BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

NO. 20-0133

LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

JUSTIN J. MARCUM,

Respondent.

RESPONDENT'S BRIEF

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II. Introduction

To the Honorable Justices of the

West Virginia Supreme Court:

In this lawyer ethics matter, counsel for Petitioner Lawyer Disciplinary Board and Respondent Justin J. Marcum were in agreement as to the proposed findings of fact, conclusions of

law, and proposed sanctions. Following the hearing held on September 21, 2020, on or about December 10, 2020, counsel for the Office of Disciplinary Counsel (ODC) and for Respondent presented the Hearing Panel with **JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS.**[1]

In its **REPORT** issued on February 8, 2021, the Hearing Panel, based upon its consideration of the evidence and the testimony of the witnesses addressing the laudatory progress Respondent has made in dealing with his opioid addiction, concluded that imposing a two-year suspension of Respondent's law license, which is stayed, along with the other monitoring conditions imposed recommended by Robert Albury, were appropriate sanctions in this case and gave proper recognition to the positive and ongoing rehabilitation efforts Respondent has made. Petitioner only disagreed with one aspect of the Hearing Panel's recommendations. Petitioner contends Respondent's law license should be suspended for a total of two years, with Respondent actually suspended for the first six months and then the remaining one year and a half of the suspension would be stayed. Thus, it was the decision by the Hearing Panel not to impose this six-months actual suspension that has prompted this appeal.[2]

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[1]In this document, the parties largely agreed to the facts, but they provided the Hearing Panel with additional briefing on a couple of issues where the parties were not in agreement. The two issues briefed by the ODC were rejected by the Hearing Panel as not being proven. (**REPORT**, at 55-57). In his brief, Respondent provided the Hearing Panel with a more detailed discussion of his mitigation efforts, which were considered by the Hearing Panel in reaching its final conclusion.

[2]The issue presented to the Court in this matter is not nearly as complex as the 69-page brief filed by Petitioner may suggest. Petitioner's brief includes an extensive discussion of matters that the ODC, counsel for Respondent, and the Hearing Panel **AGREED had not been proven** and therefore were dismissed. On page 54 of the **REPORT**, the Hearing Panel concluded:

Respondent respectfully submits the decision by the Hearing Panel is justified under the facts of this case, consistent with this Court's decisions, and, therefore, asks the Court to adopt the Hearing Panel's recommendations issued in this case.

III. Statement of the case

The most serious charge leveled against Respondent was in Count IV of the Statement of Charges, where it is alleged Respondent purchased Oxycontin from a person named Jackie Marcum (no relation to Respondent) and some time later Respondent represented Jackie Marcum as his criminal defense counsel where Jackie Marcum was facing drug-related offenses unrelated to Respondent's purchase.[3] Although Respondent has never been arrested or convicted of any crime

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> Count I: Both Disciplinary Counsel and Respondent **agree that the evidence presented at the disciplinary hearing did not prove the charges** asserted in paragraphs 21, 22, 23, 24, 25, and 26 of the Statement of Charges involving Rules 1.7(a), 1.9(a), 1.18(c), 7.3(a), 8.1(a), 8.4(c). Md 8.4(d) of the RPC against Respondent.
>
> Count II: Both Disciplinary Counsel and Respondent **agree that the evidence presented at the disciplinary hearing did not prove the charges** asserted in paragraphs 50, 51, and 52 of the Statement of Charges involving Rules 1.7(a), 7.3(a), 8.1(a), and 8.4(c) RPC against Respondent. (Emphasis added).

Respondent respectfully submits that because all counsel and the Hearing Panel agreed that Counts I and II had not been proven, pages 3 through 26 of the **BRIEF OF THE LAWYER DISCIPLINARY BOARD (PETITIONER'S BRIEF)** ought to be ignored by the Court as an unnecessary distraction from the actual issue raised in this case. Consequently, in this brief, Respondent will not comment on the allegations asserted in connection with Counts I and II, which were not proven, as agreed to by all the parties and as found by the Hearing Panel.

[3]Count III in the Statement of Charges alleged minor violations relating to Facebook posts made by Respondent relating to comments about a police officer named Bert Gibson, who was, in Respondent's opinion, unjustifiably harassing citizens in his area. Respondent admitted that these posts failed to list his address and could have been viewed either as advertising material or the solicitation of clients, without complying with those particular rules. In addressing this charge, the

in connection with this event, he freely acknowledges that on one occasion, he did purchase Oxycontin from Jackie Marcum. (**REPORT**, Finding of fact ¶87).

Once he had time to reflect on his addiction, Respondent came to realize that his dependence on drugs went back to an event that occurred when he was about twenty years old when he was attacked by someone, who hit him in the head with a hammer. (Hrg. Trans. 279). From this injury, Respondent often suffered from serious headaches for which he was prescribed opiates for treatment. (Hrg. Trans. 320-21). Respondent began abusing opiates around December of 2017 through January of 2018. (Hrg. Trans. 324).

Respondent testified that he was in the courtroom on the day that Jackie Marcum made an appearance and during the hearing, Jackie Marcum told the judge that Respondent would represent him. Although Respondent did not want to represent Jackie Marcum, he did so anyway. (*Id.*). While there was testimony that Respondent's purchase of Oxycontin from Jackie Marcum was on a video viewed by Jackie Marcum's subsequent counsel, Respondent testified this video was not in the materials he was provided by the State in discovery. (*Id.*).

Respondent worked out a plea agreement for Jackie Marcum where he entered a guilty plea to two felonies with a potential one to five year sentence. Before Jackie Marcum was sentenced on this guilty plea, his new lawyer had the guilty plea set aside and was able to negotiate a deal where Jackie Marcum pleaded guilty to one crime with a potential one to fifteen year sentence. This second

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Hearing Panel concluded, "The Facebook posts by Respondent about Mr. Gibson did not follow the requirements of the Rules to identify the posts as advertisements. However, **the Hearing Panel finds this violation to be an unintentional violation and a minor one and if alone should have only resulted in an admonishment or reprimand. The Hearing Panel Subcommittee also finds that the statements made regarding Mr. Gibson would only be a violation of the Rules if they were proven to be false and are otherwise protected by the First Amendment.** Mr. Gibson's remedy is not an ethics complaint but a suit for defamation." (Emphasis added). (**REPORT**, at 60).

lawyer believed this was a better deal because the deal included alternative sentencing. (**REPORT**, Finding of fact ¶82). "The case involving Jackie Marcum had the potential for justice to be harmed by Respondent's conflict of interest in the plea agreement he obtained for Jackie Marcum, but Jackie Marcum was able to obtain a plea offer with a lesser recommendation from the State." (**REPORT**, at 59).

While there was some conflicting testimony between allegations made by Jackie Marcum and Respondent's testimony, Respondent was very open with what inappropriate actions he had taken:

> Respondent agreed that he engaged in illegal activity in buying pills from Jackie Marcum, and he did so while he was a licensed attorney and serving in the West Virginia House of Delegates. Hrg. Trans. 278. Respondent said his addiction issues affected his ability to practice law. Hrg. Trans. 278-79....Respondent admitted he had a conflict of interest when he represented Jackie Marcum because previously, he had purchased pills from him. Hrg. Trans. 307. Respondent denied ever asking Jackie Marcum to pay him for his legal services with pills. Hrg. Trans. 306-07. Respondent denied that the trial court appointed him to represent Jackie Marcum, but rather it was Jackie Marcum who spoke up at the arraignment and stated that Respondent would represent him. Hrg. Trans. 268-269, 280-281, 307-308. (*Id.*).

Even before these ethics charges were filed against Respondent, he was forced through discussions with his family to face the reality that he had a serious substance abuse issue:

> Finally, Respondent explained that during a family camping trip in Tennessee around June 7, 2018, his family forced him to face the truth that he needed to be committed for drug rehabilitation. Hrg. Trans. 308-309. Once Respondent got into the drug rehabilitation program and committed to JLAP, he recognized his drug addiction and wanted to do what he could to overcome this disease. Hrg. Trans. 309-313). (*Id.*).

Respondent left his camping trip and enrolled in the program at Cumberland Heights in Tennessee, where Robert Albury, who is the Executive Director of JLAP, formerly worked. At that

facility, Respondent was diagnosed with chemical dependencies, specifically benzodiazepines, tranquilizers like Valium and Xanax, and opiates. After completing that program, Respondent contacted JLAP and engaged in its monitoring program. Respondent voluntarily entered into a two-year monitoring program agreement, which involves regular alcohol and drug testing, verification of regular attendance at AA or NA meetings, and participation in a lawyer recovery support group. L. Dante diTrapano was assigned to be a peer mentor for Respondent to assist him in his ongoing recovery. Respondent now has agreed to a five-year monitoring program with JLAP, which Mr. Albury explained increases the long-term success rate of the individual involved in the program. Mr. Albury recommended that any discipline issued should include the continuing monitoring of Respondent. Finally, Mr. Albury testified he had seen a huge change in Respondent, that Respondent has helped other lawyers, and that Mr. Albury was comfortable advocating on Respondent's behalf because of his documented history of rehabilitation. Respondent no longer poses a threat to any client or the public. (**REPORT**, Finding of fact ¶84).

Mr. Albury does not testify in favor of every lawyer involved in JLAP, as he explained:

> And let me tell you this, somebody earns their advocacy. I could just as easily come in and testify on behalf of the Board against somebody whose behavior is not indicative of somebody who's engaged in a program of recovery or is not compliant, so I don't do this unless my heart is in it and I believe I'm advocating for somebody who is worthy of it, who's earned it, whose record documents a history of rehabilitation, and I believe–who I believe is no longer a threat to the client public. Hrg. Trans. 199.

Mr. diTrapano testified that as a mentor, who had his own personal experiences dealing with substance abuse,[4] he texts or speaks with Respondent daily as well as attending JLAP meetings once

[4]For some background information on Mr. diTrapano's personal journey in dealing with his own substance abuse issues, see *In Re: Reinstatement of DiTrapano*, 233 W.Va. 754, 760 S.E.2d 568

a week and face-to-face meetings once a month. He observed Respondent becoming a better husband, father, and lawyer. Based upon his observations of Respondent as well as his own personal experiences, Mr. diTrapano stated he believed a suspension held in abeyance while Respondent continues to be monitored regularly through JLAP ought to be considered to ensure that Respondent remains drug-free and provides an incentive for him to continue working on his rehabilitation. (**REPORT**, Finding of fact ¶85).

The Hearing Panel adopted virtually all of the findings, conclusions, and sanctions proposed by Petitioner and Respondent in the **JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS**. In fact, all parties and the Hearing Panel were in agreement with the sanctions recommended in Paragraphs B through E. (**REPORT**, at 68). The only difference between the agreed upon sanctions and the sanctions recommended by the Hearing Panel was in Paragraph A, which states:

> A. That Respondent's law license be suspended for a period of two years, however, the suspension shall be stayed and the Respondent placed on supervised probation for the remaining period of Respondent's contract with JLAP or to June 28, 2023. See Robert C. Albury testimony Hrg. Trans. 191. Further, there shall be the immediate imposition of the entire two year suspension of any conditions or requirements of the JLAP contract or other Rules of Professional Conduct are violated after a petition to the Supreme Court.

Petitioner filed a timely objection to the Hearing Panel's recommendations, which triggered the present appeal.

(2014), and *In Re: Reinstatement of DiTrapano*, 240 W.Va. 612, 814 S.E.2d 275 (2018). With his life experiences and struggles with substance abuse, Mr. diTrapano has proven to be a valuable JLAP resource mentoring other lawyers coping with these same issues.

IV. Summary of the argument

In ethics cases where the lawyer either possessed or used illegal drugs or abused legal drugs, this Court regularly has imposed at two-year suspension of the lawyer's license to practice law. Depending on the facts of each case, the Court sometimes grants retroactive credit toward the suspension or stays the suspension while, at the same time, imposing other conditions where the lawyer is monitored on a regular basis.

When the recommendations made by an ethics Hearing Panel are reviewed, this Court gives respectful consideration of the recommendations while exercising its own judgment.

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

The following mitigating factors are present in this case: 1) absence of prior disciplinary record; 2) inexperience in the practice of law; 3) chemical dependency based upon testimony concerning Respondent's involvement with JLAP; 4) interim rehabilitation from his chemical dependency; 5) absence of a dishonest or selfish motive; 6) personal or emotional problems; 7) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; 8) character or reputation; 9) physical or mental disability or impairment; 10) no delay in disciplinary proceedings caused by Respondent; and 11) remorse.

Addiction is not a choice. Respondent persuasively has established that once he recognized he was suffering from the disease of drug addiction, he voluntarily committed himself into a rehabilitation facility in Tennessee and followed up that stay by committing to the monitoring and

counseling required by JLAP. The testimony from Mr. Albury and Mr. diTrapano corroborated Respondent's testimony, supported by test results and other documents, that Respondent has remained drug-free for several years now and he voluntarily committed to another five-year monitoring contract with JLAP.

The focus in these cases is on helping a lawyer, who not only has recognized his addiction to drugs, but also has demonstrated a persuasive and determined record of rehabilitating from this illness so that he can return to the practice of law while also protecting the public. The efforts by these lawyers to be rehabilitated should be encouraged and should serve as an example to other lawyers who find themselves in a similar situation.

This Court's jurisprudence in this area of the law has identified the aggravating and mitigating factors to be considered in deciding what sanction is appropriate and this analysis is made on a case-by-case basis. The goal of the Court is to make sure that the public is protected while also discouraging any similar conduct by other lawyers who may be faced with the same situation. The monitoring of Respondent through JLAP ensures Respondent's compliance and provides the necessary protection the public needs.

There is hope in the battle against the disease of addiction that so many families are facing; and to make clear that West Virginia's legal profession, including our disciplinary system, supports the recovery and rehabilitation of impaired lawyers.

V. Statement regarding oral argument and decision

Because the ODC objected to the Hearing Panel's recommendation to stay the entirety of the two-year suspension of Respondent's law license, this Court issued an order requiring Rule 19 oral argument in this case on September 14, 2021.

VI. Argument

In ethics cases where the lawyer either possessed or used illegal drugs or abused legal drugs, this Court regularly has imposed at two-year suspension of the lawyer's license to practice law. *See, e.g., Lawyer Disciplinary Board v. Sidiropolis*, 241 W.Va. 777, 828 S.E.2d 839 (2019); *Office of Disciplinary Counsel v. Alderman*, 229 W. Va. 656, 734 S.E.2d 737 (2012); *Committee on Legal Ethics of the W. Va. State Bar v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994); *Committee on Legal Ethics of the W. Va. State Bar v. White*, 189 W. Va. 135, 428 S.E.2d 556 (1993). Depending on the facts of each case, the Court sometimes grants retroactive credit toward the suspension or stays the suspension while, at the same time, imposing other conditions where the lawyer is monitored on a regular basis.

In the present case, after concluding that under these facts, an appropriate sanction was a two-year suspension of Respondent's law license, which is stayed, without requiring Respondent first to serve a six-month suspension, the Hearing Panel explained:

> [T]he testimony regarding rehabilitation and the efforts made in overcoming the circumstances which led to the violations in this case by Respondent are significant, particularly the progress that the Respondent has made through JLAP. **The Hearing Panel finds that the testimony and recommendations of Robert Albury on this issue to be compelling and the mitigating circumstances in this particular case justify the deferral of the two year suspension as set forth below. The hearing panel finds little utility in this case in imposing 6 months of the suspension given the progress made by the Respondent with JLAP.** (Emphasis added). (**REPORT**, at 67).

The crux of the appeal filed by Petitioner challenges this specific recommendation by the Hearing Panel. In **PETITIONER'S BRIEF**, at 47, Petitioner explains, "While the ODC asserts there was no error in the HPS's finding of fact or conclusions of law, the ODC does not agree with

the recommendation by the HPS as to the sanction." When the recommendations made by an ethics Hearing Panel are reviewed, this Court gives respectful consideration of the recommendations while exercising its own judgment, as explained in Syllabus Point 3 of *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994):

> 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 findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record. (Emphasis added).

In Syllabus Point 3 of *Lawyer Disciplinary Board v. Hassan*, 241 W.Va. 298, 824 S.E.2d 224 (2019), the Court outlined the general considerations governing the imposition of lawyer discipline:

> "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W. Va. 150, 358 S.E.2d 234 (1987).

The specific factors to be considered in deciding the appropriate sanction are spelled out in Syllabus Point 4 of *Hassan*:

> "Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: 'In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer

> Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, or the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.' " Syllabus Point 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W. Va. 495, 513 S.E.2d 722 (1998).

The Hearing Panel adopted virtually all of the agreed upon proposed conclusions of law presented by Petitioner and Respondent, with the biggest exception being the Hearing Panel's analysis of Count III, which it minimized as quoted in footnote 3 of this **BRIEF**. In an attempt to identify an additional factor to be considered in determining what sanction is appropriate, Petitioner asserts that Respondent's actions have brought further disrepute to the legal community in Mingo County, where a judge and a prosecutor were disbarred in 2013. (**PETITIONER'S BRIEF**, footnote 24). While the disbarment of these individuals is a fact, Respondent fails to see how his circumstances are in any way related to these other individuals, both of whom were convicted of crimes and incarcerated.

In Syllabus Points 5 and 6 of *Hassan*, the Court explained the impact of mitigating factors in determining what discipline to impose:

> 5. "Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Syllabus Point 2, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).
>
> 6. "Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative

> attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses." Syllabus Point 3, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

Respondent and the ODC agreed that the following mitigating factors are present in this case: 1) absence of prior disciplinary record; 2) inexperience in the practice of law; 3) chemical dependency based upon testimony concerning Respondent's involvement with JLAP; and 4) interim rehabilitation from his chemical dependency. The Hearing Panel agreed with Respondent's argument that the record also demonstrates other mitigating factors are present in this case including: 5) absence of a dishonest or selfish motive; 6) personal or emotional problems; 7) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; 8) character or reputation; 9) physical or mental disability or impairment; 10) no delay in disciplinary proceedings caused by Respondent; and 11) remorse. (**REPORT**, at 53).

With respect to his motives, it is clear from the record that Respondent was addicted to drugs for several months, which influenced and impacted some of his actions and decisions. Those actions and decisions were not the product of a dishonest or selfish motive, but rather were a consequence of his drug addiction.[5] As to his honesty, before this Hearing Panel, Respondent bared his soul and shared the struggles he went through as a father, husband, and a lawyer. The intervention of

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[5]Petitioner disagrees with the Hearing Panel's conclusion that Respondent's actions were not a product of dishonest or selfish motives. (**PETITIONER'S BRIEF**, at footnote 25). Respondent respectfully submits the Hearing Panel's recognition of this mitigating factor is supported by the record.

Respondent's family forced Respondent to face the fact that he had become a drug addict. None of the actions charged by the ODC had anything to do with a dishonest or selfish motive.

Respondent repeatedly made it clear that he was honest when he provided a sworn statement to the ODC and when he testified under oath before this Hearing Panel. All requests from the ODC for files or other documents relating to the allegations were provided in full. There is nothing in the record to suggest that Respondent has failed to cooperate in anyway with this process.

Before Respondent became addicted to drugs, he had earned a good reputation as a lawyer and community leader. The documents provide in Respondent's Exhibits demonstrate his positive character and reputation as a successful solo practitioner. Also, Respondent did not take any actions to delay these proceedings in any way.

Most of the mitigating factors supporting the proposed sanctions in this case relate to his efforts at rehabilitation. As Respondent explained, "Addiction is not a choice." Hrg. Trans. 310. Respondent persuasively has established that once he recognized he was suffering from the disease of drug addiction, he voluntarily committed himself into a rehabilitation facility in Tennessee and followed up that stay by committing to the monitoring and counseling required by JLAP. The testimony from Mr. Albury and Mr. diTrapano corroborated Respondent's testimony, supported by test results and other documents, that Respondent has remained drug-free for several years now and he voluntarily committed to another five-year monitoring contract with JLAP.

Although Respondent has never been formally charged or convicted of committing any crime, he nevertheless freely and honestly testified to his drug addiction and to purchasing drugs from Jackie Marcum on one occasion and obtained opiates from others as well. A critical part of Respondent's recovery is being absolutely honest about actions or crimes he committed associated

with his drug addiction and Respondent openly testified in his sworn statement as well as in the disciplinary hearing to his past drug-related misdeeds.

The positive and ongoing rehabilitation efforts made by a lawyer who becomes addicted to drugs or alcohol should be recognized, encouraged, and given much weight in deciding what discipline to impose. Just as Mr. diTrapano, who had gone through his own drug addiction and through hard work and determination was able to have his law license reinstated, was able to provide support and guidance to Respondent as a mentor, Respondent now will be able to assist other professionals in the future, who become drug addicts and who need the benefit of his own experiences to address this disease. Finally, Respondent made it very clear that he was remorseful for his actions.

Petitioner cites several different cases in support of its assertion that Respondent ought to be required to serve a six-month suspension of his law license, with the remaining one year and a half stayed. To date, this Court has never adopted a precise formula for determining what sanction is appropriate in any given case. In Syllabus Point 2 of *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), *overruled on other grounds in Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993), the Court explained the case-by-case approach used to determine the appropriate discipline:

> In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances in each case, including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.

In particular, Petitioner cites *Lawyer Disciplinary Board v. Sidiropolis*, 241 W.Va. 777, 828 S.E.2d 839 (2019), where, following an accident, the lawyer became addicted to opioids and then moved on to heroin. This lawyer was caught in Pennsylvania with ten bricks of heroin and he eventually pleaded guilty to one count of conspiracy to distribute heroin. Based upon his successful participation in a Drug Court program, the information filed against him was dismissed. Under these facts, in addition to several other conditions, this Court approved a two-year suspension of the lawyer's license, with the lawyer serving sixty days suspension, with the remainder of the suspension was stayed.

The differences in these two cases is stark: Respondent was never charged or convicted of any crime; Respondent was not found to have ten bricks of heroin in his possession; and Respondent was never charged with conspiracy to distribute heroin. The similarities between these two cases is that both lawyers demonstrated through their actions and participation in drug rehabilitation programs that they recognized their substance abuse issues and were working hard on a daily basis to rehabilitate themselves. Although Respondent has never been formally charged or convicted of any crime, as was the case in *Sidiropolis*, Respondent did admit to his drug abuse and that he had purchased drugs on one occasion from Jackie Marcum.

The focus in both of these cases is on helping a lawyer, who not only has recognized his addiction to drugs, but also has demonstrated a persuasive and determined record of rehabilitating from this illness so that he can return to the practice of law while also protecting the public. The efforts by these lawyers to be rehabilitated should be encouraged and should serve as an example to other lawyers who find themselves in a similar situation.

The decisions from other states cited by Petitioner simply demonstrate that courts around the country struggle with balancing the need to punish a lawyer who has abused substances and in the process has committed ethics violations with the desire to encourage the lawyer, who has demonstrated through the lawyer's actions that progress is being made in dealing with an addiction, to continue on the path to rehabilitation. The out-of-state cases cited by Petitioner are factually quite different than the present case and ultimately do not provide this Court with any additional guidance.

In *Stark County Bar Association v. Kelley*, 2021 WL 966941 (Ohio 2021), the Ohio Supreme Court adopted essentially the same sanction the Hearing Panel recommended in Respondent's case. The Ohio lawyer became addicted to opioids and in the process completely abandoned most of his clients. Once the Ohio lawyer demonstrated he was committed to addressing his addiction issues and participated in Ohio's version of JLAP, the Ohio Supreme Court imposed a suspension of his law license for two years, but the entire suspension was stayed because he was being monitored by Ohio's JLAP.

This Court's jurisprudence in this area of the law has identified the aggravating and mitigating factors to be considered in deciding what sanction is appropriate and this analysis is made on a case-by-case basis. The goal of the Court is to make sure that the public is protected while also discouraging any similar conduct by other lawyers who may be faced with the same situation. The monitoring of Respondent through JLAP ensures Respondent's compliance and provides the necessary protection the public needs.

In *In re: Reinstatement of L. Dante DiTrapano*, 240 W.Va. 612, 620, 814 S.E.2d 275, 283 (2018), which is the decision reinstating the law license of Mr. diTrapano, Justice Margaret Workman observed in her concurring opinion:

> I write separately to emphasize that our decision today sends the message that there is hope in the battle against the disease of addiction that so many families are facing; and to make clear that West Virginia's legal profession, including our disciplinary system, supports the recovery and rehabilitation of impaired lawyers. The Amici Curiae Brief of the LAP aptly describes this matter as the opportunity for this Court to "embrace the miracle of a colleague who is one of our own."

The Hearing Panel in this case opted to send a message to Respondent and to other similarly situated lawyers that there is hope. After considering all of the testimony presented, the Hearing Panel determined that there was "little utility in this case in imposing 6 months of the suspension given the progress made by the Respondent with JLAP." Under these facts, this is a just result.

VII. Conclusion

Respondent Justin J. Marcum respectfully asks the Court to adopt the recommendations offered by the Hearing Panel in this case.

JUSTIN J. MARCUM, a member of the West Virginia State Bar, Respondent,

–By Counsel–

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OF WEST VIRGINIA

NO. 20-0133

LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

JUSTIN J. MARCUM,

Respondent.

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **RESPONDENT'S BRIEF** was served on counsel of record on the 13th day of July, 2021, through email and the United States Postal Service, to the following:

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