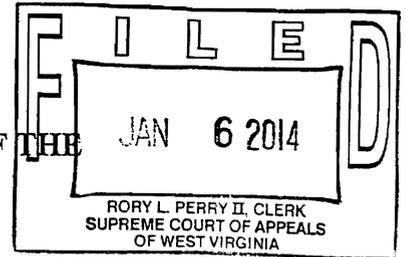


BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LOUIS DANTE DITRAPANO,

Petitioner,

v.

No. 12-0677

OFFICE OF DISCIPLINARY COUNSEL,

Respondent.

REPLY BRIEF OF THE PETITIONER LOUIS DANTE' DITRAPANO

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REPLY BRIEF OF PETITIONER LOUIS DANTE' DITRAPANO

COMES NOW Petitioner LOUIS DANTE' DITRAPANO, by his counsel Robert H. Davis, Jr. and presents his Reply Brief of argument and authority to the Honorable Supreme Court of Appeals of West Virginia as follows:

I. STATEMENT OF THE CASE

We are now before the Court on a hearing request by the Office of Disciplinary Counsel ["ODC"] following the Hearing Panel Subcommittees["HPS"] Report and Recommendation that Petitioner Louis Dante' DiTrapano["Petitioner DiTrapano"] be reinstated to the practice of law, with conditions, without further petition or hearings, at the conclusion of his supervised release, a request for argument by the Office of Disciplinary Counsel, the filing of Petitioner's Brief to the Supreme Court as required by Order of October 29, 2013, and filing of the Response Brief of the Office of Disciplinary Counsel on December 23, 2013, served by mail on Petitioner DiTrapano on that same date. Prior history of this proceeding has been provided in Briefs of both parties now filed with the Honorable Court.

II. SUMMARY OF THE ARGUMENT

The ODC argues in its recent brief that, although there is no per se rule on the issue, Petitioner DiTrapano ought not be reinstated in light of the fact that he was convicted of two criminal charges the ODC says are of the greatest seriousness. Further, the ODC argues that reinstatement is inappropriate for any person serving any degree of criminal sentence, including supervised release such as that now being served by Petitioner. Petitioner DiTrapano renews his argument, pursuant to the case law in West Virginia and the burden of proof applicable in this proceeding, that he has met all of the standards for reinstatement and that the nature of the underlying convictions, upon careful review, do not provide any basis for denial of admission at this time, thus the Court should exercise its authority under the rules and reinstate Petitioner DiTrapano, subject to this Court's terms of probation during the next 12 months while he completes his supervised release.

Petitioner DiTrapano repeats here that he has gladly accepted, and has met, the burden upon a petitioner applying for readmission after disbarment for criminal convictions. We here argue and agree that we must present compelling proof, and that we have proven with overwhelming record proof here, that it is inappropriate to determine Petitioner's fate by mere "label" focusing only upon the type of crime and specific general statute of which he was convicted but rather, the facts of the actual crime, the underlying facts of the conviction, including uncontested facts amounting to clear mitigation of the seriousness of the actions of Petitioner, expressions of remorse and acceptance of responsibility and the overall facts leading to the conviction are, not "sugarcoating" but a properly thorough review of the full nature of the

convictions. Such are the proper subject of the debate and analysis here over readmission and its timing as established by the facts here and the applicable case law.

Such an analysis shows that the crimes of which Petitioner DiTrapano was convicted, viewed in full context and compared to those cases in which this Honorable Court has denied readmission, are not a bar to readmission nor do the convictions and surrounding facts, including the uncontested fact of the presence of addiction, suggest that the reinstatement of Petitioner will endanger the public or present any risk that the public or the bar will view such readmission negatively or that such reinstatement will bring the courts or the bar in disrepute. Such proper analysis under applicable case law also supports the Petitioner's request for prompt reinstatement.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered October 30, 2013, this Honorable Court provided a briefing schedule and set this matter for oral argument on Tuesday, January 28, 2014.

IV. ARGUMENT

Petitioner DiTrapano respectfully submits additional argument supporting his position that after applying the facts of this case to the law of the State of West Virginia, he has not only met, but exceeded, the requirements for reinstatement to the practice of law, that the record overwhelmingly supports that he possesses the moral character, learning and skill in the law and the present good character for readmission to practice law and that the nature of his

actions leading to his disbarment and subsequent criminal conviction and sentence, including present supervised release, are such that, as Petitioner has carefully showed in his presentation to the Hearing Panel Subcommittee, his reinstatement will not cause the public nor members of the bar to question the integrity of the legal system or to lose confidence in the bench and bar of West Virginia. All of these important foundational facts and conclusions were properly found in the Report of the HPS filed with this Honorable Court on October 18, 2013. A fair reading of that report can only lead to the conclusion that the only apparent hesitation shown by the HPS in reinstating the license of Petitioner immediately, arose from the fact that he is presently under sentence of supervised release which will end in January of 2015.

A. Appropriate Standards To Be Considered Here

“A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee’s recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee’s finding of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.” Syl. Pt. 3. Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). While we agree with the overwhelming portion of the HPS report, we here urge this Honorable Court to clarify the law by stating that, as established in the record, a sentence of supervised release is different from one of incarceration or parole and, where a petitioner for readmission has submitted a compelling record of rehabilitation and fitness, that the status of being on supervised release shall not be a bar to immediate admission to practice.

The HPS report and recommendations find appropriately, with one exception, that Petitioner DiTrapano has proven all of the requisite elements for successful reinstatement. We argue that the HPS could not find on the “whole record” in this proceeding that restoring Petitioner’s law license while on supervised release for approximately one year, likely less, will adversely effect the public confidence in the administration of justice. There is no evidence, not one word, in the “whole record” that supports a finding that Petitioner’s crimes or his present status present an unacceptable risk to the public or the justice system; indeed the record contains only evidence supporting the position that members of the public and bar would welcome giving Petitioner DiTrapano a “second chance”.

The argument made by the ODC in its recent brief that this Court should apply a procrustean test of “two felonies mean no reinstatement” is inappropriate under case law and, most importantly, the full record here which explains the detail and the circumstances of the convictions at issue in this matter. The cases cited by the ODC in support of its factually unsupported assertion that reinstatement ought to be denied using an inflexible rule in this matter simply fail to support such a position upon examination, particularly in the context of the compelling facts now clearly in the record before this Honorable Court.

The polestar guiding the review of petitions for reinstatement is the proposition that the reinstatement rules are “rules of compassion.” Where the petitioner meets his burden, as here, of proving a record of rehabilitation since annulment, and where, as here, there is no risk that a reinstatement will endanger the public, a lawyer’s license should be reinstated. As stated by this Court in Syllabus Point 2 of In re Smith,

“2. Article VI, Sec. 35, By-Laws, West Virginia State Bar, which provides that an Attorney whose license to practice has been annulled may reapply for admission after Five years **is a rule of compassion**, and absent a showing by the Committee on Legal Ethics that reinstatement will endanger the public, an attorney’s license to practice will be reinstated after five years of good behavior.”

In Re Smith, 214 W.Va. 83, 585 S.E.3d 602 (1980).

B. The Record Here Strongly Supports That There Will Be No Adverse Public or Bar Reaction.

Petitioner filed his reinstatement papers and questionnaire on June 11, 2012 five years after being disbarred. This filing triggers, pursuant to RULE 3.33(b) of the Lawyer Disciplinary Procedure, a “prompt investigation thereof” and filing of a report with the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. The ODC investigation which took seven months included a sworn statement from petitioner, a psychological evaluation from a psychiatrist of the ODC’s choice, and a solicitation of public comment posted in the *Charleston Gazette*. The ODC filed its report on February 7, 2013. Nowhere in the investigation, the evaluation, or the solicitation for public comment did the ODC find any evidence that any person had any objection whatsoever to Petitioner DiTrapano being reinstated to the practice of law.

Likewise, during the two full days of hearings conducted in March and April of 2013, no evidence was produced either by way of live witness testimony or exhibit that showed any

objection to Petitioner DiTrapano's reinstatement. Further, in the over 700 pages of transcribed testimony and 1700 plus pages of bates- stamped exhibits is their one person or statement that supports the ODC position that the reinstatement of Petitioner DiTrapano will have an adverse effect of the public confidence in the administration of justice. There is simply nothing in the record to controvert the overwhelming evidence of support among the bar, the community, and the public at large.

Specifically, the testimony of employer Stuart Calwell, West Virginia Bar President Harry Deitzler, Principal of George Washington High School George Aulenbacher, Lawyer Assistance Program Executive Director George Daugherty, WVU Board of Governors Member and Lawyer Tom Flaherty, Reverend Matthew Watts, Businessman Joey Holland, Federal Defender Attorney Mary Lou Newberger, friends, family, neighbors, the arresting police officer, and many others all consistently support Petitioner DiTrapano in his reinstatement effort and Petitioner asserts that these individuals whose testimony and letters are in the record represent a comprehensive and broad cross-section of the general public and the bar whose testimony ought to be given respect, such was apparently afforded it by the HPS. Specific summaries and citations to this strongly-supportive testimony are found in the brief of the ODC and Petitioner's original brief to this Court and will not be repeated here. Further, the three-member HPS comprised of a lawyer from Clarksburg, a lawyer from Wheeling, and a layperson from Parkersburg who heard the evidence in this matter quite appropriately concluded that reinstatement would not have a substantial and justifiable adverse effect on the public confidence in the administration of justice upon the expiration or termination of Petitioner's supervised release is to be given respectful consideration by this Court.

C. This Court Should Reject the ODC Argument That Two Felony Convictions Require the Rejection of Petitioner DiTrapano's Petition

The ODC, aware that there is no factual support for its conclusion as to any identified or identifiable detrimental effect of Petitioner's reinstatement has instead resorted to suggesting that this Honorable Court take a hard line approach that a lawyer convicted of two felonies does not meet the In re Brown test that "the seriousness of the underlying offense leading to disbarment may, as a threshold matter, preclude reinstatement such that further inquiry as to rehabilitation is not warranted." In Re Brown, 166 W.Va. 226, 273 S.E.2d 567 (1980). This position is inapplicable to the facts now before this Court, the law in this state, the report and recommendations of the Hearing Panel Subcommittee, and the entire record in this case. Petitioner DiTrapano pled guilty to being an "unlawful user of controlled substances in possession of firearms." To reach an appropriate conclusion as to the applicability of the In Re Brown test, one must look not only at the statute violated but at the background of the conduct that gives a full picture of the gravity of the offense.

A conviction of possession of a firearm while addicted is the "underlying offense" for which Petitioner DiTrapano was disbarred in May of 2007 and is admittedly facially serious. However, this Court has recognized in Lawyer Disciplinary Board v. Hardison, 205 W.Va.344, 518 S.E.2d 101 (W.Va. 1999) that addiction is a disease and that you cannot deprive a person of his profession based simply on an illness. Likewise, a crime committed while addicted is mitigated by such addiction. The other prong of the federal firearm possession crime to which Petitioner pled guilty was possession of firearms on which prong the record illustrates sentencing

Judge David Faber found as a matter of law that the firearms that Petitioner DiTrapano owned were used solely for “sport and collection” after hearing evidence at the sentencing hearing put on by Petitioner and the United States Attorney’s Office. The conduct constituting this offense occurred in 2006. Clearly the primary evil sought to be avoided in the statute, that is, actual possession of firearms by one involved in other active criminal conduct or avoidance of dangers presented when an addicted person may misuse firearms, are simply not present here. The record is clear that the firearms were locked in a safe in the basement of Petitioner’s home and had never been fired by Petitioner or used in any illegal manner whatsoever.

The second crime to which Petitioner DiTrapano pled guilty in 2009 involved conduct that occurred in July of 2005 - prior to the conduct that Petitioner was incarcerated and disbarred for in 2006. The United States Attorney’s Office, in an unprecedented approach with respect to timing in prosecuting a case in West Virginia as the record here shows, sought to incarcerate petitioner for the crime of “providing false information to a bank when obtaining a loan.” As set forth in previous filings, while Petitioner recognizes his wrongdoing and has taken full responsibility for his behavior, the plain facts surrounding that conviction that describe its true nature are that there was no money lost by any person, financial institution or entity involved in the subject loan and investment transaction, including Petitioner DiTrapano’s then client, and as stated by the United States Attorney’s Office in their pre-sentencing filings, “all the information known to the United States indicates that defendant was heavily using controlled substances at the time he committed the instant offense.” (Joint Exhibit 41 at 000771-000773). Additionally as this Court is aware, the Hearing Panel Subcommittee correctly found by clear and convincing evidence that Petitioner’s addiction was a major mitigating factor to both felonies. (Report and

Recommendations of HPS pg. 22). Accordingly, if there were some history of a rule in West Virginia that any conviction of two felonies is, without more investigation, a *per se* bar to readmission, which assertion the ODC candidly admits is not the law, the convictions of Petitioner DiTrapano, mitigated as they are by his addictions at the time and seen in their true light, would not qualify under such suggested standard.

D. Admission of Petitioner While On Supervised Release Is Appropriate

Supervised release is rehabilitative, not punitive, as clearly stated in the case law, United States v. Pierce, 75 F. 3d 173, 177 (4th Cir. 1996), and found by the HPS in their report and recommendations.(HPS Report and Recommendations p. 23). In Office of Disciplinary Counsel v. John Alderman, III, 229 W.Va. 656, 734 S.E.2d 737 (2012), the ODC allowed Mr. Alderman to practice law while serving a sentence of probation for various crimes related to his substance abuse and addiction. Although Mr. Alderman had ultimately pled guilty to two misdemeanor crimes in Kanawha County Magistrate Court, the conduct underlying his guilty pleas included possession with intent to deliver crack cocaine (a felony), obstruction of justice, and other possession charges. Alderman, 229 W.Va. at 658, 734 S.E.2d at 739. Alderman, like Petitioner DiTrapano is a recovering addict. They are both in the West Virginia Lawyers Assistance Program (WVLAP) and attend Alcoholic Anonymous meetings together regularly. Petitioner DiTrapano has well over six years of sobriety and Mr. Alderman has three years. George Daugherty, the executive director of the WVLAP testified at both Mr. Alderman and Petitioner DiTrapano's hearings before the HPS and endorsed both men as safe bets to remain on the road to recovery. Mr. Alderman, while practicing law on probation for State Court charges was subject to the exact same conditions as Petitioner DiTrapano is on federal supervised release.

(WV Code 50-2-3a). The fact that Petitioner DiTrapano was prosecuted by a more zealous prosecutorial body than Mr. Alderman should not be the determinative factor utilized by the ODC to oppose Petitioner DiTrapano's reinstatement when it previously supported Mr. Alderman.

While this Court looks at these matters on a case-by-case basis, it endeavors to be consistent. Petitioner DiTrapano has completed 48/60 months of the supervised release that he was sentenced to by Judge Johnston for conduct that occurred during his relapse in July, 2005. His supervision requirements amount to sending a form each month to the United States Probation Department (USPD) and he cannot violate any federal, state, or local laws. Petitioner DiTrapano has an agreement with the USPD that he can travel, without express permission, for work and family matters outside of the Southern District of West Virginia. Petitioner DiTrapano lives with his family, has been gainfully employed at The Calwell Practice for five years, has a standing offer to be hired as an associate lawyer and supervised by Stuart Calwell, is in strong recovery from addiction, is active in the community, and is categorized by the USPD, the Department of Justice, and the United States Sentencing Commission as a "low risk" offender. The goals of supervised release would be further advanced by Petitioner DiTrapano's reinstatement to the West Virginia Bar and restoration of his law license.

The cases of In Re: Petition for Reinstatement of Esposito, No. 11-0671 (W.Va. June 12, 2013), In Re: Petition for Reinstatement of Hrutkay, No. 11-0136 (W.Va. June 12, 2013), Lawyer Disciplinary Board v. Arch A. Moore, Jr., 217 W.Va. 780, 591 S.E.2d 338 (2003) and In the Matter of Steven M Askin, No. 30724 (W.Va May 11, 2006) that the ODC cites as being

persuasive are significantly dissimilar to the case before you. One can quickly grasp that in Esposito, Hrutkay, and Moore, the petitioners were involved in significant political corruption with no mitigating factors that the corruption had already presented embarrassment to the bar, and the record relating to their attempted reinstatement contained testimony of persons who stepped forward to raise significant objection to their reinstatement. As we have noted, and as this Honorable Court's careful review of the whole record will reveal, the conviction of Petitioner does not involve conduct such that has caused anyone to speak one word in objection to his reinstatement, as discussed in part B, above, of this brief. The Askin case involved a conspiracy constituting "obstruction of justice charge", among other charges and involved significant damage to several clients that this Court found "struck at the very essence of the integrity of our legal system." The nature of the crimes of Petitioner, as described above and as discussed and found by the HPS clearly distinguishes it from the type of activity found by this Court in Askin.

In Moore, the former Governor persistently refused to take responsibility for the crimes that were the subject of his disbarment and that became the primary obstacle for his reinstatement. Clearly Moore's betrayal of public trust quite strongly impacted this Court's final decision that reinstatement of Moore would cause an unacceptable reaction in the public. In contrast, in Petitioner's present case, the ODC has stipulated to his legal competence to resume the practice of law and joins the HPS in finding no flaw in his basic character and his rehabilitation by acts of true public spirit. Further and importantly in comparing the present petition to that of former Governor Moore, the evidence reflects that Petitioner has demonstrated great remorse for his previous misconduct, has expressed his remorse for his actions, not only to

the HPS but previously to a number of others whose lives were impacted by his actions and has accepted full responsibility for his misconduct. The ODC also acknowledges and the HPS has correctly found upon good evidence that Petitioner has demonstrated a record of honorable behavior since disbarment and presented testimony that he has come to terms with his past wrongdoing, has expressed apologies and remorse on a number of occasions to others and intends to continue to adhere to high moral standards and to high standards of professional performance in the future. Additionally, the ODC has noted that Petitioner has presented a compelling record of rehabilitation concerning his addiction. We say without apology that it will be difficult, if not impossible, for this Honorable Court to identify a petitioner for readmission who has presented a more complete and compelling case demonstrating rehabilitation, abstinence from drugs and alcohol, acceptance of responsibility, remorse, and fundamental character than that which are plainly on the record in this proceeding.

The HPS found, after listening to 15 witnesses over a two day period and carefully examining over 1700 pages of exhibits, that Petitioner has proven all of these elements by “clear and convincing” evidence and that at early termination or the expiration of Petitioner’s supervised release on January 14, 2015, that he be reinstated without further petition or hearing. Implicit in this specific recommendation, is the plain fact that the HPS has clearly and correctly determined that Petitioner’s reinstatement will not have a substantial adverse effect on the public confidence in the administration of justice.

While it is understandable that the ODC has taken, in the best of good faith, its traditional position that any petitioner serving any type of criminal sentence must not be

reinstated, citing a handful of cases from other jurisdictions that are not factually on point with the facts here, the plain fact remains that such is not an inflexible rule in West Virginia, fixed in law, and Alderman, supra, illustrates that this Court, observing the rehabilitative and restorative focus of its reinstatement rule, can and will, where appropriate, mold its orders to allow attorneys serving sentences of supervised release to rebuild their lives and practices, where the surrounding facts make such a logical and positive alternative.¹ We again urge that the Court's proper course here is to exercise its complete powers over discipline and licensing to again mold a reinstatement decision that will allow a petitioner of the excellence of Petitioner DiTrapano to continue rehabilitation of his life by prompt reentry into the practice of law. The record here illustrates that the public and bar reaction to such a decision will be widespread understanding and joy, not condemnation, as the ODC suggests.

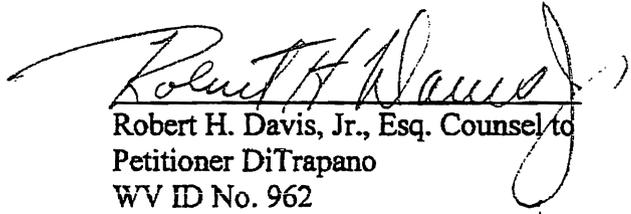
V. CONCLUSION

The Petitioner, Louis Dante' DiTrapano, again respectfully requests that this Honorable Court reinstate his license to practice law in the State of West Virginia immediately, placing him on probationary status for such appropriate period as this Honorable Court determines to be appropriate, while completing his supervised release, subject to such conditions as the Hearing Panel Subcommittee recommended in their report filed with this Court on October 18, 2013. In

¹ This Court has previously recognized that it will consider the facts and circumstances of each individual case involving the determination of a disciplinary action, rather than attempting to establish an inflexible, uniform standard. Alderman, 229 W.Va. at 661, 734 S.E.2d at 742, citing Lawyer Disciplinary Bd. V. Veneri, 206 W.Va. 384. 524 S.E.2d 900 (1999).

the alternative, Petitioner DiTrapano again requests that this Court adopt the Hearing Panel Subcommittee report and recommendation in total as presented.

Respectfully Submitted this 6th of January, 2014.



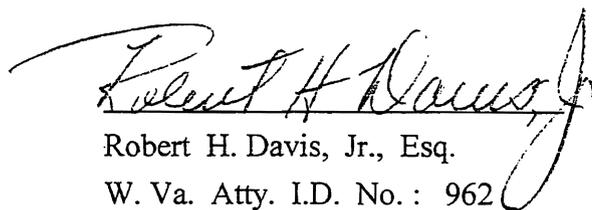
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CERTIFICATE OF SERVICE

I certify that I, Robert H. Davis, Jr., Esq., as counsel to Petitioner L. Dante diTrapano have on the date entered below caused a true and accurate copy of the foregoing Reply Brief of Petitioner L. Dante DiTrapano to be served upon the Office of Disciplinary Counsel by personal delivery to its Chief Counsel, Rachael L. Fletcher Cipoletti, Esq. or an available member of her staff at the following address:

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This the 6th day of January, 2014



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