembers a lover's swing and a wheelchair ramp. He remembers entering from a door on the side of the house that led into the kitchen, also accurate with the representations made in the crime scene sketch. Mr. Sells remembers killing these two women, and it is for that reason that he needs to be deposed.

ODC Exhibit 35, Record, pp. 2070-2071.

Nowhere in the motion or memorandum is there any mention of whether Mr. Sells and Mr. Smith knew each other prior to the murders. Yet, the *Charges* inexplicably assert that Respondent filed a motion with these “knowingly false” statements. The *Charges* do not allege that any of the statements that actually appear in the motion or memorandum are “knowingly false,” statements, and no evidence was introduced at the hearings in this matter that any of the statements actually included in the motion and memorandum was a “knowingly false” statement.

The Hearing Panel next concluded that Rule 3.4(b) (Fairness to opposing party and counsel) was violated in that: “On or about September 24, 2004, Respondent returned to the Polunsky Unit in Livingston, Texas and knowingly and intentionally elicited false statements from Mr. Sells during his video-taped deposition.” *Hearing Panel Decision*, ¶ 97.

Respondent's repeated and consistent denials that she never heard Mr. Sells tell her in their first meeting that he knew Mr. Smith are credible. As discovered after the first two days of testimony, there does exist an email from Ms. Brumfield to Respondent dated February 2, 2006 (after Respondent left the Public Defender's Office) where Ms. Brumfield states as follows: “Wendy, I went back over my notes of our first meeting Tommy [Sells] and at that time, he said he was at the bar with Dana [Smith]”. *ODC Exhibit 44, Record* p. 3240. The email contains no response from Respondent. However, Respondent's email immediately prior to Ms. Brumfield's contains

Respondent's comments speculating as to whether Mr. Sells and Mr. Smith knew each other from the Walls (neighbors of the victims). This begs the question - If Respondent was aware that Mr. Sells and Mr. Smith knew each other from her very first meeting with Mr. Sells in 2004, why would she be speculating with her "co-conspirator" Jane Brumfield in 2006 about how the two (Sells and Smith) may have come to know each other? Rather than being evidence of wrongdoing, this email actually lends credence to Respondent's testimony that she does not recall Mr. Sells ever telling her that he knew Mr. Smith. Yet, the Hearing Panel concludes that Respondent "knowingly and intentionally adduced incomplete and incorrect evidence, asked the Court to rely on this false evidence thereby, knowingly perpetrated a fraud on the Courts." *Hearing Panel Decision*, p. 40. In other words, Respondent, who does not recall Mr. Sells ever saying that he knew Mr. Smith, and who thereafter heard the witness testify in a deposition that he did not know Mr. Smith, has committed a "fraud on the court" by not realizing that she had notes which suggest otherwise, and by not then alerting her supervisors to the fact that she did not recall that she had any such notes. The Hearing Panel's conclusion must necessarily rest on the belief that: (1) Respondent is lying when she says that she does not recall Mr. Sells saying that he knew Mr. Smith at the initial interview; (2) that she instructed Ms. Brumfield not to ask the question in the initial interview; (3) that she failed to tell the circuit court, when requesting Mr. Sell's deposition, that Mr. Sells told her that he knew Mr. Smith; and (4) having "knowledge" of Mr. Sells' false testimony, when she left the Public Defender's Office, she was too incompetent to destroy the notes which suggest otherwise. This is simply implausible, as well as highly speculative, and there is an astonishing lack of any real evidence that she knowingly "perpetrated a fraud on the Courts."

Thus, the Hearing Panel's decision against Respondent on Count I is not supported by clear and convincing evidence and must therefore be reversed.

C. THE HEARING PANEL'S FINDINGS AGAINST RESPONDENT ON COUNT II MUST BE REVERSED BECAUSE THEY WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Count II alleges, and the Hearing Panel Found, that: "Respondent, without the knowledge and consent of her client, engaged in a relationship with a witness in her client's case and that the unilateral termination of said relationship ultimately harmed her client's objective in his habeas matter. Therefore, she has violated Rule 1.7(b) of the Rules of Professional Conduct which provides as follows:

Rule 1.7. Conflict of interest: General rules.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

Hearing Panel Decision, ¶ 120.

Moreover, with absolutely no evidentiary support in the record, the Hearing Panel states that the denial of Mr. Smith's habeas petition was "based partly on the discovery of Respondent's conduct." *Hearing Panel Decision*, p. 36.

While the Respondent's actions in corresponding with Mr. Sells were ill-advised, the Respondent, being a young and inexperienced attorney, began such correspondence out of a good faith belief that she was assisting her client, Mr. Smith. The record clearly shows that she did not

believe that her actions in corresponding with Mr. Sells materially limited her responsibilities to Mr. Smith. The Respondent has repeatedly stated and the record demonstrates that though the Respondent corresponded with Mr. Sells, she was not in a “relationship” with him. The record also fails to contain any clear and convincing proof that her correspondence with Mr. Sells harmed her client’s objectives in the habeas matter.

The Circuit Court of Kanawha County denied Mr. Smith's writ of habeas corpus by Order entered September 17, 2007. *Charges*, ¶ 41; *Response* ¶ 41. In its Order, the Circuit Court, first found that “Tommy Lynn Sells’ ‘confession’, standing alone, pales when compared with the overwhelming and largely uncontested evidence [against Mr. Smith].” *ODC Exhibit 36, Record pp. 2752-2753*. The court further noted that Sells has recanted his confession on more than one occasion, and noted that Mr. Sells and Mr. Smith were housed together during Mr. Smith’s “highly publicized trial” and later in the West Virginia Penitentiary. Without specifically addressing Mr. Sell’s letter of February 7, 2006, the court characterized Mr. Sell’s confession as having a “lack of integrity.” *Id.*, at 2753-2754.

Upon Mr. Smith’s appeal to this Court, it is evident that the issue of Mr. Sells’ confession and his subsequent recantation was not material to the Court’s decision in the case. With respect to the recantation, this Court stated that “In view of the record submitted in this case, we are unable to definitively conclude that the trial court considered Mr. Sells' letter.” *State ex rel. Dana December Smith v. McBride*, 224 W. Va. 196, 205, 681 S.E.2d 81, 90 (2009). This Court then went on to discuss the confession, but concluded: “In the instant case, the State argues that because of the strength of the evidence against Mr. Smith, Mr. Sells' implausible confession would not bring about a different result at a new trial. We agree.” *Id.*, at 224 W. Va. 210, 681

S.E.2d 95.

For the *Hearing Panel* to conclude that Respondent's actions harmed Mr. Smith's habeas proceeding in the face of this Court's affirmance of his conviction in light of "the overwhelming and largely uncontested evidence [against him]" defies logic.

The evidence that Respondent's correspondence with Mr. Sells harmed the client in any way is simply lacking, and this Court cannot let the Hearing Panel's decision stand.

VI. SANCTIONS

Sanctions should not be imposed upon Respondent, as her actions, at worst, were the result of the negligent actions of a young attorney, and there are present in this case numerous mitigating factors.

"Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: 'In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.'" Syl. pt. 5, *Lawyer Disciplinary Bd. v. Smoot*, 228 W. Va. 1, 716 S.E.2d 491, 493 (2010) *cert. denied*, 132 S. Ct. 94, 181 L. Ed. 2d 23 (U.S. 2011), *citing* syl. pt. 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W. Va. 495, 513 S.E.2d 722 (1998).

The evidence clearly shows that Respondent did not knowingly misrepresent, or hide or

conspire to hide, any evidence in this case, or to submit knowingly false information during or after her representation of Mr. Smith. While the Respondent's correspondence with Mr. Sells was juvenile and ill-advised, it was not done with the intent to harm or damage Mr. Smith's case, and in fact there is no clear and convincing evidence that her correspondence with Mr. Sells in fact damaged Mr. Smith's case in any way. Therefore, the Respondent's actions did not violate any duty owed to a client, to the public, to the legal system, or to the profession.

Likewise, the evidence clearly shows that the Respondent did not intentionally, knowingly or negligently hide, conceal, or fail to disclose any material evidence in this case. Her ill-advised correspondence could be rightfully characterized as "negligent" or as she even acknowledged, "stupid", *Day 3 Transcript*, p. 401, but again there is no evidence that the Respondent breached any duty on her part.

Thus, there is no clear and convincing proof any actual or potential injury to a client, to the public, to the legal system, or to the profession. However, while there are no aggravating factors present in this case, there are numerous mitigating factors.

"Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior

offenses.” Syl pt. 8, *Lawyer Disciplinary Bd. v. Smoot*, 228 W. Va. 1, 716 S.E.2d 491, 493 (2010) *cert. denied*, 132 S. Ct. 94, 181 L. Ed. 2d 23 (U.S. 2011), *citing* syl. pt. 3, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

Respondent has no prior disciplinary action. *Day 2 Transcript*, pp. 197-198. Though two complaints were filed against her after she left the Public Defender’s office and was employed as an administrative law judge, one was closed after she responded and the other was closed without Respondent being asked to respond. *Day 3 Transcript*, p. 250.

No evidence was admitted of a dishonest or selfish motive. Indeed, had Respondent truly “conspired” with Jane Brumfield, it would have been easy to destroy their notes from the first meeting with Mr. Sells, as well as the May 28, 2004 letter from Mr. Sells. Indeed, Respondent made no effort to conceal or destroy the 61 letters, which she would be expected to do if she was knowingly or intentionally engaging in conduct she knew to be unethical.

At the time that these actions are alleged to have occurred, Respondent was inexperienced in the practice of law. Respondent had only practiced law for six years when assigned to this case. This was one of the first cases assigned to her when she transferred to the appellate division.¹⁵ The deposition of Mr. Sells was the first deposition that Respondent had ever taken.

¹⁵Tim Koontz characterized the decision to send Respondent to Texas, both to interview Mr. Sells and later take his deposition, as “the dumbest decision that we did in this case.” *Day 1 Transcript*, p. 324. “And an experienced attorney needed to -- I don't think that someone -- in all due respect to Wendy, I don't think a lawyer with six years of experience in a murder case like this where a man is in prison without any chance of parole for a double murder that we should send someone with just six years of experience that's never ever had, you know, experience with something like this. I mean, this would be -- as I said before, this would be very challenging for either me or George to handle properly, and to pass it off to an amateur like Wendy at the time --” *Id.* at pp. 324-325.

Day 2 Transcript, p. 326. And this was the first (and only) time in her career when she had contact with a serial killer. *Day 2 Transcript*, p. 398.

With respect to Respondent's character or reputation, she was uniformly complimented by the various witnesses:

1. George Castelle "liked her" and thought she was a "good lawyer" "up until this time," *Day 2 Transcript*, pp. 89-90;
2. Peggy Longwell stated that "Wendy was always extremely diligent and ethical in all of my experiences with her[,] and agreed that this situation was "aberrant", *Day 1 Transcript*, p. 211;
3. Greg Ayers, her immediate supervisor in the Public Defender's Office, appellate division, said "I had great – and I still have great respect for Wendy's legal ability", *Day 1 Transcript*, p. 136;
4. Jane Brumfield never knew Respondent to do anything dishonest in any of the cases she worked on with her, *Day 1 Transcript*, p. 71; and
5. Even Tim Koontz described her as a "good lawyer." *Day 1 Transcript*, p. 232.

The delay in the time period between when these events allegedly occurred (in 2005 and 2006) and when the Charges were brought and hearings held have prejudiced Respondent at least somewhat. The number of times that the various witnesses said "I don't recall" or "I don't remember" are too numerous to count. There are discrepancies in the testimony about matters of little importance (such as who assigned Respondent to the case) and matters of much more importance (such as the level of Mr. Castelle's involvement in the case, or the circumstances under which Respondent was permitted to go to Texas without Mr. Koontz or circumstances

surrounding her being relieved from the case). That is not to say that there would not be disagreements or contradictory testimony if these matters had occurred just months ago, instead of years ago, but the passage of time has clearly dulled the memories of the witnesses, and that, in and of itself, constitutes prejudice to Respondent.

Finally, Respondent has expressed remorse for her actions. She admitted her correspondence with Mr. Sells was, in hindsight, “pretty stupid.” *Day 2 Transcript*, p. 401. She admitted that sending Mr. Sells “shout outs” to a local radio station was not a good thing to do, *Day 3 Transcript*, p. 242. Although she has testified “over and over again” that she does not recall Mr. Sells’ saying in their first meeting that he knew Mr. Smith, she has acknowledged that she understands why someone else looking at her notes (at least the first page) could come to a different conclusion. *Day 2, Transcript*, p. 403. As she stated during the August 26, 2011 hearing:

I am so sorry. You probably noticed that I cried a lot when Geor -- or Greg and Peggy were in here at the beginning. The Public Defender's Office was my home. It's where I started. I would never intentionally do anything to put any of them in any bad light or to put them in the position that they were in. And I am just so sorry. I never meant to hurt anybody in any of this case. And I was just -- I was stupid. I was stupid about the letters. But I really -- I really tried to do the right thing and do the best I could. And I'm sorry.

Day 2 Transcript, pp. 410-411.

Thus, given the facts presented above, most importantly the running of the appropriate statute of limitations, the imposition of sanctions against the Respondent is not warranted. However, should this Court deem some form of sanctions appropriate in this matter, those sanctions should be far less severe than recommended by the Hearing Panel.

In fact, the cases referenced in the *Hearing Panel's Decision* show that the recommended

sanctions are too severe for the allegations against the Respondent. Though it is still far from clear what the allegations against the Respondent are, it seems to be that she has violated the Rules by not alerting her supervisor that she could not recall that Mr. Sells may have told her in an earlier interview that he knew the Respondent's client, Mr. Smith. By not advising her supervisor of this, she is alleged to have broken the Rules when her supervisor, Mr. Castelle, then made certain statements to the contrary in court filings which were drafted and filed some time after the Respondent left the Public Defender's Office.

For this "offense," the Hearing Panel seeks the very real and very clear sanctions of a three (3) year suspension, evaluation by a mental health provider prior to reinstatement, twelve (12) additional hours of ethics classes, the costs of the proceedings and two years of supervised practice. To support this harsh punishment, the Hearing Panel cites several previous disciplinary matters¹⁶ in which sanctions were imposed. However, a review of these cases reveals that the sanctions sought by the Hearing Panel in this matter far outweigh the "offense" committed by the Respondent.

The Hearing Panel concedes that the Respondent is charged with only one incident of "fraud on the Courts." The Hearing Panel then cites *Lawyer Disciplinary Board v. Edward R. Kohout*, No. 22629 (WV 4/14/95) for the purpose of arguing that "an isolated incident of this misconduct alone warrants suspension of her license." However, Mr. Kohout was found to have perpetrated several incidents of fraud, including his continuing representation of clients in

¹⁶It should be noted that the specifics of several of these disciplinary decisions are not available to the public or the undersigned. In those cases the facts cited herein are taken from the descriptions provided in the *Hearing Panel's Decision*. Presumably the Hearing Panel had access to the facts in their own files.

Bankruptcy Court after having been suspended from practice therein. In addition to the fraudulent Bankruptcy practice, he was found to have lied *repeatedly* regarding his expulsion from law school. Yet for these *numerous* incidents of fraud, he received a *two-year* suspension.

The Hearing Panel also cites *Lawyer Disciplinary Board v. Jeffrey A. Holmstrand*, No. 22523 (WV 5/30/96). Again, Mr. Holmstrand was found to have committed numerous frauds upon the Courts including creating false pleadings, false affidavits and false testimony to a Court all in an attempt to cover up a missed deadline. Yet despite these *numerous* incidents of fraud, his license was suspended for *one year*.

In *Board v. Humberson*, No. 25925 (WV 10/26/00) Mr. Humberson was found to have committed one incident of fraud - he swore out a false affidavit. His sanction – a 90 day suspension. Similarly, in *Board v. Hays*, No. 28465 (WV 10/04/01), Mr. Hays forged two title letters for personal gain. He got by with just a *reprimand*. In *Board v. Ansell*, 210 W.Va. 139, 556 S.E.2d 106 (2001), Mr. Ansell *altered* a court order yet received a mere 60 day suspension.

A much more egregious case is *Board v. Billups*, No. 32572 (WV 10/06/05). Here Mr. Billups lied to a client regarding the filing of his lawsuit. Then to cover his lie to his client, Mr. Billups prepared false documents and then went so far as to advise his client that a settlement had been reached. For these “numerous” violations, Mr. Billups had his license suspended for *six months*.

Finally, the Hearing Panel cites the cases of *Board v. Losch*, 219 W.Va. 316, 633 S.E.2d 261 (2006) and *Board v. Smoot, supra*. In *Losch*, the attorney altered a Circuit-Court issued document and caused it to be served on an individual. The Board sought a 30-day suspension which this Court reduced to a reprimand. In *Smoot*, as discussed above, the lawyer intentionally

removed and withheld relevant information from a *pro-se* litigant. For this, he received a *one-year* suspension.

The Hearing Panel attempts to justify its call for an unreasonable sanction by claiming that the Respondent had an “inappropriate” relationship with Mr. Sells and that this created a conflict of interest. However, the facts developed in this matter fall far short of proving there was any “relationship,” which the Respondent continues to deny. At worst, the Respondent exchanged some “questionable” personal information with Mr. Sells and knew about the radio station emails which took place after she ceased representing Mr. Smith. Regardless, the Hearing Panel thinks these facts are analogous to the facts in *Board v. Perry*, No. 10-4006 (WV 11/22/2011). In *Perry*, the attorney was sanctioned for attempting to have sexual relations with his incarcerated client’s wife. When caught, he lied to the ODC and “abandoned” his law practice. Clearly, Mr. Perry’s charges are significantly more severe than this Respondent’s, yet the Hearing Panel seeks the *same sanction!*

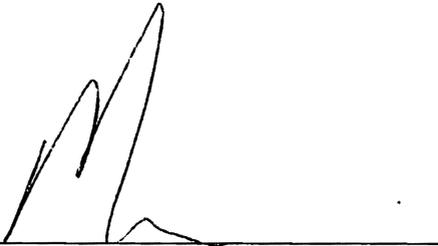
In the instant matter, the Hearing Panel seeks sanctions that go way beyond what has been imposed in much more egregious situations. Several times, this Court reduced even those less punitive sanctions. For some reason, the Hearing Panel seeks to punish the Respondent much more severely than the facts, and previous decisions, warrant. For these reasons, in addition to the reasons set forth regarding mitigation, it would appear that the sanctions sought by the Hearing Panel in this matter are overly punitive. Accordingly, should this Court deem some sanction appropriate, that sanction should be something significantly less punitive than the litany sought by the Hearing Panel. Certainly no suspension is warranted but if this Court should impose some suspension, the Respondent asks that it be for a very minimal time with automatic

reinstatement at the conclusion of the suspension.

VII. CONCLUSION

For the foregoing reasons the Respondent, Wendelyn A. Elswick, respectfully requests that the Supreme Court dismiss the charges contained in Count I because the statute of limitations has expired for each and every allegation made by the Hearing Panel. In the alternative (as to Count I), and as to Count II, this Court should reverse the Hearing Panel's findings because the charges are not supported by clear and convincing evidence as required by Rule 3.7 of the Rules of Lawyer Disciplinary Procedure and therefore the charges against the Respondent must be dismissed. Finally, the sanctions sought by the Hearing Panel are not appropriate considering the allegations made against Respondent. Even taking the Hearing Panel's allegations at face, they do not warrant the severity of punishment that the Hearing Panel is seeking from the Respondent in this matter. Respondent requests such other relief as this Court deems just and proper.

Respectfully submitted this 14th day of June, 2013.



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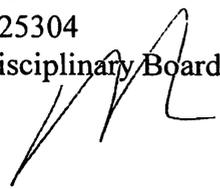
WENDELYN A. ELSWICK

By Counsel

CERTIFICATE OF SERVICE

I, Mark W. Kelley, Esq., counsel for Respondent Wendelyn A. Elswick, hereby state that on June 14, 2013, I served true and correct copies of the "Brief of the Respondent Wendelyn A. Elswick" on the parties hereto by U.S. mail, postage prepaid, addressed as follows:

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