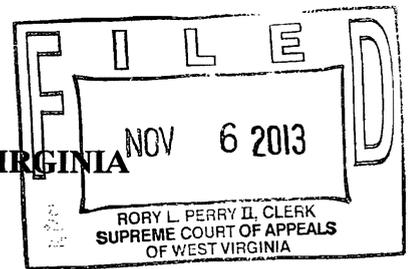


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 12-0174

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

RICHARD T. BUSCH,

Respondent.

RESPONDENT RICHARD T. BUSCH'S BRIEF

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RESPONDENT RICHARD T. BUSCH'S BRIEF

Now comes Respondent Richard T. Busch ("Busch"), by counsel, pursuant to this Court's Order dated September 4, 2013, and Rules 35 and 38, *West Virginia Rules of Appellate Procedure*, and files his brief in this lawyer disciplinary proceeding and in response to the Statement of Charges filed against him, the undated Report and Recommendation of the Hearing Panel Subcommittee ("HPS") submitted to the Court by ODC on August 21, 2013, and the Brief of the Lawyer Disciplinary Board filed on October 7, 2013.

STATEMENT OF THE CASE

The Proceedings

The Statement of Charges in this case was filed on February 13, 2012. Busch filed his Answer and Affirmative Defenses and discovery ensued. The evidentiary hearings in this proceeding were held on July 12 and July 27, 2012. On or about August 21, 2013, after a delay of more than one year, the HPS issued its Report and Recommendation of the Hearing Panel. Busch filed his objections under Rule 3.11, and this Court entered its Order on September 4, 2013, establishing the briefing schedule and setting the case for oral argument. Busch does not object to the recitation of procedural facts in the "Nature of Proceedings" section of the Brief of the Lawyer Disciplinary Board.

The Respondent

Busch is the second person in his immediate family to practice law in Elkins, West Virginia. Respondent's father, John E. Busch, a well-known local lawyer and former West Virginia State Bar President and member of the American Bar Association House of Delegates, was the founding member of the firm of Busch & Talbott (now, Busch, Zurbuch & Thompson). Prior to winning election to the Office of Prosecuting Attorney for Randolph County, West

Virginia, Busch worked as an associate lawyer in his father's firm, for a period of approximately five (5) years. Busch took the oath of office and began his term as Prosecuting Attorney in January 2009 and served in that capacity until December 5, 2011, at which time he resigned his official position. He served for a period of 36 months.

Prior to becoming the Prosecuting Attorney, Busch also worked as a private practice civil lawyer at another firm and as City Attorney for Elkins but did not have any significant criminal law experience, either as an assistant prosecuting attorney or as a defense counsel. As it turns out, with the benefit of hindsight and a full and complete record in this lawyer disciplinary proceeding, Busch's lack of professional experience in the primary practice area of criminal law and the death of his father, who served as his primary resource person, appear to have been contributing factors which predisposed him to having difficulty in performing his official role as it related directly to the investigation, handling and prosecution of criminal cases and the overall management of the office at that time in 2010 and 2011.

The Statement of Charges

The Statement of Charges contains two separate counts. Count I charges Busch in the *Blake* criminal case with violating Rules 3.1, 3.3, 3.4, 3.8 and 8.4(c) and (d). Count II charges him in the *Faulkner* case with violating Rules 3.1, 3.3, 3.4, 3.8 and 8.4(c) and (d). Busch admits that he violated Rule 3.3, albeit not intentionally or knowingly. He denies that he violated Rules 3.4, 3.8 and 8.4(c) and (d). The HPS did not make any findings of fact or conclusions of law or recommendation as to Rule 3.1.

The Case and its Factual Record

This lawyer disciplinary proceeding and its underlying facts are largely undisputed and stipulated. What is contested are the conclusions reached by the HPS that Busch

acted with a state of mind indicative of intentional and knowing misconduct as opposed to negligence as to the stipulated violation of Rule 3.3 in both cases, that he violated Rules 3.4, 3.8 and 8.4(c) and (d) in both cases, and that the actual harm was great. In addition, the mitigating factors presented are of greater number, importance and weight than given by the HPS.

Consistently, Busch and his counsel have admitted and stipulated to specific instances of misconduct in each of these two cases. There has been no attempt by Busch to avoid acceptance of responsibility as his resignation on December 5, 2011, and his cooperation throughout these proceedings are demonstrative of an attorney who is taking steps to restore public confidence to the Office of the Prosecuting Attorney and the legal profession. Busch has not worked as a licensed lawyer since the date of his resignation and, upon the advice of counsel, will not do so until this Court concludes its work in his case and he satisfies the sanction imposed upon him. Thus, he requests consideration for a retroactive application of his sanction.

Count I – Blake Case

According to the Report of Criminal Investigation prepared and signed by Deputy A. G. Vanscoy of the Randolph County Sheriff’s Department, James Ronald Blake, Jr., and Judy May Blake embezzled money from the Community Response Foundation (“CRF”), which entity they co-directed, where money was being deposited and held on behalf of Mona Corder. ODC Exhibit, Tab B, No. 23, pp. 00512-00516. Deputy Vanscoy was advised in July of 2008 by his Sheriff of the “questionable accounting practices” of the CRF and he thereafter commenced his criminal investigation into the matter. ODC Exhibit, Tab B, No. 23, p. 00513.

On October 7, 2008, Deputy Vanscoy interviewed Judy May Blake and her husband, James Ronald Blake, Jr., who were the targets of the criminal investigation. ODC Exhibit, Tab B, No. 23, pp. 00514-00515. It was during the interview that Mr. Blake admitted

that, “he used some of the funds in the Corder account to pay for the funeral expenses of another person.” He further stated that he had written permission from Ms. Corder to do so but could not produce the evidence since it had allegedly been destroyed in a fire at his office. ODC Exhibit, Tab B, No. 23, p. 00515. Thereafter, on October 20, 2008, Deputy Vanscoy executed a search warrant for CRF’s account records with Huntington Bank in Elkins. ODC Exhibit, Tab B, No. 23, p. 00529; July 12, 2012 Hearing Transcript, p. 241.

Busch was elected as the Prosecuting Attorney of Randolph County during the general election held on November 4, 2008. July 27, 2012 Hearing Transcript, p. 218. On January 2, 2009, Busch was sworn into office. July 27, 2012 Hearing Transcript, p. 307-308.

Ronald M. Blake, Jr., died in November 2009, without being charged. Arrest warrants were sought by Deputy Vanscoy and issued for Judy May Blake by the Magistrate Court of Randolph County on December 4, 2009. ODC Exhibit, Tab B, No. 23, pp. 00579-00592. On December 7, 2009, Deputy Vanscoy also sought and obtained search warrants for, among other things, all computers maintained by the CRF and Judy May Blake. ODC Exhibit, Tab B, No. 23, pp. 00558-00561. According to the property receipt dated December 7, 2009, and Deputy Vanscoy’s testimony, four computers were seized during the execution of the search, and they were stored in the evidence locker in the Sheriff’s Department, where they remained under his exclusive control until July 30, 2010. ODC Exhibit, Tab B, No. 23, p. 00562; July 12, 2012 Hearing Transcript, pp. 188-190. Also on December 7, 2009, Deputy Vanscoy executed the warrant issued December 4, 2009, for Judy May Blake’s arrest. ODC Exhibit, Tab B, No. 23, pp. 00579-00592; July 12, 2012 Hearing Transcript, p. 223.

The Blake arrest and search warrants were obtained by Deputy Vanscoy without any consultation with Busch and his staff. July 12, 2012 Hearing Transcript, p. 211-212.

Deputy Vanscoy candidly admitted that he did not base his decision to charge and arrest Ms. Blake on the information contained on the computer hard drives but, instead, relied upon the checks and other financial records he previously obtained earlier in the investigation. In Deputy Vanscoy's opinion, the information on the computer hard drives was not relevant to the criminal case. July 12, 2012 Hearing Transcript, pp. 246-247. This was the position expressed by Busch throughout the case.

After her arrest, Judy May Blake retained Stephen G. Jory. Ms. Blake and her counsel waived the preliminary hearing and the felony case was bound over to the Circuit Court of Randolph County to be presented at a later date to the Grand Jury. July 12, 2012 Hearing Transcript, pp. 22-23. By correspondence dated January 13, 2010, Busch requested that Deputy Vanscoy make copies of all accounting files on the computer hard drives to assist Appalachian Benefits Assistance, Inc. ("ABA"). Busch's correspondence reads:

Dear Deputy Vanscoy:

As you are aware Appalachian Benefits Assistance, Inc. has been appointed as Conservator over the Judy Mae Blake/Community Response Foundation accounts. In order for Appalachian Benefits Assistance, Inc., to effectively act as Conservator, it is imperative that they receive a copy of the computer accounts, which are currently in your possession. Therefore, please accept this letter as a request to make a copy of any and all accounting files which are on the Community Response Foundation computers. Once you have successfully duplicated those accounts, will you please provide the disk(s) to our office so that the same can be forward [sic] to Appalachian Benefits Assistance, Inc.

Respondent Exhibit 9; July 27, 2012 Hearing Transcript, pp. 334-335. No response was made by Deputy Vanscoy or anyone in the Sheriff's Department to Busch's letter of January 13, 2010, and no files were copied as requested. Deputy Vanscoy denied ever receiving, reviewing or having any knowledge of the correspondence. July 12, 2012 Hearing Transcript, p. 181.

As to the reason for the April 7, 2010 hearing, Judge Wilfong testified during the hearing that it was her best recollection that someone from ABA e-mailed her office and that she *sua sponte* scheduled a hearing and noticed Busch and others to be present so:

. . . that those hard drives could be cloned for Appalachian Benefits so that they could try to start sorting out who owned that money, so they could start trying to make a paper trail and connect the dots of who was entitled to what portion of the 150 or -- I can't remember -- the 150 or the \$180,000.

July 12, 2012 Hearing Transcript, p. 496. Mr. Jory testified that he did not know why the hearing was called as he had no involvement in the matter other than he was "invited to attend."

July 12, 2012 Hearing Transcript, p. 24. He did not have any specific recall of getting a notice, a letter or simply that someone had called his office and told him to come to a hearing, and he was unsure as to the purpose, because the *Blake* criminal case had not yet been indicted. July 12, 2012 Hearing Transcript, p. 24. Busch recalled that notices were sent to the civil attorneys handling the litigation arising from the alleged embezzlement of CRF funds being held on behalf of Ms. Corder. July 27, 2012 Hearing Transcript, p. 338. Busch, like Mr. Jory, appeared to have simply been invited to participate along with the civil attorneys for the reasons stated by Judge Wilfong during her testimony as to why the hearing was scheduled. July 27, 2012 Hearing Transcript, p. 338.

Judge Wilfong entered an Order on April 8, 2010, resulting from the hearing held the day before. The Order stated:

By previous order of this Court, Appalachian Benefits was appointed as conservator for the Community Response Foundation, an organization involved in the above styled matter. Appalachian Benefits requested a copy of the complete archives of the Community Response Foundation and Defendant's computers, such that it may fulfill its duties as conservator for the Community Response Foundation. Such computer archives are in the possession of the Randolph County Sheriff's Office, as they were

seized in accordance with a search warrant issued in this matter. The Randolph County Sheriff's Office indicated to the Court that they would provide such computers to the State Police Crime Lab for the purpose of copying the entire archival history of each computer. [Emphasis added.]

ODC Exhibit, Tab B, No. 5, pp. 00035-36. The Court further ordered that the Clerk forward a copy of the Order to Busch, to Mr. Jory, to ABA and to "the Randolph County Sheriff's Office, and the State Police Crime Lab." ODC Exhibit, Tab B, No. 5, pp. 00035-00036. The April 8, 2010 Order did not direct that Mr. Jory receive a copy of the files from the computer hard drives. July 12, 2012 Hearing Transcript, pp. 24-25. This was consistent with law since his client had not been indicted at that time.

Deputy Vanscoy acknowledged during his testimony that he received a copy of Judge Wilfong's Order entered April 8, 2010, directing that the computer hard drives were to be cloned and archival copies of all files made but did not act according to it. July 12, 2012 Hearing Transcript, pp. 186, 226-227. Deputy Vanscoy's response to receipt of the Court Order was expressed in his correspondence dated April 27, 2011, to Busch, and it reads:

Sir,

Last week I received a message from Bill Gallegher of the WV State Police Crime Lab in regards to the duplication of the computer hard drives seized from Community Response Foundation by Judy M. Blake. I was informed by Gallegher that the WV State Police Crime Lab does not handle this type of request and recommended that I contact Sgt. C. M. Casto, Digital Forensics Unit Director, WV State Police Morgantown.

I was able to make contact with Sgt. Casto today and explain what is requested by Appalachian Benefits Assistance, Inc. To my understanding, if Sgt. Casto's unit was to create an image file of the questioned hard drives, Appalachian Benefits Assistance, Inc., would need to acquire software to view the created image file. The created image file would not be a plug in and view file. I was under the impression that Sgt. Casto's unit does not clone hard

drives, but may be able to do so if additional hard drives are provided for the cloning by your office.

At this time, your office will have to contact Sgt. C. M. Casto at (304) 293-6400 to discuss further action to be taken and provide any items necessary for the completion of this request.

ODC Exhibit, Tab B, No. 5, p. 00038; July 12, 2012 Hearing Transcript, pp. 226-227. Deputy Vanscoy testified that he copied Judge Wilfong on his correspondence because, "I just wanted the court to be aware that this action has been taken [sic] place." July 12, 2012 Hearing Transcript, p. 186.

The record does not clearly establish why the July 21, 2010 hearing was scheduled by Judge Wilfong, but it is believed the ABA was continuing to seek documentation concerning to whom the funds were to be distributed as part of its work as conservator for CRF. On July 21, 2010, Judge Wilfong, in what appears to have been a routine status hearing designed to simply check on the progress made in the duplication of the files contained on the computer hard drives seized and secured by Deputy Vanscoy and the Sheriff's Department, called upon Busch to provide the Court with an update. In doing so, Busch made the following statements:

THE STATE [Respondent Busch]: I can give you the status on that right now, Your Honor.

THE STATE [sic] [The Court]: That'd be great.

THE STATE [Respondent Busch]: Sergeant Casto, with the West Virginia State Police Special Crimes Investigative Unit is located in Morgantown, he is a computer expert. And, what he is doing is, he is duplicating the hard drive while keeping it in the chain of custody so we can get that hard drive out and get it to Mr. Jory and also to the benefit services group, the Appalachian Benefits, has taken over the accounts.

In addition, there are also - - - I've been told by Deputy Vanscoy, there have been more checks come in that we need to investigate on the more criminal end of it. So, at this point, I tried to contact Sergeant Casto yesterday and I'm waiting [sic] his response with

regards to the status of if he's copied the hard drive or not. Essentially, that's where we are, Your Honor.

THE COURT: Okay.

ODC Exhibit, Tab B, No. 23, pp. 00793-00794. At that time, Busch failed to advise the Circuit Court that he had not personally communicated with Deputy Vanscoy or Sergeant Casto regarding the duplication of the hardware or that he was relying upon what he was told by his investigator, Charles D. Renton.

As to the reason for the Circuit Court's scheduling of the July 12, 2010 hearing, Mr. Jory did recall, however, that he first received notice in early June 2010 when a notice "out of the clear blue" arrived at his office. He did not know why he was again being called to the hearing and, in looking back through his records, he revealed that he sent an e-mail to his client saying, "I don't know why this has been called, but we need to be there." The hearing was continued to July 21, 2010. July 12, 2012 Hearing Transcript, p. 28.

In spite of his lack of involvement, it was at the July 21 hearing that Mr. Jory first complained about the delay in receiving a copy of the archival record of the files contained on the computer hard drives, even though there was never a request or motion made by him for same. A careful review of the transcript of the July 21, 2010 hearing reveals that no request was made by Mr. Jory for the files, but he was included in the discussion. July 12, 2012 Hearing Transcript, p. 28. In fact, the record appears to show that Mr. Jory was appearing for ABA and Ms. Blake when the Court inquired who was present for that entity. The record is confusing in this regard. ODC Exhibit, Tab B, No. 23, pp. 00793-00794.

Mr. Jory testified in this proceeding that he made a "Me, too" request for the records at the July 21, 2010 hearing, "because it could be exculpatory material." Mr. Jory's testimony was:

Q. [CIPOLETTI] Okay. After the April 7th hearing and the April 8th order as entered, some time passes and there is a status hearing held before Judge Wilfong on July 21st, 2010. Is that your recollection?

A. [JORY] Yes. First, there was a notice of a hearing on June 9, or a date close to that, and again I got a notice out of the clear blue. I didn't know why I had been called, and, in fact, looking back through my records, I have an email sent to my client saying, 'I don't know why this has been called, but we need to be there.'

And that was continued again by the court or the prosecutor or somebody. I don't have any record of anybody requesting a continuance, but it was delayed to July 21. And so that was the next time that the same matter was brought into court.

And then I learned more about it at that time, that this really was – Appalachian Benefits was seeking these hearings and they couldn't allocate the money and they didn't know what to do with it.

And it was at that hearing that I then jumped in and said, 'And we need it also for our investigation.'

Q. So at this July 21 hearing, this is the first mention you make of, 'Me, too. I want the records, too?'

A. Yes. I had not filed any motion for that, but it was simply orally, at that July 21 hearing, I said, 'Yes, I want to get those records also, because it could be exculpatory material.'

July 12, 2012 Hearing Transcript, pp. 27-29.

Mr. Renton testified that he clearly recalled seeing Judge Wilfong's April 8, 2010 Order, and the receipt of it is what prompted him to call the Sheriff's Department to check on the location of the computer hard drives and whether they were being duplicated. Mr. Renton testified that:

Q. [BENNINGER] Were you aware of that April 2010 hearing?

- A. [RENTON] I wasn't present at it.
- Q. Okay. Do you recall ever seeing an order from Judge Wilfong from it?
- A. I did see the order, which is why I called the sheriff's department and said, "Where is this stuff?"
- And they told me that it had been sent to the state police computer forensics lab up in Preet [sic] Building in Morgantown.
- Q. I just want to make sure because the dates are important here. You recall seeing an order that first required your office, Rich Busch and his office, to disclose and copy these things?
- A. I did see an order that said exactly that.
- Q. And you're aware that there was another hearing, I believe, on July 21, 2010?
- A. Yes. But, before the July hearing, my question was, "Why is he asking for discovery because his client doesn't rate discovery because she hasn't been indicted?"
- Q. I understand. But did you have any contact with anybody in the Randolph County Sheriff's Department concerning the location, the testing and the duplication of these hard drives in compliance with Judge Wilfong's order in April before this July 21 hearing, where Rich went back in front of her?
- A. Yes. That's when I asked them where the hard drive was and they said they had just sent it off to the state police.
- Q. Okay. And what did you – did you do anything with that information before that July 21 hearing?
- A. I told Rich that the evidence was with the state police. Because that's what the sheriffs had told me.
- Q. And you're aware that Richard went into court and told Judge Wilfong that he believed they were up – that these had already been sent?

- A. He believed that because I told him that because I believed it because that's what the sheriff's deputies had told me.
[Emphasis added.]

July 27, 2012, Hearing Transcript, pp. 162-164. Mr. Renton concluded that he was sure Busch believed him and relied upon what he had told him about the location and the efforts to duplicate the computer hard drives in compliance with Judge Wilfong's April 8, 2010 Order. July 27, 2012 Hearing Transcript, p. 164.

Deputy Vanscoy recalled that his first contact regarding the hard drives after sending his April 27, 2010 correspondence to Busch was with Mr. Renton in June of 2010. Apparently, the communication was *via* telephone and included the inquiry by Mr. Renton as to the location of the hard drives that were ordered to be duplicated by Judge Wilfong. July 12, 2012 Hearing Transcript, pp. 186-187. Deputy Vanscoy stated that he "informed him that they were still located in evidence and at that time the evidence custodian was Deputy Burns, and he would have to make contact with Deputy Burns to see whatever is required of Deputy Burns to get those items out of evidence so they could be transported." July 12, 2012 Hearing Transcript, p. 187.

Deputy Vanscoy denied being present at the July 21, 2010 hearing before Judge Wilfong, where Busch made false statements relating to the location and duplication of the hard drives. July 12, 2012 Hearing Transcript, p. 187. There was no explanation by Deputy Vanscoy or anyone from the Sheriff's Department as to why they, as sole custodians of the computer hard drives, failed to take any action in compliance with Judge Wilfong's Order and their seeming refusal to cooperate in even the most minor way with Busch and his office concerning this particular matter. The Sheriff's Department was copied on the April 8, 2010 Order at issue, and the Circuit Court apparently had direct contact with its personnel regarding the hard drives.

After the July 21, 2010 hearing, Busch again discussed the issue of the duplication of the computer drives with Mr. Renton. July 27, 2012 Hearing Transcript, pp. 170, 235-236. Mr. Renton explained that he had previously talked to Sergeant Casto about duplication of the computer hard drives, as evidenced by his e-mail string with Sergeant Casto. ODC Exhibit, Tab B, No. 30, pp. 02163-02164; July 27, 2012 Hearing Transcript, pp. 166-170. Mr. Renton further explained:

. . . At that time, I called the state police and asked them how long it was going to take them, and I talked to Sergeant Casto.

Sergeant Casto called me back after three days and said, 'Charlie, listen, we've turned this office upside down. These hard drives are not here.' So then I got on the phone to the sheriff's department again and conveyed that information.

And then I was told, 'Well, yes, we have the hard drives, but they're in our evidence locker.'

July 27, 2012 Hearing Transcript, p. 165.

Judge Wilfong testified that she did not know the exact date after the July 21, 2010 hearing when she first learned that the computer hard drives had not been sent to the State Police Lab as represented by Busch at the hearing. She specifically related that, "I don't remember what day it was, whether it was immediately after the hearing or even after the 30th."

July 12, 2012 Hearing Transcript, p. 502. Judge Wilfong is certain, however, that:

Deputy Vanscoy came in and said something to me along the lines of, 'Yeah, you know those computer hard drives that Rich Busch said are at the state police crime lab?'

And I said, 'Yeah.'

And he said, 'Do you know where they are?'

And I remember saying, 'At the state police crime lab?'

And he said, 'No, they're in the evidence locker, where they have sat since they've been seized. And I have made repeated contacts to tell him that the hard drives were there, to tell him who the custodian was for the sheriff's department, to tell his office how they needed to go about getting these hard drives so that they could be duplicated, and nothing has ever been done.

'And he stood up in court and told you that it's the state police's fault. They don't have them. They are still sitting locked up in the evidence locker for the sheriff's department.'

July 12, 2012 Hearing Transcript, pp. 502-503.

Even though Deputy Vanscoy would have had no apparent reason to dispute the circumstances of his providing the first notice to Judge Wilfong concerning the whereabouts of the computer hard drives, he emphatically denied that he did so. His testimony is revealing and is as follows:

- Q. [BENNINGER] Did you ever tell the judge that -- did you go and tell the judge that those discs hadn't been sent before June -- July 30?
- A. [VANSCOY] No. No. The only time I have ever -- has only been in court or by that letter.

July 12, 2012 Hearing Transcript, pp. 214-215. Judge Wilfong's correspondence dated October 12, 2010, also confirmed, "Deputy Vanscoy has, however, advised me of his concern regarding the representation of the State with regard to the processing and transfer of the evidence." ODC Exhibit, Tab B, No. 5, pp. 00054-00056.

In spite of denying he ever talked to Judge Wilfong about the hard drives after the July 21, 2010 hearing and even though an Order was not entered by Judge Wilfong for the July 21, 2010 hearing until August 24, 2010, Deputy Vanscoy testified that he transported the hard drives to the State Police Laboratory in Morgantown on July 30, 2010, to make copies of the files contained therein. July 12, 2012 Hearing Transcript, p. 190. Interestingly, he further

testified that he finally acted to transport the computer hard drives because, "I believe I got a copy of the order or something where those representations were made. In that order it said they needed to be transported ASAP to Morgantown so I took the necessary steps." July 12, 2012 Hearing Transcript, p. 189. In fact, the Order from the July 21, 2010 hearing was not entered until August 24, 2010. ODC Exhibit, Tab B, No. 5, p. 00047.

A careful examination of the record reveals that, following the July 21, 2010 hearing, Deputy Vanscoy had telephone contact with Mr. Renton as to the status of the hard drives. Deputy Vanscoy's testimony confirmed Mr. Renton did contact him by telephone in June 2010 to inquire as to the status of the duplication of the computer hard drives and next called him on July 22, 2010, the day following the hearing, and accused him of not properly handling the evidence. The following dialogue demonstrates the nature, the dates and the intensity of the ongoing conflict between the Sheriff's Department and Busch's office:

- Q. [BENNINGER] Did you walk it [April 8 Order] over and give it to Burns?
- A. [VANSCOY] Again --
- Q. Yes or no, and then you can explain.
- A. No, no.
- Q. Is there a reason why you didn't?
- A. Again, I had already explained to his office what needed to be done in order to complete the task that they ordered.
- Q. No, I'm asking about the order.
- A. Exactly. In order for them to complete whatever the judge ordered at that time, which was to make duplication of the hard drives, they needed to contact the state police and find out what they needed to provide to do that. Whether they did or not, I don't know.

Q. Do you have any reason to believe that Richard Busch was unwilling to try to help you and the sheriff's department to present a proper case against Blake?

A. Unwilling?

Q. Yeah.

A. No.

Q. And that he would have done his very best given if -- you know -- under the circumstances, whatever his experience was?

A. Well, if -- he never contacted me asking. Mr. Busch has never picked up the phone and called me and asked where the hard drives were at or anything. I sent him the letter. I never heard back from him. The only contact I heard back after that letter was from Renton in June.

Q. Was that offensive to you that he didn't call you himself?

A. It's not offensive, but -- that itself is not offensive, but when Mr. Renton from his office is calling me on July 22 being accusatory of where are the hard drives at --

Q. That stiffened you up a little bit?

A. It does. Because, 'One, you were told in the April letter where they were at, and, two, you were told in June where they were at, and then, three, you're calling me in July asking once again where they're at. How many times do I have to tell you where they are at?'

Q. Is that basically the tone of your conversation with him?

A. Yes.

July 12, 2012 Hearing Transcript, pp. 238-240.

Contrary to Deputy Vanscoy's testimony, a copy of the Order from the July 21, 2010 hearing, which was ultimately prepared by Mr. Jory, could not have reached him by July 30, 2010, and did not require the Clerk to transmit a copy to the Sheriff's office or the State

Police Lab as did the Order of April 8, 2010. July 21, 2010 Order, ODC Exhibit, Tab B, No. 5, p. 00047; April 8, 2010 Order, ODC Exhibit, Tab B, No. 5, pp. 00035-00036.

As to the disputes over the wording of the Order, on July 26, 2010, Mr. Mendelson, an Assistant Prosecuting Attorney in Busch's office, served the proposed order believed to have been prepared by Holly Helzer, the Office Manager/Paralegal, from the July 21, 2010 hearing. ODC Exhibit, Tab B, No. 5, pp. 00039-00040. By correspondence dated July 27, 2010, Mr. Jory wrote to Judge Wilfong and presented his version of the Order from the hearing. ODC Exhibit, Tab B, No. 5, pp. 00041-00043. Same was served upon Mr. Busch that day. Respondent Busch sent a letter dated August 3, 2010, to Judge Wilfong in response to receipt of Mr. Jory's earlier correspondence and proposed Order. In the August 3 letter, Respondent Busch very clearly advised the Court and Mr. Jory as follows:

The State's notes from the hearing on July 21, 2010, do not reflect the requests as asserted by Defense Counsel. The State's investigation may or may not include the said hard drives that are being provided to Appalachian Benefits Services, and therefore the State is of the opinion that Defendant is not entitled to copies of said hard drive at this time.

ODC Exhibit, Tab B, No. 5, p. 00044. Respondent Busch's August 3, 2010 correspondence to Judge Wilfong, which was copied to Mr. Jory, concluded with an earnest and straightforward request to the Court: "Please advise how the Court wishes the State to proceed through correspondence or by order." ODC Exhibit, Tab B, No. 5, p. 00044.

By letter dated August 11, 2010, Mr. Jory responded to Respondent Busch's letter of August 3, 2010. Mr. Jory's correspondence simply asserted certain questions and positions to be considered by Busch. ODC Exhibit, Tab B, No. 5, pp. 00045-00046. Of particular importance is Mr. Jory's concluding sentence noting that, "three civil actions have been filed against her, all based upon the woefully deficient criminal complaints filed, as I understand it,

without any oversight from your office.” Remarkably, Mr. Jory, at this time, knew that Respondent Busch had not been consulted by Deputy Vanscoy or anyone from the Sheriff’s Department prior to the filing of the criminal complaints and the seeking of the arrest and search warrants issued against Mr. Jory’s client. ODC Exhibit, Tab B, No. 5, pp. 00045-00046. Thereafter, Judge Wilfong entered Mr. Jory’s version of the Order from the July 21, 2010 hearing on August 24, 2010, with minor modifications, and did so without first responding to Busch’s direct inquiry to the Court as to how to proceed. Nor did the Circuit Court schedule the matter for a hearing. ODC Exhibit, Tab B, No. 5, p. 00047.

The ongoing written dialogue between Respondent Busch and Mr. Jory continued with Mr. Jory’s letter of September 9, 2010, advising that his client was aware several weeks ago that the ABA had received a copy “of the hard drive and asking her about several issues.” Mr. Jory requested that a copy of the file documents be provided within the next week and he concluded with his statement that he preferred not to file a Rule 41 motion for return of property. ODC Exhibit, Tab B, No. 5, pp. 00048-00049. By correspondence dated September 27, 2010, Busch responded to Mr. Jory’s and succinctly stated his position, which included an inquiry as to whether Mr. Jory’s client was willing to assist in obtaining and opening the files with the installed operating system. Busch advised Mr. Jory that ABA had the hard drives, which were useless to it until Ms. Blake provided the operating system information so that the files could be accessed. Busch again reiterated what he had previously questioned in his correspondence to Judge Wilfong on August 3, 2010, as to why Mr. Jory felt he was entitled to any of the information on behalf of Defendant Blake since she had not yet been indicted. Busch concluded and reiterated concerns about privacy of the information contained on the hard drives and requested information as to whether Ms. Blake was willing to assist ABA in obtaining the

documentation from the hard drives then in their possession. Judge Wilfong was copied on said correspondence. ODC Exhibit, Tab B, No. 5, p. 00050-00051.

By correspondence dated September 28, 2010, Mr. Jory responded and most notably chastised Busch by stating, “the more I look at this case, the stronger is my belief that your office never should have approved the search warrant or the filing of the criminal complaints.” A copy of Mr. Jory’s letter was sent to Judge Wilfong. ODC Exhibit, Tab B, No. 5, pp. 00052-00053. It should be remembered that Deputy Vanscoy testified, and the evidence established that neither Busch nor anyone in his office was consulted prior to the Sheriff’s office’s seeking the issuance of arrest and search warrants.

Apparently, in response to receipt of this September 28 correspondence, Judge Wilfong did two things. First, on October 12, 2010, she again entered the same Order which she had previously entered on August 24, 2010. ODC Exhibit, Tab B, No. 5, p. 00057. Next, Judge Wilfong sent correspondence dated October 12, 2010, to Busch and Mr. Jory regarding the ongoing dispute which had been playing out since the hearing on July 21, 2010. ODC Exhibit, Tab B, No. 5, pp. 00054-00056.

The dispute initially arose over the wording of the Order and evolved into a complete dissertation on Busch’s and Mr. Jory’s respective positions on a vast number of collateral issues, in addition to the duplication of the computer hard drives which was the core focus of the whole matter. Judge Wilfong testified: “I remember getting a litany of letters back and forth, and -- but I don’t recall if that was the last one. I have no reason to dispute that.” July 12, 2012 Hearing Transcript, pp. 510-511.

Judge Wilfong further testified that she sent the correspondence because:

Q. [BENNINGER] Why send the letter?

- A. [WILFONG] Because, you know, I felt like this was the least -- I don't know if I want to say least restrictive alternative, but I think it was the least offensive alternative, sending a letter. So that it just went to the relevant parties, just so it was -- you know -- it's not something that's going to be made front and center. It gave Mr. Busch an opportunity.

This was the first time that I was aware that I had a situation that, if corrective action wasn't taken by Mr. Busch, I was going to be forced to file a complaint, which would have been the second complaint I've ever had to file in my career, my legal career.

July 12, 2012 Hearing Transcript, p. 513. Neither Busch nor Mr. Jory responded in writing to Judge Wilfong's letter of October 12, 2010.

Busch readily acknowledged that he received Judge Wilfong's letter of October 12, 2010, and explained that his serious personal resentment toward Mr. Jory may have impaired his judgment on the matter. July 27, 2012 Hearing Transcript, pp. 239-241. The following discourse during the hearing revealed Busch's confusion as to why he failed to respond to Judge Wilfong's letter:

- Q. [BENNINGER] Did you receive the letter?
- A. [BUSCH] I received the letter.
- Q. Why didn't you respond?
- A. I cannot right now -- and at the time -- as I've thought about this, I can't -- I don't know why -- not a good answer. Maybe I was trying to stick my head in the sand or trying to -- I don't -- I don't have a good reason why I didn't respond because I asked her for clarification. She gave me clarification and --
- Q. And, in fact, she gave you a chance to fully explain your position?
- A. Correct.

July 27, 2012 Hearing Transcript, pp. 240-241. Busch described his failure to respond to Judge Wilfong's correspondence as "a grave error and my mistake." July 27, 2012 Hearing Transcript, p. 241.

The *Blake* criminal case was presented to the Grand Jury on October 25, 2010, and an 11-count indictment was returned that day. ODC Exhibit, Tab B, No. 5, pp. 00058-00062. A careful review of the exhibits offered by ODC reveals that the arraignment in the *Blake* case was held on November 10, 2010, and the Arraignment Order was entered by Judge Wilfong on November 22, 2010. ODC Exhibit, Tab B, No. 5, pp. 64-66. The Arraignment Order had actually been served by Busch upon Mr. Jory on November 12, 2010. ODC Exhibit, Tab B, No. 5, p. 00067. The Arraignment Order required that discovery be provided on or before November 20, 2010. ODC Exhibit, Tab B, No. 5, pp. 00064-00066.

By correspondence dated November 9, 2010, Busch specifically directed Deputy Vanscoy and the Sheriff's Department to provide Mr. Jory with access to the original computer hard drives. Respondent's Exhibit 11. In addition, Busch also wrote to Mr. Jory on November 9, 2010, and advised him to contact Deputy Vanscoy to obtain access to the original computer hard drives. ODC Exhibit, Tab B, No. 5, pp. 00063. This was in discharge of his duty to disclose evidence to the defense.

Mr. Jory testified during the July 12, 2012 hearing in this proceeding that Deputy Vanscoy and the Sheriff's office refused to comply with Busch's directives and required him to file a motion and obtain an order from Judge Wilfong before the Sheriff's office would release the computer hard drive to Mr. Jory. ODC Exhibit, Tab B, No. 5, pp. 00068-00070; July 12, 2012 Hearing Transcript, pp. 58-60, 100-101. In this regard, Mr. Jory testified as follows:

Q. [BENNINGER] And you had prior to submitting your motions, I believe, received Richard's November 9 letter

where he told you that ‘I have directed Vanscoy, Deputy Vanscoy, to give you the original stuff, the original hard drives or whatever?’

A. [JORY] The November 9 letter?

Q. Yes.

A. Yes.

Q. Okay. And when you checked up on it by calling Sheriff Roy, you’ve testified the Sheriff’s department wouldn’t do it at Richard’s request. They wouldn’t comply with his request, would they?

A. That’s correct.

Q. Did they tell you why?

A. No, not to my recollection.

July 12, 2012 Hearing Transcript, pp. 100-101.

Because of the Sheriff’s office’s refusal to release the computer hard drives to Mr. Jory without a court order, even though directed to do so by Busch in his correspondence of November 9, 2010, Mr. Jory had to file a motion for return of seized property and obtain an Order to retrieve the evidence from Judge Wilfong which was entered on November 16, 2010. ODC Exhibit, Tab B, No. 5, pp. 00068-00070. In addition, Busch and his office timely served “State’s Discovery Response and Disclosure” on November 19, 2010, well within the timeframe of Judge Wilfong’s Arraignment Order which was actually entered three days later, on November 22, 2010. ODC Exhibit, Tab B, No. 5, pp. 00071-00077, 00066.

Even though the *Blake* criminal case had not been indicted until October 25, 2010, and Mr. Jory took physical possession, in November 2010, of the original computer hard drives which had always been in the possession of the Sheriff’s Department, he thereafter filed a motion to dismiss on December 9, 2010, based upon alleged prosecutorial misconduct. Mr. Jory

claimed that Busch's office's failure to comply with the April 8 and August 24, 2010 Orders somehow prejudiced his client, even though such Orders were entered months before his client's criminal case was even indicted and the motion to dismiss was filed after he had obtained the original computer hard drives. July 12, 2012 Hearing Transcript, pp. 62-63, 77-78. Judge Wilfong's April 8, 2010 Order did not authorize him to obtain a copy of the hard drives.

The Motion to Dismiss in the *Blake* case was argued before Judge Wilfong on December 22, 2010, and, from the bench, Judge Wilfong dismissed the case with prejudice. Respondent Exhibit 8. By Order entered January 10, 2011, Judge Wilfong set forth the basis of her reasons for the dismissal of the case with prejudice. ODC Exhibit, Tab B, No. 23, pp. 00761-00770. The Court's Order dismissing the case with prejudice did not reflect the Court's awareness that Deputy Vanscoy, from the outset, had not and was not going to rely upon anything that was in the computer hard drives to establish the case he initiated against Ms. Blake. In this regard, Deputy Vanscoy stated that, "I didn't need that information for my criminal charge portion of it," in reference to the files contained on the computer hard drives. He further stated that, "I was good in the sense that there was money from a dead lady that was deposited into a bank account. Now, how that money was split up on the computers, that didn't have any relevance on there was money deposited into a bank account from a dead lady. That's what I was charging her on." July 12, 2012, pp. 246-247. As a matter of fact, this was Busch's position as stated in his correspondence of September 23, 2010, to Mr. Jory, for which he is being charged under Rules 3.4 and 3.8.

Count II – Faulkner Case

According to the Criminal Complaint filed in the Magistrate Court of Randolph County by Senior Trooper A. S. Loudin, of the West Virginia State Police, Ms. Faulkner, a

seventh grade Social Studies teacher, had sex with a 15-year-old student. ODC Exhibit, Tab B, No. 24, pp. 00806-00807. The Arrest Warrant was issued and executed on March 25, 2009, and charged that the unlawful conduct occurred on December 21, 2009 [sic]. ODC Exhibit, Tab B, No. 24, p. 00808. Ms. Faulkner made her initial appearance and was arraigned on March 26, 2009, at which time bond was posted and she was released. ODC Exhibit, Tab B, No. 24, pp. 00809-00817. Mr. Mazzei served his Notice of Appearance as counsel for Ms. Faulkner on April 23, 2009. ODC Exhibit, Tab B, No. 24, pp. 00819-00820.

Assistant Prosecuting Attorney Christopher Cooper, Mr. Mazzei and Trooper Loudin appeared for the preliminary hearing and it was waived at that time upon agreement that early discovery would be provided in lieu of the preliminary hearing. July 12, 2012 Hearing Transcript, p. 626. The State provided its Response to Defendant's Motion for Discovery on or about May 5, 2009. The discovery was prepared and served by Mr. Cooper. ODC Exhibit, Tab B, No. 24 pp. 00835-00837.

Mr. Cooper recalls that Trooper Loudin was "certainly present" and would have provided a packet of materials to Mr. Cooper with one being designated for the Prosecutor's office and one for discovery exchange with Defendant and counsel. Mr. Cooper stated the reason for this procedure in Magistrate Court is, "because if we're going to use anything at the preliminary hearing level, we have to present it to opposing counsel." Mr. Cooper recalled there being either one or two CD-ROMs or DVD-ROMs in the packet of material handed to him by Trooper Loudin. July 12, 2012 Hearing Transcript, pp. 627-628. Mr. Cooper did not recall reviewing the CD-ROMs as the preliminary hearing was waived, and a copy of the material, including the CD(s), was provided to Mr. Mazzei and a handwritten receipt was signed by him. July 12, 2012 Hearing Transcript, pp. 629-630; Respondent's Exhibit 3.

This was the first time Mr. Cooper and Mr. Mazzei had ever worked with each other on a criminal case. July 12, 2012 Hearing Transcript, p. 630. Mr. Cooper related that he was told the CDs contained the phone numbers or contact information and “the child talking about what had happened.” He related specifically that Trooper Loudin represented to him what was contained on the CDs turned over to Mr. Mazzei. July 12, 2012 Hearing Transcript, p. 629. Trooper Loudin testified that there was no question whatsoever that the CDs that he left with Mr. Cooper at the preliminary hearing included the interview of the child victim. July 12, 2012 Hearing Transcript, pp. 399-400. Again, Busch was not involved in this exchange in Magistrate Court.

The witnesses, including Cooper, Mazzei and Loudin, were unsure as to how many copies of the video of the child victim were available at the time of the preliminary hearing. Trooper Loudin agreed that the records could provide that information. July 12, 2012 Hearing Transcript, p. 401. A subpoena was issued following the first hearing on July 12, 2012, and, pursuant to the records produced by the Children’s Advocacy Center (“CAC”), received by ODC on July 20, 2012 (which is marked as ODC Exhibit, Tab B, No. 30, pp. 02165-02167), it revealed that the interview of the child victim was conducted on March 25, 2009, the date of Ms. Faulkner’s arrest. Two copies of the interview were made by CAC at that time. “The CAC originally kept Copy 1 and gave Copy 2 to Trooper Loudin.” ODC Exhibit, Tab B, No. 30, p. 02165.

This record clearly establishes that the preliminary hearing was held on April 23, 2009, and CAC thereafter provided Trooper Loudin Copy 1 on July 9, 2009, and the CAC made another copy for its file and marked it “Copy 3.” This occurred almost three months after the preliminary hearing was held. Therefore, the inescapable conclusion is that Trooper Loudin

provided Mr. Cooper with Copy 2 made by CAC, and same was provided to Mr. Mazzei at the preliminary hearing. Trooper Loudin is certain that this is the transaction which occurred at the preliminary hearing. July 12, 2012 Hearing Transcript, pp. 399-400.

The handwritten receipt provided by Mr. Mazzei is part of the record.

Respondent Exhibit 3. Mr. Mazzei testified before the HPS that the receipt contains his authentic signature, but he denied receiving a CD containing the interview of the child victim. This position appears suspicious in view of the circumstances as presented by the witnesses called by ODC and the records received from the CAC subsequent to the July 12, 2012 hearing. July 12, 2012 Hearing Transcript, pp. 299-302.

On February 22, 2010, prior to the first indictment in the *Faulkner* case (Circuit Court No. 09-B-24), Ms. Faulkner, her counsel Mr. Mazzei, and Busch negotiated and presented a two-count felony plea agreement to Judge Wilfong for consideration. ODC Exhibit, Tab B, No. 24, pp. 00943-00950. The proposed plea called for the filing of a two-count Information charging Ms. Faulkner with sexual assault in the third degree, a felony in violation of *West Virginia Code* § 61-8B-5(a)(2). At the hearing held on February 22, 2010, Judge Wilfong refused the plea agreement and entered an Order on March 31, 2010, stating that she did so, “as it is not consistent with the public interest in the fair administration of justice.” ODC Exhibit, Tab B, No. 24, p. 00876.

Busch then presented the case to the Grand Jury on February 23, 2010, and no indictment was returned. July 12, 2012, Hearing Transcript, p. 263. The *Faulkner* case was first indicted on June 28, 2010, and was docketed as Case No. 10-F-22. ODC Exhibit, Tab B, No. 24, pp. 883-885. The State provided written discovery to Ms. Faulkner and her counsel on August 5, 2010. ODC Exhibit, Tab B, No. 24, pp. 00886-00892. On December 22, 2010, coincidentally,

the same date as the Circuit Court dealt with the *Blake* case motion to dismiss filed by Mr. Jory, the Court heard argument concerning Ms. Faulkner's two separate motions to dismiss indictment. By Order entered January 25, 2011, Judge Wilfong dismissed the *Faulkner* case without prejudice because a Grand Juror made a comment about the rejected plea agreement. ODC Exhibit, Tab B, No. 24, pp. 01213-01214.

The Grand Jury returned the second *Faulkner* indictment on February 28, 2011. ODC Exhibit, Tab B, No. 25, pp. 01220-01223. In March and April 2011, counsel for Ms. Faulkner filed a number of pretrial motions, including a motion to dismiss indictment or, in the alternative, motion to suppress evidence. ODC Exhibit, Tab B, No. 25, pp. 01228-01275. On March 18, 2011, Busch and his office provided State's Discovery Response & Disclosure, in response to Defendant's discovery request. ODC Exhibit, Tab B, No. 25, p. 01276. At the motions hearing held on June 1, 2011, and specifically with reference to Ms. Faulkner's motion for specific discovery of the child victim's statement and motion to dismiss the indictment, Judge Wilfong inquired of Busch as to the CD containing the interview of the child victim:

THE COURT [Judge Wilfong]: So, the things that you're missing, you're missing a CD -- a CD of victim, the victim testifying or his statement --

MR. MAZZEI: Yes, their --

...

THE COURT: Thank you. Mr. Busch?

MR. BUSCH: Well, let me start, Your Honor, with regards to the disc, the alleged review of the victim. I contacted Trooper Loudin about that and was unable to find that. And the fact of the matter is, is --

THE COURT: Does it exist or are you -- are you contesting that it exists or just saying you can't locate it?

MR. BUSCH: I believe we can't locate it. So, in that regard, we've tried to locate it and not been able to. However, we don't feel that that is a [sic] absolute crux of our case, Your Honor.

ODC Exhibit, Tab B. No. 26, pp. 01400, 01401-01402.

At first blush, it appears that Busch may have made knowingly false statements to Judge Wilfong during the June 1, 2011 hearing. However, it is important to note that the records subpoenaed from CAC reveal that CAC made Copy No. 4 on June 2, 2011, just one day after the June 1, 2011 hearing and it, "was given to and signed for by Peggy Burgess in the Randolph County Prosecutor's office." ODC Exhibit, Tab B, No. 30, pp. 02165-02166. When asked about the number of copies of the CD of the child victim's interview given to the Prosecuting Attorney's office, Trooper Loudin testified that he gave one copy at the end of the preliminary hearing and then a second copy, "because they told me they lost it and they couldn't find it." July 12, 2012 Hearing Transcript, p. 392. Trooper Loudin stated, "I don't remember," when he provided the second copy to the Prosecuting Attorney's office. July 12, 2012 Hearing Transcript, p. 393. The second copy was not given to Busch's office until June 2, 2011.

During the June 1, 2011 hearing and during the verbal exchange among Judge Wilfong, Busch and Mr. Mazzei, Busch made statements which were false, but were based upon what he was being told in real time by his office manager/paralegal who was in attendance with him in the courtroom. It is recalled that the office manager/paralegal was texting another staff person in Busch's office about the location of the missing CD at the same time the Court was inquiring of Busch. Apparently, Busch was parroting back to Judge Wilfong what he was being told and understood from the communications his office manager/paralegal was having with another staff member. Unfortunately, Busch did not just simply state to the Court that he was unsure as to the status and whereabouts of the CD. Instead, his choice of words was unwise,

inappropriate and lacked a verified basis in fact. This appears to amount to negligent, but not intentional, conduct.

In this regard, Busch testified:

Q. [BENNINGER] -- but at least, in part, did you believe that your statement was to some extent accurate based on what Holly had whispered to you at the bench -- at the bar -- at the table?

A. [BUSCH] At the table -- yeah. I had no reason to believe it was not accurate. I thought that she was telling me what she had heard. Either what she knew firsthand or what Peg, at our office, had told her, because they were texting and calling back and forth.

July 27, 2012 Hearing Transcript, pp. 278-279.

Judge Wilfong's frustration was palpable during the June 1, 2011 hearing, as demonstrated by dialogue captured by the hearing transcript:

THE COURT [Judge Wilfong]: This Motion to Dismiss was filed 45 days ago.

MR. BUSCH: I understand, Your Honor.

THE COURT: Why has the State not looked at it, said, 'holy cow, we didn't provide what we were supposed to, let's fix it.' At least six weeks before jury selection instead of the day of the hearing? Why has that not been done?

MR. BUSCH: Well, Your Honor, it's been placed --

THE COURT: Because certainly that's one opportunity that you had to fix it.

MR. BUSCH: Certainly. There's nothing I can say, Your Honor, except that this was in the list of cases and as we work through them, we work through them, and that was something that I overlooked. Because of the nature of them, when I first initiated and looked at them, I intended to bring some of those issues to the Court. And was not able to, Your Honor.

ODC Exhibit, Tab B, No. 12, p. 00166. The case was dismissed without prejudice by ruling from the bench at the conclusion of the June 1, 2011 hearing. ODC Exhibit, Tab B, No. 12, p. 00167. No Order was ever entered by Judge Wilfong memorializing same. ODC Exhibit, Tab B, No. 25, p. 01219. The other action taken by Judge Wilfong following the June 1, 2011 hearing was to schedule a Judicial Review for June 7, 2011. ODC Exhibit, Tab B, No. 25, p. 01387.

At the Judicial Review scheduled for June 7, 2011, Judge Wilfong rehashed the events of the June 1, 2011 hearing, where Busch seemingly made excuses for not having disclosed the CD of the child victim in the case, and provided Trooper Loudin and Busch the opportunity to comment on the assertions at issue. ODC Exhibit, Tab B, No. 12, pp. 00172-00178. Busch, appearing without counsel, clearly attempted during the June 7, 2011 hearing to advise the Court as to his state of mind and accepted full responsibility for any statements he made and problems the statements may have caused. ODC Exhibit, Tab B, No. 12, pp. 00172-00186. Judge Wilfong refused to accept Busch's statements that he intended to accept full responsibility for having misplaced the CD and did not intend to blame Trooper Loudin for same. ODC Exhibit, Tab B, No. 12, p. 00175. Specifically, Busch stated, "It was entirely my office's fault and the responsibility lays [sic] entirely upon me." ODC Exhibit, Tab B, No. 12, p. 00175. However, the established fact is that Busch's office did not have another copy of the CD until Copy 4 was provided by Trooper Loudin on June 2, 2011, and his office did not lose or misplace it. It had been given to Mr. Mazzei. As Mr. Cooper was no longer employed in Busch's office, there was no way he would have known of the earlier exchange in Magistrate Court.

Busch also advised the Court that he telephoned Trooper Loudin immediately after the June 1 hearing to advise him that, "it's totally my fault," that there was a problem with the CD and the case got dismissed. ODC Exhibit, Tab B, No. 12, p. 00175. Again, Busch attempted to explain to Judge Wilfong that, "The issue of the disc is solely [the] responsibility of the Prosecuting Attorney's Office and not of the State Police and not of Trooper Loudin's [sic]." ODC Exhibit, Tab B, No. 12, p. 00176. He further stated, "I did not make it clear to the Court that day, I'm taking full responsibility for that disc -- and the absence of it with regards to the discovery, Your Honor." This response was obviously unsatisfactory to Judge Wilfong. ODC Exhibit, Tab B, No. 12, pp. 00176-00178.

Early in the day on June 13, 2011, Busch text-messaged Judge Wilfong, requesting that a meeting be scheduled so he could discuss the problem which existed as a result of the ethical issues that arose from his statements made to her at the June 1, 2011 hearing. Judge Wilfong described the interaction during her testimony before the HPS, and she readily admitted that she offered to help Busch and that, "He sat down with me. He said, you know, 'I messed up. How would you handle this? What do I need to do?' At this point he said, 'Do you realize the troopers are all upset with me?' or something along those lines." July 12, 2012 Hearing Transcript, pp. 555-556. A course of corrective action was then discussed between Judge Wilfong and Busch which included contacting the state police. July 12, 2012 Hearing Transcript, p. 557. Judge Wilfong also described how Busch looked, appeared and behaved. A full dissertation on the plan for corrective action was described by Judge Wilfong at length during her testimony. July 12, 2012 Hearing Transcript, pp. 558-559.

Later, on June 13, 2011, Busch, following his early morning meeting with Judge Wilfong, sent correspondence to Trooper Loudin, explaining that he never intended to call the

Trooper's integrity into question and that Busch was fully responsible for the misstatements of fact he made, which Judge Wilfong understood as an attempt to blame Trooper Loudin for not having the CD-ROM. The letter is self-explanatory and shows Busch's state of mind. ODC Exhibit, Tab B, No. 15, p. 00198.

By correspondence dated June 23, 2011, Judge Wilfong withdrew her offer to accompany Busch to a meeting with Trooper Loudin and the state police officers to discuss the matter. ODC Exhibit, Tab B, No. 15, p. 00199. Upon examination during the hearing, Judge Wilfong would not concede that Busch's comments contained in his June 13, 2011 letter, which apparently offended her and caused her to withdraw her assistance, could be read in an innocent, non-confrontational way. July 12, 2012 Hearing Transcript, pp. 572-574 and 583-584. Judge Wilfong was clearly incited to anger by comments made by her secretary and Trooper Loudin as a result of private discussions each had with the Court. June 12, 2012 Hearing Transcript, pp. 582-584.

By Order entered June 23, 2011, Judge Wilfong set forth the occurrences at the June 7, 2011 Judicial Review hearing. In the Order, she found Busch in contempt and deferred ruling as to sanctions until the final contempt hearing to be held on June 30, 2011. ODC Exhibit, Tab B, No. 25, pp. 01388-01390. On June 30, 2011, Busch and his counsel appeared for the final contempt hearing before Judge Wilfong. At that time, it was again expressed by counsel for Busch that he did not intentionally or knowingly make any material misrepresentations to the Court, but same was summarily rejected. No sanctions were imposed and, as of this date, there has been no Order entered by Judge Wilfong reflecting the occurrences and rulings from the hearing held on that date. ODC Exhibit, Tab B, No. 28, pp. 01445-01481.

Thereafter, Mr. Jory was appointed by Judge Wilfong as Special Prosecutor in the *Faulkner* case on September 6, 2011. ODC Exhibit, Tab B, No. 29, pp. 01485-01486. The Grand Jury returned another indictment against Ms. Faulkner on February 28, 2012. From public information, the trial of the *Faulkner* case occurred in September 2012, and the jury returned “not guilty” verdicts on all counts. At trial, the State was represented by Mr. Jory, and Ms. Faulkner was represented by Mr. Mazzei. Judge Wilfong presided over the trial. This resolution of a major felony case stands in stark contrast to the felony pleas negotiated and accepted by Ms. Faulkner and her counsel, which were rejected by Judge Wilfong on February 22, 2010.

SUMMARY OF ARGUMENT

Busch admits violating Rule 3.3 in the *Blake* and *Faulkner* cases. He does so with the good faith explanation that he did not make false statements in either case with a knowing or intentional state of mind. He failed to correct his false statement in the first case—*Blake*—and regrets his lack of action, but he attempted to do so in good faith in the second case—*Faulkner*. These two cases stand as aberrations in his 36-month career as Prosecuting Attorney of Randolph County, West Virginia. Busch denies that he violated Rules 3.4, 3.8 or 8.4(c) or (d), as charged in these two cases. Lastly, he argues that mitigating factors are present and, upon their consideration, that a less severe sanction than has been recommended should be imposed, with retroactive application.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Busch asserts that oral argument is necessary pursuant to the criteria contained in Rule 18(a), West Virginia Rules of Appellate Procedure. ODC does not object to oral argument

being granted, and it is understood that this Court has scheduled this case on the Court's argument docket for Wednesday, January 22, 2014.

ARGUMENT

I. RESPONDENT BUSCH ADMITS THAT HE MADE FALSE STATEMENTS TO THE COURT IN THE *BLAKE* AND *FAULKNER* CASES BUT THAT HE DID NOT DO SO WITH A KNOWING AND INTENTIONAL STATE OF MIND AND THAT HIS FAILURE TO CORRECT SAME WHEN OFFERED THE OPPORTUNITY TO DO SO IN *BLAKE* WAS AN ERROR OF JUDGMENT AND A MISTAKE.

Earlier in this proceeding, Busch admitted making false statements to the Court that the hard drives had been sent to the state police in Morgantown for duplication and that he had been in contact with Sergeant Casto. However, the undisputed record in this case establishes that Busch's investigator had been in contact with Deputy Vanscoy of the Sheriff's Department and understood that the hard drives had been sent for duplication and that he had been in contact with Sergeant Casto concerning same.

Mr. Renton provided this information to Busch before the July 21, 2010 status hearing. Busch's reliance on Mr. Renton's information was objectively reasonable under the circumstances. However, his word choices, including speaking in first person as though he was the one who actually contacted Deputy Vanscoy and Sergeant Casto, was, at a minimum, misleading and inappropriate. All Busch had to do was to explain to the Circuit Court, either during the hearing on July 21, 2010, or thereafter, that it was Mr. Renton who was the person handling the matter on behalf of Busch's office. Regrettably, Busch did not do so and he certainly should have been more aware of the problems being encountered by Mr. Renton in his attempt to obtain duplication of the hard drives. He could have taken action by seeking relief from Judge Wilfong or by contacting the Sheriff directly in an attempt to have corrective action taken as there appears to have been an uncooperative attitude between Deputy Vanscoy and

Busch's office. Regardless, Busch admits it was indeed a "grave error" not to more clearly communicate with the Circuit Court and to fail to take any corrective action when provided the opportunity to do so regarding any misleading statement he had previously made concerning this matter.

Moreover, Busch admits making statements in the *Faulkner* case to the Circuit Court, which reasonably led Judge Wilfong to believe that any problem with the alleged failure to disclose the CD of the child victim's interview was the fault of Trooper Loudin. Busch believed that was the case at the time he made the statements based upon what he was told by his legal assistant who was in the courtroom at the time of the June 1, 2011 hearing. Upon learning that his statements were incorrect, Busch sought to correct same with the Circuit Court and Trooper Loudin personally. Unfortunately, the manner in which he did so was not deemed appropriate or pleasing to Judge Wilfong.

Under these circumstances, Busch and his counsel urge this Court to understand and conclude that he accepts full responsibility for the misleading nature of the statements made to the Circuit Court at the July 21, 2010 hearing but this misconduct was not committed with a knowing and intentional state of mind and that the sanction formulated by this Court should be less severe than that which is sought by ODC and recommended by the HPS.

II. RESPONDENT BUSCH DID NOT UNLAWFULLY OBSTRUCT MR. JORY'S ACCESS TO THE HARD DRIVES AT ISSUE IN THE *BLAKE* CASE, NOR DID HE KNOWINGLY DISOBEY AN OBLIGATION IMPOSED UPON HIM BY THE CIRCUIT COURT'S DIRECTIONS AND ORDER RESULTING FROM THE JULY 21, 2010 HEARING IN VIOLATION OF RULES 3.4 AND 3.8.

A real dispute arose between Mr. Jory and Busch after the July 21, 2010 status hearing regarding Ms. Blake's right to have the hard drives prior to her indictment and whether there was anything relevant to or exculpatory in her case contained on them. Importantly, the

investigating officer, Deputy Vanscoy, had always maintained that the hard drives and their contents were irrelevant to the case he was making against Ms. Blake. This was the position maintained by Busch throughout.

Busch and Mr. Jory did communicate with each other concerning the initial dispute over the wording of the Order being prepared as a result of the July 21, 2010 hearing. In this regard, Busch, in his August 3, 2010 letter, specifically stated his concerns based upon “[t]he State’s notes from the hearing of July 21, 2010” that Ms. Blake was not entitled to a copy of the hard drive at this time. Specifically, Busch, in his letter to Judge Wilfong, requested, “[p]lease advise how the Court wishes the State to proceed through correspondence or by order.” Busch did not ignore these issues and asked the Circuit Court for help. He reasonably complied with the Orders entered on August 24 and October 12, 2010, although in a belated fashion. He timely complied with the post-indictment Arraignment Order by seeking to facilitate disclosure of the hard drives to Mr. Jory through the uncooperative Sheriff’s office. These facts are cited above.

III. RESPONDENT BUSCH DID NOT VIOLATE RULE 8.4(c) OR (d) IN THE *BLAKE* CASE.

Busch did not hide any evidence, lie about its existence, ignore the issues in dispute, commit any crime or engage in any dishonest, deceitful or fraudulent misconduct in the *Blake* case which was in any way prejudicial to the administration of justice. What he did do, however, was to fail to simply handle the legitimate dispute which arose between himself and Mr. Jory relating to the disclosure of a copy of the hard drives in a procedurally appropriate manner. He should have filed a motion seeking relief from the Circuit Court’s instructions made during and Orders entered from the July 21, 2010 hearing. Ideally, he should have provided the Court with all relevant law and facts supporting his position that Ms. Blake was not entitled to a

copy of the hard drives, whether they contained exculpatory information or not, until there was an indictment returned by the Grand Jury and a triable case existed.

Ultimately, Busch did, in fact, seek to facilitate disclosure of the hard drives soon after indictment and well within the time frame set forth for discovery disclosure contained in Judge Wilfong's Arraignment Order. These actions under these circumstances do not equate to disciplinable conduct under Rule 8.4(c) and (d), especially since there was no real legal or factual basis for the Circuit Court to have dismissed the *Blake* case.

IV. RESPONDENT BUSCH DID NOT VIOLATE RULES 3.4, 3.8 OR 8.4(c) OR (d) IN THE FAULKNER CASE.

The *Faulkner* case initially was handled by Mr. Cooper. At the time Ms. Faulkner and her counsel waived the preliminary hearing in Magistrate Court, Mr. Cooper provided the CD of the interview of the child victim to defense counsel. Defense counsel signed a receipt for same. While this information was unknown to Busch until much later, it is certainly relevant as to the underlying facts, tone and context of this lawyer disciplinary proceeding. Thereafter, confusion arose in Busch's office concerning the whereabouts, location and disposal of the CD at issue. Busch has admitted to making a false statement with regard to his understanding or belief that Trooper Loudin was responsible in some manner for the lack of disclosure of the CD or its untimeliness. Such statements were clearly made based upon information being provided in real time by Busch's legal assistant/office manager who was present with him in the courtroom and communicating with other members of his staff, as set forth above. Other than making a false statement based upon information being provided to him, there was no dishonest, deceit or fraudulent conduct or an attempt by him to engage in any conduct which is prejudicial to the administration of justice. When Busch's office contacted Trooper Loudin and immediately obtained an additional copy of the CD, Busch took action to

seek advice and counsel from the Circuit Court and followed up by telephone and in writing with Trooper Loudin to apologize for his misstatements. This is the type of responsible follow-up action, albeit not satisfactory to Judge Wilfong, that the legal system expects of licensed lawyers and its prosecuting attorneys.

Therefore, from a fair and complete review of the entire record in this case, it certainly appears that Busch's conduct in this regard was reasonable under the circumstances after being advised of the facts and circumstances of the exchange of CDs between the state police and his office.

**MITIGATING FACTORS, HARM AND SANCTIONS IMPOSED
IN OTHER LAWYER DISCIPLINARY PROCEEDINGS**

Busch requests that this Court consider the following mitigating factors, under Rule 3.16, *West Virginia Rules of Disciplinary Procedure*, the American Bar Association, Standards for Imposing Lawyer Sanctions, 9.32 (1992), adopted in *Scott, infra*, together with the sanctions imposed in other lawyer disciplinary proceedings, in fashioning a sanction against him for his admitted Rule 3.3 violations in the *Blake* and *Faulkner* cases:

- (1) his lack of any prior disciplinary record;
- (2) his lack of any prior service as prosecuting attorney and experience in handling criminal cases generally;
- (3) his acceptance of responsibility for his actions as demonstrated prior to and during this lawyer disciplinary proceeding;
- (4) his attempt to ask for Circuit Court guidance in his August 3, 2010 correspondence in the *Blake* case and a meeting with Judge Wilfong on June 13, 2011, in the *Faulkner* case;
- (5) his resignation from his elected position of Prosecuting Attorney of Randolph County, West Virginia, based on his perception that he was no longer effective in his position;

- (6) his cooperative attitude toward these lawyer disciplinary proceedings and his full and free disclosure to the Disciplinary Board throughout the entire proceeding;
- (7) his decision to refrain from the practice of law since December 5, 2011, until this lawyer disciplinary proceeding is completed and his sanction is satisfied, and the obvious adverse financial ramifications his self-suspension have caused;
- (8) the lack of evidence of a pattern of misconduct;
- (9) the absence of any dishonest or selfish motive;
- (10) the personal and emotional problems created for him as a result of his father's long-term illness and the loss of his father as a mentor and resource person;
- (11) his general anxiety disorder for which he has been treated for a number of years;
- (12) his general good character; and,
- (13) the delay of over one year in these lawyer disciplinary proceedings from his final evidentiary hearing on July 27, 2012, until the issuance of the HPS' Report in August 2013.

Contrary to the arguments presented by ODC and the findings of the HPS, there was no actual harm or injury to Trooper Loudin. There was no harm or injury to Ms. Blake or her ability to defend herself after indictment, and there was no basis for the Circuit Court to dismiss the case with prejudice. There was no harm or injury to Ms. Faulkner, as she was provided full due process disclosure of the CD of the child victim either at the preliminary hearing or in subsequent discovery disclosures. The only harm or injury actually presented in this case was the efficient operation and function of the legal system in these two limited cases, which issues were corrected by Busch within a reasonable time.

Busch respectfully requests that the Court consider the facts and circumstances presented in *Lawyer Disciplinary Board v. Sims*, 212 W.Va. 463, 574 S.E.2d 795 (2002); *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 579 S.E.2d 550 (2003); *Lawyer*

Disciplinary Board v. Hatcher, 199 W.Va. 227, 483 S.E.2d 810 (1997); and *Lawyer Disciplinary Board v. Jarrell*, 206 W.Va. 236, 523 S.E.2d 552 (1999), and compare them to the record in the instant proceeding and impose a sanction less severe than imposed in the *Scott* case. Busch further requests retroactive application of any suspension imposed in this case because he has not practiced law since December 5, 2011. See, *Office of Disciplinary Counsel v. Alderman*, 229 W.Va. 656, 734 S.E.2d 737 (2012); and *Committee on Legal Ethics v. White*, 189 W.Va. 185, 428 S.E.2d 556 (1993). He has done all he can to restore confidence in the Office of the Prosecuting Attorney and the legal system by his resignation and admissions made in this proceeding and by voluntarily absenting himself from the practice of law.

CONCLUSION

Busch and his counsel respectfully request that the Court hold that the facts presented fail to establish by clear and convincing evidence violations of Rules 3.1, 3.4, 3.8 or 8.4(c) or (d) in the *Blake* and *Faulkner* cases. Busch further states that the sanctions imposed upon him for the stipulated Rule 3.3 violation should be less than that sought by ODC and recommended by the HPS and that he be given consideration for the time for which he has voluntarily refrained from the practice of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Richard T. Busch, Esquire, do hereby certify that on November 6, 2013, the foregoing *Respondent Richard T. Busch's Brief* was duly served upon counsel of record specified below by depositing true and exact copies thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

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