

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of February, 1999, the following order was made and entered:

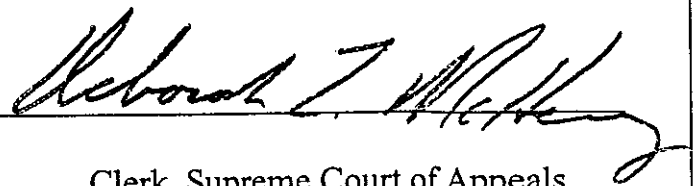
Lawyer Disciplinary Board,
Petitioner

vs.) No. 25795

Eric K. Powell, an inactive member of
The West Virginia State Bar, Respondent

The Court, having maturely considered the petition for rehearing filed in the above-captioned case is of opinion to, and doth hereby, deny the petition for rehearing.

A True Copy

Attest: 
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS, STATE OF WEST VIRGINIA

Lawyer Disciplinary Board,

Petitioner,

vs.

Case No.: 25795

**Eric K. Powell, an inactive member
of The West Virginia State Bar,**

Respondent.

PETITION FOR REHEARING

Comes now Respondent, Eric K. Powell, pursuant to Rule 24 of the Rules of Appellate Procedure and hereby petitions this Honorable Court to rehear the annulment date of Respondent's law license. Factually, the Court ordered Respondents's law license annulled effective January 13, 1999. The proposed order submitted to this Honorable Court by the Office of Disciplinary Counsel recommended an annulment date of June 30, 1998.

Respondent numerically sets forth points of fact which may have been overlooked or misapprehended by the Court in the entering of its order dated January 13, 1999, resulting in Respondent being denied an effective annulment date of June 30, 1998. Respondent asserts the following in support of his Petition for Reconsideration:

1) That I am an honest lawyer and no longer licensed to practice law in the State of West Virginia as ordered by this Court January 13, 1999.

2) That my disbarment is a direct result of an Alfred plea entered into June 30, 1998 before the Honorable Judge Robert A. Waters of the Wood County Circuit Court, Parkersburg, West Virginia,

in Case No. 97-F-149. I accepted the plea agreement solely to avoid further excessive legal costs of representation, to minimize the emotional hardship on my parents (including family and friends), to stop the continuing negative statewide publicity of false and malicious television and newspaper reports of my alleged misconduct, and to avoid the unnecessary risk of losing everything I have worked hard for over the past 39 years on the remote possibility of a conservative jury believing they owe the Prosecutor at least one felony conviction for their effort in trying the case.

3) This motion is submitted in a good faith attempt to explain to this Court the relevant facts and circumstances for the purpose of assisting them in their decision to consider making the Respondent's date of disbarment retroactive to June 30, 1998.

4) That Respondent acknowledges the material facts so alleged in the criminal indictment filed December 19, 1997, in Case No. 97-F-149 are true only in regard to the counts identified as 6, 7, 8, 9, 12, 13, 14 & 15 alleging the misdemeanor crimes of prostitution. The material facts contained in the remaining counts of said indictment, particularly the five felony counts relating to Respondent allegedly photographing a minor engaged in sexually explicit conduct, are legally and factually defensible.

5) However, as to the counts plead to, Respondent submits that he was never involved in a prostitution ring in Wood County, West Virginia, as contended and reported in the media.

6) Nor has Respondent ever been involved in any form of prostitution ring during the natural course of his life.

7) That none of the women Respondent had intimate relations with were known prostitutes. In fact, none of the women with whom Respondent had been intimate with ever charged with the crime of prostitution by the Wood County Prosecuting Attorney's Office.

8) All of the women I had intimate relations with were above the age of consent and each of the women voluntarily consented to having sexual relations with Respondent.

9) That none of the women involved were ever forced, coerced, threatened or in any other way, shape or form intimidated in having sexual relations with Respondent.

10) None of the women involved were, or ever became, clients of the Respondent, nor did any of the women ever seek, or receive, legal advice from the Respondent.

11) That Respondent's law practice was not involved in any way with Respondent's acts of prostitution.

12) That Respondent did not use his position, education or experience as an attorney to cause, promote, or facilitate the acts of prostitution.

13) That in no way, shape or form did Respondent advise, counsel, or inform any of the women involved how to commit, or avoid, the commission of a crime, including the act of engaging others in prostitution.

14) That the acts of prostitution did not adversely reflect on Respondent's honesty, fitness or trustworthiness as a lawyer.

15) That Respondent's conduct did not endanger the public nor did Respondent's private conduct reasonably place the integrity of the profession at risk.

16) That in regard to the alleged minor involved and giving rise to the five felony counts in indictment 97-F-149, said minor, identified in the indictment as "C.S.", was **intentionally and specifically** made up through the application of make-up and hair styling under the direction of Kevin Mayhugh and/or Heather Nicholson to appear older than her actual age of 16 years and 7 months.

17) That, according to C.S., she was also instructed by Mayhugh and/or Nicholson to wear a black evening dress to project a more sophisticated appearance than her actual age. C.S. donned the evening dress before Mayhugh called Respondent and invited himself, Nicholson and C.S. to Respondent's home.

18) More importantly, C.S. was specifically instructed by Mayhugh and/or Nicholson that when she met Respondent, she was to tell Respondent she was either 18 or 19 years of age.

19) Respondent, never having met C.S. before hand, was lulled into believing C.S. was an adult from the fact C.S. was in the company of two other known adults and had the height, build and physical attributes of a mature woman.

20) Furthermore, C.S. had represented (during a 35 to 40 minute conversation in Respondent's living room in the presence of Mayhugh and Nicholson) that she moved back home with her parents prior to the *birth of her child*; that she lived in Blennerhassett Heights with her parents, had attended Blennerhassett Junior High School, subsequently graduated to, and from, Parkersburg South High School and was going to enroll at WVU-Parkersburg the following semester to major in nursing.

21) That during intimate relations with Respondent, C.S., first tells Respondent on videotape that she is 18 years old. C.S. later informs Respondent again, on videotape, that she is 4 months shy of her 19th birthday.

22) That during this sole visit with C.S., Respondent lacked the actual knowledge of the truth and, therefore, never formed any criminal intent (i.e., mens rea) necessary to photograph and videotape C.S. engaged in sexual relations with Respondent. In fact, from the **conspiratorial acts** of Mayhugh and/or Nicholson and C.S., **Respondent was never intended to know** the truth of C.S.'s actual age.

23) That Respondent was the intended target of deception and lies from the juvenile, Mayhugh and/or Nicholson.¹

24) That had Mayhugh, Nicholson and/or C.S. been truthful and not knowingly lie, conceal, or otherwise keep secret the actual age of C.S., Respondent would never have permitted C.S. in his home.

25) C.S. apparently informed the Parkersburg Police Department during their investigation of Respondent that she was instructed by Mayhugh and/or Nicholson to lie to Respondent about her actual age.

26) Disregarding the exculpatory nature concerning Respondent's knowledge and lack of criminal intent, Randy Lowe filed a criminal complaint in Wood County Magistrate Court charging Respondent with photographing and videotaping a minor in sexually explicit conduct.

27) That from information previously disclosed to Respondent, it is evident that certain portions of information gathered by the Parkersburg Police Department concerning Respondent and his alleged conduct are just plain false, misleading and calculated to place Respondent in a false light. It is not known whether or not this false information was ever forwarded to the Office of Disciplinary Counsel for consideration of disbarment, but said portions of information learned from the Wood County Prosecutors Office have Respondent in places he has *never* been, engaged in various conversations that Respondent *never* was a part of or aware of, and talking to people with

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Investigators hired by Respondent learned Heather Nicholson subsequently disclosed to Jamie Frazier that she (i.e., Nicholson) was going to blackmail Respondent. However, the details of the blackmail attempt were never fully developed, not only due to the eventual plea agreement, but because Parkersburg Police Detective Randy Lowe instructed Frazier and Nicholson not to mention anything about the blackmail attempt to Respondent's investigators.

whom Respondent *never* spoke.

28) Respondent has never had an interest in child pornography but has, nevertheless, suffered irreparable harm to his reputation from patently false and misleading newspaper and television reports seemingly implying Respondent knew that C.S. was a minor.

29) Respondent voluntarily stopped engaging in this type of sexual promiscuity approximately five (5) weeks before the Parkersburg Police came to Respondent's home to conduct a search² of Respondent's home. Respondent cooperated with the police during the search by giving them what they were searching for and answering questions in the negative concerning allegations of an underage female having been at Respondents home.

30) C.S. was not charged with any criminal violation while Nicholson was permitted to plead "no contest" to the misdemeanor crime of "contributing to the delinquency of a minor".

31) That none of the women involved with Respondent had filed a victim's impact statement with the court at the time of Respondents sentencing June 30, 1998.

32) In considering this Petition, be advised Respondent closed his practice before the sentencing date of June 30, 1998, by sending registered letters by certified mail to his then current clientele advising them of Respondent closing his law practice. Respondent also refused to accept appointed cases two to three months before the sentencing of June 30, 1998, as well as refused retainers from third persons seeking representation.

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The search warrant is presumptively invalid since it was not based on timely information, but rather upon statements from two persons last in Respondents home 4 and 7 months prior to the issuance of a search warrant by Wood County Circuit Judge George W. Hill. No search warrant has ever been held valid in any court in the United States when the search warrant was found upon information over seven *weeks* old.

33) Respondent has not advised, counseled or represented any prospective client since June 30, 1998, in anticipation of this Honorable Court executing the order submitted by the Office of Disciplinary Counsel which set forth the effective date of Respondent's annulment to be June 30, 1998.

34) That after learning of the Supreme Court of Appeals' decision not to give retroactive effect to Respondent's disbarment, Office of Disciplinary Counsel Steven Johnston Knopp commented, in effect to Respondent's counsel Cynthia Gustke, Esq., "That the Supreme Court of Appeals should have given [Respondent] the retroactive date of June 30, 1998 as [Respondent] is one of the few attorneys in this State who **actually stopped the practice of law** on his sentencing date".

35) That pursuant to the plea agreement, Respondent underwent and successfully completed five weeks of rehabilitative counseling for his behavior at the Keystone Center in Chester, PA., at a cost of Ten Thousand Dollars (\$10,000.00), as well as continued counseling on an out-patient basis until November, 1998.

36) I accept responsibility for using poor judgement in my personal life and for being the cause of unintended publicity that tarnished the image of the legal profession and have publicly apologized for my behavior.

37) In final support of this motion, please note that I have enjoyed the practice of law with my brother and my 73 year old father during the five years of my practice in West Virginia and I believe the enjoyment has been reciprocal. I never would have knowingly done anything to jeopardize the working relationship with my father and it is largely due to my father's age factor that I kindly request this Honorable Court to revisit its decision of January 13, 1999, and grant this Motion for Reconsideration making the date of Respondent's disbarment effective June 30, 1998.

Respectfully submitted,

Eric K. Powell

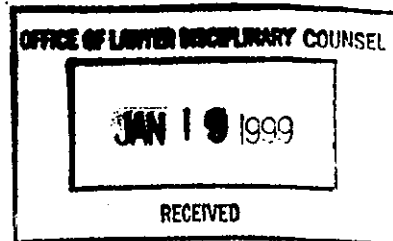
Eric K. Powell, Pro Se
2002 20th Street
Parkersburg, WV 26101
(304) 428-5016

CERTIFICATE OF SERVICE

I, Eric K. Powell, hereby certify that on February 16, 1999, I timely served via United States mail with first class postage, a true and exact copy of the MOTION FOR REHEARING upon the Office of Disciplinary Counsel, ATTN: Steven J. Knopp, with address of 1710 Huntington Bank, 900 Lee Street, East Boulevard, Charleston, WV, 25301.

Eric K. Powell

Eric K. Powell
2002 20th Street
Parkersburg, WV 26101
(304) 428-5016



STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of January, 1999, the following order was made and entered:

Lawyer Disciplinary Board,
Petitioner

vs.) No. 25795

Eric K. Powell, an inactive member
of The West Virginia State Bar,
Respondent

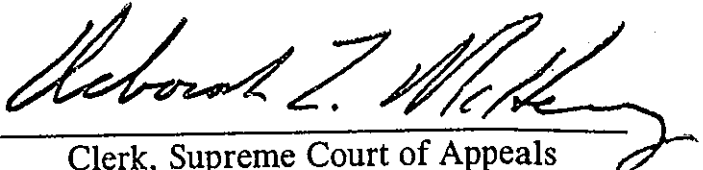
On a former day, to-wit, December 22, 1998, came the petitioner, the Lawyer Disciplinary Board, by Steven Johnston Knopp, Lawyer Disciplinary Board counsel, and presented to the Court, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, its petition seeking the annulment of the license to practice law in the State of West Virginia of the respondent, Eric K. Powell, an inactive member of The West Virginia State Bar, with respondent's voluntary consent thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition. It is therefore ordered that the license to practice law in the State of West Virginia of the respondent, Eric K. Powell, be, and it hereby is, annulled, said annulment effective this date. Justices Maynard and McGraw would have made the annulment of respondent's license to practice law in the State of West Virginia effective on June 30, 1998.

Service of a copy of this order upon all parties shall constitute sufficient notice of the contents.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

No.

**ERIC K. POWELL, an inactive member
of The West Virginia State Bar,**

Respondent.

PETITION FOR ANNULMENT OF LAW LICENSE

On behalf of the Lawyer Disciplinary Board, and pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel submits the formal Affidavit and Exhibits of Eric K. Powell, Respondent herein, which set out and support Respondent's voluntary consent to disbarment. Respondent has submitted his Affidavit and supporting exhibits with the understanding that they will not be made public, pursuant to the express requirements of Rule 3.25 of the Rules of Lawyer Disciplinary Procedure.

Based upon a review of the attached Affidavit of Respondent, Lawyer Disciplinary Counsel states that the Respondent's Affidavit complies with the requirements of the applicable rule, and respectfully requests that the Supreme Court of Appeals of West Virginia enter its order disbarring Eric K. Powell upon his consent, as provided in Rule 3.25 of the

Rules of Lawyer Disciplinary Procedure. Respondent Powell asks that the effective date of the annulment of Respondent's license be made the date of Respondent's Plea entered in the underlying criminal matters, and the first date upon which any application for reinstatement could be made be set at five years following the effective date. The Office of Lawyer Disciplinary Counsel recommends that Respondent's request for effective date, and date for first application for reinstatement, be granted by the Court.

Respectfully submitted,

LAWYER DISCIPLINARY BOARD
By Counsel

Submitted by :

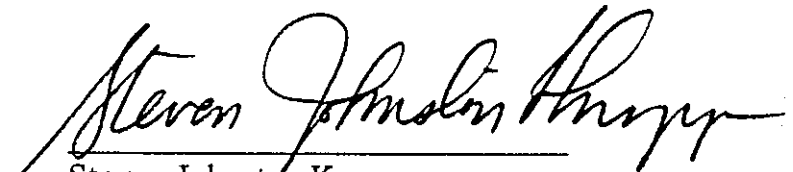


Steven Johnston Knopp (WVSB No. 2085)
Lawyer Disciplinary Counsel
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900 Lee Street, East
Charleston, West Virginia 25301
(304) 558-7999
(304) 558-4015 (fax)

CERTIFICATE OF SERVICE

I, Steven Johnston Knopp, Lawyer Disciplinary Counsel, do hereby certify that a copy of the foregoing document, entitled "Petition for Annulment of Law License" has been served upon Respondent's Counsel, Cynthia S. Gustke, Esquire, on this 22nd day of December, 1998, by placing a copy in the United States Mail with first-class postage affixed thereto and addressed to:

Cynthia Santoro Gustke, Esq.
P.O. Box 983
Elkins, West Virginia 26241


Steven Johnston Knopp
Lawyer Disciplinary Counsel