IN THE DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE:	**STEPHEN P. JONES, BPR #16764** **Respondent, an Attorney Licensed to Practice Law in Tennessee** **(Shelby County)**	**DOCKET NO. 2016-2534-9-KH**

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On Friday, August 19, 2016, the Board of Professional Responsibility filed its response in opposition to Stephen P. Jones's motion for summary judgment. To address three aspects of the Board's response, Mr. Jones now submits this reply memorandum:

A. THE BOARD'S RESPONSE MAKES REPEATED, FALSE STATEMENTS REGARDING MR. JONES' DEPOSITION TESTIMONY.

The Board, in opposing summary judgment, has now asserted not just once but in four separate places that Mr. Jones made a decision not to produce the third Hammack statement. That would, of course, be a significant piece of information if true, but the Board's assertion is false, and the willingness of disciplinary counsel to repeatedly mischaracterize the record in this case is troubling. Each and every time that the Board asserts in its Response and Memorandum in Opposition to Summary Judgment ("Response") that Mr. Jones made such a decision, the Board is engaged in misrepresentation. In addition to this repeatedly made, repeatedly meritless accusation, the Board also misstates Mr. Jones's testimony in at least two other respects in its Response. The Board's willingness to repeatedly put words into Mr. Jones's mouth that he never

said and to attempt to mislead the Hearing Panel through false characterizations of the testimony in this case is unjustifiable.

On page 4 of its Response and Memorandum in Opposition to Summary Judgment ("Response"), the Board writes: "From his cursory review, he decided that the statement did not need to be delivered to the defense." No citation to the record follows that remarkable statement by the Board. Seven sentences later there is a string citation that includes a string citation of pages from Mr. Jones' deposition.[1] But, nowhere at any point in any of those pages does the transcript reflect any testimony by Mr. Jones saying any such thing about any such decision.

The Board repeats this false statement about a "decision" on page 10 of its Response. "First, Mr. Jones conducted a cursory review of the third statement and decided that it did not need to be shared with the defense." The Board again offers no record citation to support this statement, not even through a subsequent omnibus-style string citation. There is no place in the record to which the Board could turn for support because Mr. Jones never testified about making any such decision. The fact that there is no support in the record for the Board's accusation should come as no surprise because Mr. Jones never made any such decision.

On page 11 of its Response, the Board offers another variation of its false statement on the same topic, writing: "It is for these reasons that Mr. Jones' initial decision that the third statement was a 'non-issue' demonstrates a pattern of knowing behavior." This iteration of the falsehood, if it stood alone, might be excusable as a merely disingenuous effort at taking words out of context. The Board again does not attempt to offer a citation to the record to support this claim regarding any testimony, but unlike the prior two instances of misrepresentation on this

---

[1] This string citation approach to attempting to provide record support for several sentences of accusations by the Board appears to tie back to the Board's Response to Mr. Jones's Statement of Undisputed Material Facts. Mr. Jones is separately addressing the Board's failure to comply with Tenn. R. Civ. P. 56.03 in a motion to strike.

topic, there is at least a place in Mr. Jones' deposition where he did say he considered the third statement to be a "non issue." Specifically, after having already answered disciplinary counsel's questions as to how the statement came to end up in a flap in the trial notebook, disciplinary counsel then asked Mr. Jones: "Did you think about it at all after putting it in the notebook?" Mr. Jones answered that question, by saying "No. I mean to me it was a non-issue." (Jones Dep. p. 107, lines 20-22.) Of course, there again is no support in the record for an assertion that Mr. Jones made a decision not to produce the statement.

On page 16 of its Response, the Board accuses Mr. Jones for the fourth time of making this decision he never made: "He was aware that he made a decision not to produce it to the defense." As with other instances, there is no citation by the Board to any place in the record that would support this assertion. It is unsupportable. And the Board's willingness to engage in misrepresentation is indefensible.

In addition to the effort to misrepresent Mr. Jones's testimony about an imagined deliberate decision not to produce a document, the Board makes at least two more false statements about Mr. Jones' testimony. Near the bottom of page 4 of the Response, the Board misleadingly describes Mr. Jones as not talking to his co-counsel about the statement because it was a "'non-issue' and not material." This reply has already discussed the one place in Mr. Jones's deposition testimony where the word "non-issue" was uttered by him, and it was not in reference to any explanation for a decision not to have a discussion with co-counsel. (Jones Dep. p. 107, lines 20-22.) Mr. Jones's actual testimony was that he didn't immediately hand the statement over to his co-counsel or discuss the statement with his co-counsel because she wasn't there. (Jones Dep. p. 95, lines 8-11.) After making that same point a second time during his testimony, Mr. Jones also then immediately testified in response to a follow up question that he

could have discussed it with his co-counsel later if he had remembered about the statement. (Jones Dep. p. 107, lines 13-19.) Were this the only instance of the Board bending the truth, it might be overlooked as just a warped reading of testimony, but, given all of the other instances of the Board's willingness to misrepresent testimony to serve its desire to keep this case alive, it is hard not to see this instance as more proof of a deliberate effort to mislead the Hearing Panel.

The Board also mischaracterized Mr. Jones's testimony about why hearing Mr. Hammack's testimony didn't remind him about the existence of the third Hammack statement. The Board claims that Mr. Jones "testified that he could not remember whether those examination questions about statements given to the police reminded him of the third statement...." (Response at 5.) Again, the Board does not offer a direct citation to the record as claimed support for this assertion and, presumably, again intends for the same string citation to as ostensible support for this accusation like the other accusations from page 4 of the Response. But Mr. Jones's actual testimony does not correspond at all to how the Board attempts to characterize it. The Hearing Panel can read all of the pages that the Board has offered from the deposition transcript to see for itself, but among the places from Mr. Jones's testimony where it is clear that nothing about the Hammack testimony triggered any memory of the third statement are as follows:

> Q. When Ms. Weirich was questioning Mr. Hammack, was there – why didn't that prompt your memory about the third statement?
>
> A. I can't explain a negative ....

(Jones Dep. p. 104, lines 13-16.)

> Q. Were you present in the courtroom when Mr. Hammack testified?
>
> A. I'm sure I was.
>
> Q. Okay. So –

A. Well, I say I'm sure I was. I had throughout this trial what I believe was an allergic reaction to the evidence . . . and throughout the trial I had a horrible dry, unproductive cough that started toward the beginning of the trial . . . . I have no doubt I stepped out at times, maybe to get – well, they had water there. But to answer your question, I don't know that I was in there, but I believe I was there for – I don't have a specific recollection of not being there.

(Jones Dep. p.111, lines 3-25.)

Q. Did anything about Mr. Hammack's testimony prompt you to think about the third statement?

A. No.

(Jones Dep. p. 112, lines 21-23.)

Q. Mr. Jones, can you remember – I don't want to say it like that. Did you think at any point during Mr. Hammack's testimony that you needed to correct the record about how many statements he had given to the police?

A. No. . . .

(Jones Dep. p. 113, line 23 – p. 114, line 3.)

A. And when I said all that explanation, I was doing to that to explain the premise of your question, at least what I understood the premise of your question to be, which was shouldn't I have remembered this based on the questions and answers being given? And I don't recall this testimony at all, but I was just pointing out that statements do have a specific meaning at 201 – or in the D.A.'s Office.

Q. Okay.

A. But I don't recall remembering or having any memory jogged in any way about this.

(Jones Dep. p. 116, lines 13-24.)

More than seven years ago, in the Notice of Omitted Jencks Statement in Relation to the Testimony of Andrew Hammack that Mr. Jones filed with the Criminal Court on February 26, 2009, Mr. Jones explained that once he received the third Hammack statement from his investigator he "intended to deliver a copy to defense counsel at the next opportunity and not

wait until after the witness testified, however, due to the number of witnesses testifying the day the statement was received, the undersigned placed the statement in the flap of one of the trial notebooks to be dealt with later." (Exhibit 5 to the Jones Deposition transcript.) As the Hearing Panel can determine for itself from a review of the transcript of the deposition of Mr. Jones taken in this case, disciplinary counsel never asked Mr. Jones about that aspect of the contents of that Notice. So that there can be no doubt about what Mr. Jones's testimony actually is – he made no decision that the third Hammack statement was not to be produced – attached as Exhibit A to this Reply is the Declaration of Stephen P. Jones.

In other circumstances, a lawyer for a client willing to make the kind of provably false assertions in a brief that have been made in the Response likely ought to be subjected to sanctions. Mr. Jones is not interested in an ancillary proceeding within this proceeding, however, as this proceeding has already gone on longer than it should. Mr. Jones asks only that the Hearing Panel recognize the Board's misrepresentations for what they are, and render the correct result on the merits by granting him summary judgment.

B. THE BOARD'S RESPONSE DEMONSTRATES THAT MR. JONES IS ENTITLED TO SUMMARY JUDGMENT AS TO THE BOARD'S RPC 3.4(c) CLAIM.

The Board has now finally admitted what was always clear -- no motion pursuant to Tenn. R. Crim. P. 26.2 was ever made upon the conclusion of Mr. Hammack's direct testimony. The plain text of Rule 26.2 requires such an event to have happened in order to trigger its provisions. Thus, Mr. Jones has negated an essential element of the Board's claim as to the charged RPC 3.4(c) violation because he never violated Rule 26.2. Remarkably, instead of simply conceding the point that this means that no violation of RPC 3.4(c) premised upon a violation of Rule 26.2 can survive, the Board continues to attempt to argue that it should still

prevail on RPC 3.4(c). In part, it attempts to get there through an affidavit of one of Noura Jackson's two trial counsel, Valerie Corder. Ms. Corder's affidavit not only does nothing to change the fact that Rule 26.2 was not violated by Mr. Jones but also speaks only in terms of a statement Ms. Corder claims was made by Mr. Jones's co-counsel, not by Mr. Jones. (Part 8 of the Appendix to the Board's Response to SUMF, Corder Aff. ¶ 4.) Even worse than that, the Board now appears to try to pivot and claim that it could prove a violation by Mr. Jones of RPC 3.4(d), a rule that he was not alleged to have violated in either the original petition, nor in the amended petition. The Hearing Panel should grant summary judgment as to the Board's RPC 3.4(c) claim against Mr. Jones.

C. THE HEARING PANEL SHOULD DEFER TO THE JUSTICES AND JUDGES WHO, WITH KNOWLEDGE OF THE FACTS, DETERMINED THEY HAD NO ETHICAL DUTY TO REPORT MR. JONES.

In the original memorandum in support of summary judgment, Mr. Jones expanded on a point that was raised earlier by members of the Hearing Panel during oral argument on Mr. Jones's motion for judgment on the pleadings. The Tennessee Supreme Court has already spoken both by what they said in footnote 52 of their opinion in the State v. Jackson case and by what they did not do – make a report to the Board regarding Mr. Jones. With full knowledge of the pertinent facts, the Court affirmatively noted that it was not going to overturn the trial court's finding that Mr. Jones did not act intentionally. Each of those five Justices also had ethical obligations under judicial ethics rules to take actions if they knew of unethical conduct by Mr. Jones. None of those five Justices took any such action. Mr. Jones also made the point that each of the three members of the Court of Criminal Appeals panel, as well as Judge Craft, sitting as the trial judge, had ethical obligations to report Mr. Jones if they concluded that his conduct was a disciplinary violation. None of those judges made any such report either. The Board attempts

to downplay the significance of this event by arguing that who makes a report does not matter to whether a violation of the ethics rules has occurred and that, by analogy, the fact that someone does not make a report should not matter either. Yet, given the ethical obligations imposed on Judge Craft, the members of the panel of the Court of Criminal Appeals, and the five Justices of the Tennessee Supreme Court, the fact that not one of those 9 members of the judiciary filed a report against Mr. Jones clearly does have meaning.

Though the Board will no doubt treat it as just another insignificant declaration, the author of the opinion of the Court of Criminal Appeals has also provided a sworn statement in this matter, and it is attached as Exhibit B to this reply. In his declaration, Judge Glenn explains his belief that had he considered Mr. Jones's conduct to have violated the ethics rules then he would have had to take some action as against Mr. Jones. (Declaration of Alan E. Glenn Pursuant to Tenn. R. Civ. P. 72, ¶ 6.) Mr. Jones submits that the Hearing Panel should view this additional declaration as one more piece of evidence that the Board's apparent willingness to undertake a "win at all costs" approach to this matter – for whatever reason they think justifies it – includes asking this Hearing Panel to be willing to issue a ruling that would call into question whether Judge Craft, Judge Glenn, two other members of the Court of Criminal Appeals, and five justices of the Tennessee Supreme Court violated the judicial ethics rules when they did not file a disciplinary complaint against Mr. Jones with respect to the third Hammack statement.

Finally, to the extent that the Board has attempted to argue that the Tennessee Supreme Court's citations to other cases handled within the Shelby County Attorney's Office in footnote 52 of its opinion is somehow an indictment of Mr. Jones's conduct or should somehow be treated as speaking more loudly than the Court's statement that it was not disturbing the finding of the trial court that Mr. Jones's conduct was unintentional, Mr. Jones' Declaration (attached as

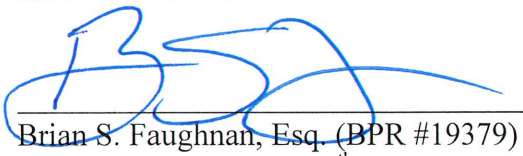
Exhibit A) makes plain that he was not involved at all in the Roe v. State case and that he sat as second chair in the State v. Coleman case but does not recall anything regarding the alleged discovery violation nor whether he even had any role in, or responsibility for, discovery in that case. (Jones Decl. ¶¶ 5-6.) A review of the actual Court of Criminal Appeals decision from nearly fourteen years ago demonstrates that the Court of Criminal Appeals found the issue raised by defendants to have been waived for failure to comply with Tenn. R. App. P. 24(b) and never actually ruled that there had been any discovery violation of any sort in Coleman. See State v. Coleman, No. W2001-01021-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 965, at **25-26 (Tenn. Crim Ct. App., Nov. 7, 2002).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Mr. Jones's original Memorandum in Support, Mr. Jones's Motion for Summary Judgment should be granted, and the Amended Petition for Discipline against him should be dismissed in its entirety.

Respectfully submitted,

LEWIS THOMASON



Brian S. Faughnan, Esq. (BPR #19379)
40 South Main Street, 29th Floor
Memphis, Tennessee 38103-5529
(901) 577-6139
(901) 525-6722 (fax)
bfaughnan@lewisthomason.com

Attorney for Respondent Stephen P. Jones

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Memorandum of Law in Support of Motion for Summary Judgment has been served upon Deputy Chief Disciplinary Counsel Krisann Hodges, Esq., by email and by regular U.S. Mail, postage prepaid, at 10 Cadillac Drive, Suite 220, Brentwood, Tennessee 37027 on this the 7th day of August 2016.

BRIAN S. FAUGHNAN

IN THE DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE:	**STEPHEN P. JONES, BPR #16764** **Respondent, an Attorney Licensed to Practice Law in Tennessee** **(Shelby County)**	**DOCKET NO. 2016-2534-9-KH**

DECLARATION OF STEPHEN P. JONES PURSUANT TO TENN. R. CIV. P. 72

STEPHEN P. JONES states as follows:

1. I am the Respondent in these proceedings.

2. I have been licensed to practice law in Tennessee since 1994, and I have never had any discipline subjected against my license.

3. Upon receiving the document that has been referred to in this proceeding, and by the Tennessee Supreme Court, as the third Hammack statement, I did not decide that the statement did not need to be produced to the defense counsel.

4. To the contrary, I fully intended for the statement to be produced to defense counsel but, based on the series of events first explained in a court filing I made back in 2009 and again during my June 21, 2016 deposition, I placed it in the folder of the trial notebook and then forgot about it until after the trial.

5. I played no part in the Roe v. State case referenced by the Tennessee Supreme Court in footnote 52 of its State v. Jackson opinion.

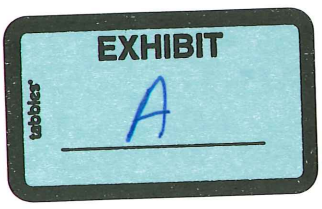
6. I recall that I served as second chair in the State v. Coleman case referenced by the Tennessee Supreme Court in footnote 52 of its State v. Jackson opinion but I do not recall

anything regarding the alleged discovery violation nor do I recall whether I even had any role in, or responsibility for, discovery in that case.

Pursuant to Tennessee Rule of Civil Procedure 72, I declare under penalty of perjury that the foregoing is true and correct.

STEPHEN P. JONES

Dated: 8/22/16



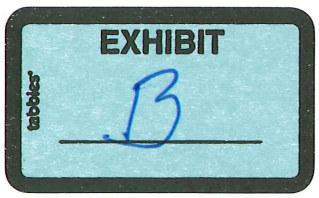
IN THE DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE:	**STEPHEN P. JONES, BPR #16764** **Respondent, an Attorney Licensed to Practice Law in Tennessee** **(Shelby County)**	**DOCKET NO. 2016-2534-9-KH**

DECLARATION OF ALAN E. GLENN PURSUANT TO TENN. R. CIV. P. 72

ALAN E. GLENN states as follows:

1. I am a judge of the Tennessee Court of Criminal Appeals and have been a member of the court for seventeen years. Over the years, as a prosecutor, private practitioner, and appellate criminal judge, I have given a large number of speeches and presentations on topics related to prosecutorial and judicial ethics. Many of the speeches regarding criminal law and procedure included a discussion of Rule 3.8 of the Rules of Professional Conduct regarding the special duties of a prosecutor, including the production of exculpatory evidence. I was also a member of the Tennessee Bar Association committee that worked on the review of Tennessee's judicial ethics rules that culminated in the adoption by the Tennessee Supreme Court of the current Code of Judicial Conduct in Tennessee that went into effect on July 1, 2012. For the past twelve years, I have been chair of the Judicial Ethics Committee, appointed by the Tennessee Supreme Court, and, as such, am the author of all Tennessee judicial ethics opinions published since 2004. I estimate that, during that period, I have responded to approximately 3,000 ethics inquiries from Tennessee judges, judicial candidates, and related officials of state and local governments.



2. I understand that the Respondent in this case, Stephen P. Jones, is being accused of unethical conduct tied to his failure to make disclosure of the third statement of Andrew Hammack until shortly after trial. That untimely disclosure was raised as an issue in the direct appeal of the conviction.

3. I was a member of the panel of the Court of Criminal Appeals that decided the appeal in *State v. Noura Jackson*, and authored the opinion that affirmed the judgment of the trial court, which had imposed a sentence of twenty years upon the defendant following her conviction for second degree murder. As I recall, the appellate record in this matter was unusually large and complicated, including more than forty volumes of trial testimony and three hundred plus exhibits.

4. The Tennessee Supreme Court disagreed with and reversed the ruling of the Court of Criminal Appeals affirming the conviction, in part, regarding whether the undisclosed statement would have been of benefit to the defense in the trial of the matter. Since the defendant had not raised as an issue on appeal the trial court's finding the untimely production of the statement was unintentional, neither of the appellate courts considered otherwise in making their determinations.

5. While the responsibility of the Court of Criminal Appeals panel considering the matter was to rule on the issues raised by the defendant, the panel members additionally could have reported this matter to the Board of Professional Responsibility. However, I did not do so, and, to the best of my knowledge, a disciplinary complaint regarding the untimely disclosure was not made by the trial judge, the two other members of the Court of Criminal Appeals panel, or the five justices of the Tennessee Supreme Court.

6. I am well familiar with Rule of Professional Conduct 3.8, regarding the special duties of a prosecutor. As to the untimely production of the third statement of state's witness Andrew Hammack, the trial court found that this trial error was unintentional. Regarding this question, the trial court was the trier-of-fact, as is a jury in ascertaining the credibility of trial witnesses. Having spent many hours reviewing the trial record in this matter, I am unaware of any basis for questioning this finding by the trial court, and note the two appellate court panels reviewing the conviction did not do so. This being the situation, it did not occur to me that this inadvertent trial error, disclosed by the attorney himself, reasonably could be viewed as a breach of prosecutorial ethics. Had I believed that to be the case, I would have considered advising the Board of Professional Responsibility myself, as I have done with regard to other attorneys with matters before our court.

Pursuant to Tennessee Rule of Civil Procedure 72, I declare under penalty of perjury that the foregoing is true and correct.

Alan E. Glenn

ALAN E. GLENN

Dated: August 9, 2016