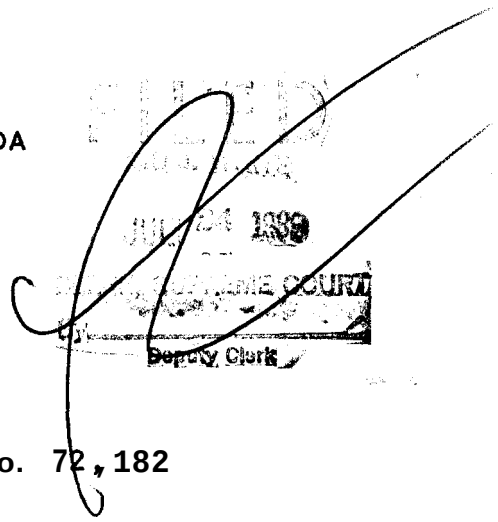
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

IN RE: MICHAEL J. JAHN
(Petition for Reinstatement) / Case No. 72,182

ANSWER BRIEF OF THE PETITIONER

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SYMBOLS AND REFERENCES

The Petitioner in these proceedings, Michael J. Jahn, will be referred to as "Petitioner" or by name. The Florida Bar will be referred to as such or as "The Bar."

The following symbols will be used in this brief:

T- Transcript of Reinstatement hearing held on February 20, 1989.

RR- Report of Referee dated May 4, 1989.

D/M- The Transcript of the Deposition of Steven Douglas Milbrath, a character witness for Petitioner.

D/S- The testimony of Dr. Doyle Preston Smith at Final Hearing in the disciplinary proceedings brought against Petitioner and consisting of pages 132-170 of the Original Transcript of Final Hearings.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the Bar's Statement of the Case and Facts as presented in its initial brief.

SUMMARY OF ARQUMENT

Petitioner has proved his rehabilitation by the overwhelming weight of the evidence presented in these proceedings. He has proven up all of the elements required of a petitioner in reinstatment proceedings by In Re: Dawson, 131 So.2d 472 (Fla. 1961).

The Bar presented no witnesses in opposition to Petitioner's reinstatement. Their sole witness was a Bar investigator who testified briefly about the manner in which he investigated Petitioner's petition. The investigator did state that an ad was placed in The Florida Bar News seeking comments on Petitioner's reinstatement.

The Referee found that Petitioner has lived a drug-free life since the spring of 1984. The misconduct which led to Petitioner's felony conviction and subsequent suspension was "entirely attributable to chemical dependency," a problem that no longer exists. After considering the evidence before him, including Petitioner's five witnesses (two by deposition), and after observing Petitioner during final hearing, the Referee found that Petitioner had proved rehabilitation and should be reinstated.

The only impediment to Petitioner's reinstatement was his misrepresentation to NCNB Bank about Petitioner's past conviction. The Referee specifically considered the NCNB episode. He observed that it occurred only after Petitioner's candor about his past criminal record repeatedly resulted in his

being denied employment. The Referee found that this act was an aberration from Petitioner's normal exemplary behavior and was not sufficient cause to deny reinstatement.

Petitioner has proved rehabilitation by the overwhelming weight of the evidence presented. He has been suspended for over four years and during that time, with the exception of the NCNB incident, has lived a faultless life. He should be reinstated and allowed to resume the practice of law.

ARGUMENT

POINT I

PETITIONER HAS DEMONSTRATED GOOD MORAL CHARACTER AND REHABILITATION AND SHOULD BE REINSTATED.

A. Introduction

Petitioner was automatically suspended on June 12, 1985 following his conviction of the felonies of possession of cocaine and delivery of cocaine to a minor. His suspension was predicated on the two felony drug convictions. RR-1. Subsequently, The Florida Bar brought disciplinary proceedings against Petitioner which resulted in a three-year suspension nunc pro tunc to the beginning of the automatic suspension in 1985. The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

In the original disciplinary proceedings, The Florida Bar first tried to convince the Referee and then tried to convince this Court that Petitioner was guilty of more than his convictions. Specifically, the Bar attempted to prove that Petitioner forcibly injected women with cocaine against their will. Jahn, supra, 286. The Referee emphatically rejected this claim after finding that the testimony of the two women who testified was "highly unreliable and worthy of little weight,...." and that the cocaine use by the women was "consensual." Jahn, supra, 286.

At final hearing in the reinstatement case, despite actively investigating Petitioner's petition for reinstatement and despite an ad in The Florida Bar News seeking input on his petition, The

Florida Bar presented no witnesses in opposition to the petition. Their sole witness was a Bar investigator who testified about the manner in which the petition was investigated.

The only evidence before the Referee rebutting Petitioner's rehabilitation was a composite exhibit containing documents pertaining to the NCNB incident. The Referee specifically considered those documents and Petitioner's testimony relating to them. He then found that Petitioner had proved rehabilitiation and recommended that Petitioner be reinstated.

As was true in the disciplinary proceedings, The Florida Bar has appealed the Referee's findings and recommendations to this Court. The Bar hangs its appellate hat solely on the NCNB evidence and completely ignores the overwhelming evidence proving Petitioner's rehabilitation.

B. The NCNB Incident

Petitioner candidly admitted the misrepresentation to NCNB. T-58-64, 91-93, 96-97. Petitioner stipulated to the entry nto evidence of the resume that he sent to NCNB, his application for employment and the results of his polygraph examination. In all three instances, Petitioner concealed his past criminal conviction.

Clearly, Petitioner acted wrongfully. But, while Petitioner's misrepresentation was for personal gain, i.e., he wanted a job in Miami, he was not trying to wrongfully extract anything from NCNB. He was not trying to steal any money from them. He was not trying to obtain financing under false

circumstances. He was not trying to get the bank to act to its detriment. As Petitioner stated, his "sole purpose was to get in the front door and show them I was a good employee...." T-91.

As observed by the Referee, Petitioner's misrepresentation to NCNB was the result of his becoming "extremely frustrated" over his repeated failure during the preceding ten months to get a job after revealing his past conviction and with Petitioner's being "almost obsessed" with a desire to leave Orlando and to move to Miami. RR-4.

Petitioner's misrepresentation to NCNB, while not commendable, was understandable when Petitioner's past efforts at securing gainful employment are considered. He testified that for the eight to ten months prior to applying to NCNB, he had sent out "an extraordinary number of resumes" and had travelled down to Miami frequently for interviews. However, whenever he revealed his past background, the interviewers were always very congenial and very supportive, but there were never any job offers. T-59.

Petitioner related one incident where he interviewed with a title insurance company in Miami and the interviewer was "extraordinarily positive." Towards the end of the interview, the interviewer asked when Petitioner could start employment. Petitioner then disclosed his entire background, including his drug addiction and his conviction. The interviewer completely reversed his position, became very cool, and the interview ended within five minutes. T-60. Petitioner stated that similar

circumstances happened in quite a few instances. Even Petitioner's father, a well-respected lawyer whose practice is entirely devoted to the title insurance industry, could not get Petitioner a job. Mr. George Jahn contacted at least seven companies throughout the state and in Mr. Jahn's words:

> And though they were friends of mine and people that I've worked with for a great many years, they were frank to tell me that because of the conviction, they didn't think that their upper echelon that approved everything would go along with it. T-50.

Petitioner wasn't trying to defraud NCNB. They would have received valuable services for their pay. After being repeatedly denied employment following candid disclosure and after being denied the chance to show rehabilitation and to prove that he could become a productive member of society, Petitioner desperately sought some means of proving his worth. As he explained it to the Referee:

> The reason I did that was -- As (sic) I said, I tried for ten months. My purpose was not to forever deny them that knowledge, my purpose was to get my foot in the front door, establish myself at some type of record there, that I was a good employee and that I was well worth keeping on, you know, when I did discuss it to them.
>
> It's absolutely ludicrous of me to think that I could withhold that information from them for any period of time. I listed them -- I would have had to list them as my employer when I reinstated, and the Bar would call them immediately. I knew that.
>
> My sole purpose was to get in the front door and show them I was a good employee, and hopefully, then, they would keep me on. T-91.

In fact, Petitioner did list his NCNB employment on his Petition for Reinstatement.

The evidence is unrebutted that Petitioner disclosed his conviction to his employer before NCNB and to all employers ever since. T-56, 57, 90-92, P.Ex. 4 and 5.

Petitioner acknowledged that his resumes were misleading. However, except for NCNB, he always disclosed his conviction during his interviews, T-97. And, he never got hired.

NCNB required Petitioner to take a polygraph examination. Although he had never taken one before and although he stated during the examination that he had never been convicted of a crime, he passed the polygraph test. T-61. In explaining his taking the polygraph examination, lying on it, and passing it, Petitioner gave additional insight to the Referee about his concealment of his convictions. As Petitioner put it:

> And it was just that after ten months of that situation, the first time I don't disclose it I get the job.
>
> So they then told me well, you have to take a polygraph exam. And basically I went to the polygraph exam and I just threw my hands up and said Hey, I've -- I've really got nothing to lose at this point. T-63.

Ironically, the polygraph operator told Petitioner how to pass the test. He told Petitioner that the most important thing is attaining a rhythmic breathing pattern. Petitioner concentrated on his breathing and he passed the test. T-63.

When asked if he expected to pass the polygraph test, Petitioner replied:

> I didn't know. I just went and took a shot at it because I wanted to go home (Miami) that bad. T-64.

The Orlando area is replete with bad experiences for

Petitioner. Unfortunately, due to financial circumstances, he had to stay there because he needed to live with his parents. Petitioner describes the Orlando area, due to his convictions and the extensive publicity surrounding them, as being a difficult place to live because of the "general negative atmosphere" surrounding his living there. T-62. Even Petitioner's reinstatement was generating negative publicity as indicated by Petitioner's Exhibit 6, a newspaper article dated December 5, 1988 with headlines stating, "Lawyer out of prison wants to practice again." T-65.

Support for Petitioner's testimony about bad publicity was provided by Judge Norris, the Referee. He added on the record that he had received at least three telephone calls about Petitioner's reinstatement proceedings from Orlando-area radio stations. T-65.

Petitioner originally tried to attend a lawyers AA group, but the extensive publicity surrounding this Court's order of discipline resulted in his receiving a chilly reception among the members of that group. T-67. He left the group after two meetings.

The Bar would have this Court believe that Petitioner's misrepresentation on his resume, his misrepresentations to each interviewer and his subsequent passage of the polygraph exam are each a separate incident which show a course of conduct of deceit and dishonesty. Petitioner urges this Court to adopt the Referee's view and to consider the entire episode as a single

offense that took place over a one-week period and which, while showing bad judgment, does not show a basic character flaw.

Petitioner's conviction and disciplinary sanction did not result from dishonesty, fraud, deceit, or misrepresentation. They were the result of his dependency on cocaine. His conviction involved possession of cocaine and delivery of cocaine to a minor who, after testifying before a referee, was found to have consented to the delivery of cocaine. Jahn, supra, 286.

It is unrebutted that, with the exception of NCNB, Petitioner has advised all of his employers and all of his prospective employers of his criminal background. The Bar did not present a single witness who testified to the contrary.

Petitioner disclosed his NCNB employment on his Petition for Reinstatement and did not equivocate or in any way try to defend his misrepresentation. He made a mistake and acknowledges it.

Despite the fact that the Bar had jurisdiction to bring displinary proceedings against Petitioner for his misrepresentation, there is no evidence indicating that they did so. Rather, they would have Petitioner's petition be denied, thereby resulting in his being out of practice an additional year beyond the four years that he has already been suspended. [Rule 3-7.9(l) prohibits a successive petition for reinstatement being filed for one year after a denial of that first petition].

Petitioner argues that if he were disciplined for similar conduct, his penalty would not even approach one year. For example, in The Florida Bar v. Siegel and Canter, 511 So.2d 995

(Fla. 1987), two lawyers each received 90 day suspensions (with automatic reinstatement) for lying on an application to secure financing of their law office. In its decision suspending Siegel and Cantor, this Court found that the Respondents were "guilty of a deliberate scheme to misrepresent facts in order to secure full financing of their purchase." The Court then suspended them for their "fraudulent activity." The Court specifically rejected the Bar's request for a ninety-one-day suspension.

In the The Florida Bar v. Batman, 511 So.2d 558 (Fla. 1987), a lawyer received a public reprimand for testifying falsely about his practicing law while suspended for non-payment of dues.

In the The Florida Bar v. Levkoff, 511 So.2d 556 (Fla. 1987), the Respondent also performed numerous acts as a lawyer while he was suspended. As discipline for his misconduct, the Court ordered an additional ninety-day suspension to begin on the date that the first suspension ended.

Finally, in The Florida Bar v. Shupack, 523 So.2d 1139 (Fla. 1988), the accused received a ninety-one-day suspension for fraudulently recording the purchasers' mortgage before the vendors' mortgage. Mr. Shupack had previously been suspended for thirty days for engaging in similar misconduct.

The Bar cites The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985), The Florida Bar v. Johnson, 439 So.2d 216 (Fla. 1983), and The Florida Bar v. Nuckolls, 521 So.2d 1120 (Fla. 1988) as support for their argument that Petitioner should not be reinstated. Its reliance is misplaced.

Neither Beneke (public reprimand) nor Nuckolls (ninety days) received disciplines requiring proof of rehabilitation. Both involved misconduct far more serious than Petitioner's misrepresentation to NCNB. (in fact, Nuckolls was guilty of a breach of a fiduciary duty). Yet neither lawyer was required to prove good character as an incident to continuing his practice. Why, then, should Petitioner be denied reinstatement, after he has proved rehabilitation when his offense did not even approach the severity of Beneke's or Nuckolls'?

Petitioner's situation is not even closely similar to that involved in the Johnson case. Johnson forged his wife's signature to three promissory notes and he filed false financial statements to a bank. His conduct involved illegal conduct involving moral turpitude in violation of Disciplinary Rule 1-102(A)(3).

The above-cited cases are set forth to put Petitioner's acts into perspective. They are not on point, but are analogous. They indicate, however, that the delay in Petitioner's reinstatement to practice as a result of the Bar's appeal of the Referee's report constitutes sufficient discipline for his bad judgment.

The Referee below specifically considered the NCNB incident in making his decision on proof of rehabilitation and reinstatement. The Referee set forth his concern over the incident and came to the following conclusion:

> Petitioner's lack of candor with NCNB cannot, of course, be condoned but i feel that the negative

effects of this one transgression are now mitigated by the passage of time (one and one-half years) and by his efforts to live a life free from a dependency on chemicals (four and one-half years). Thus, the critical question is: "Which one is the real Michael Jahn -- the one who kicked cocaine or the one who lied to NCNB?" In view of the totality of the evidence, I opt for the one who kicked cocaine. RR-5.

C. Bankruptcy

Although the Bar did not raise the issue at final hearing, they now argue to the Supreme Court that Petitioner's bankruptcy shows a lack of good character. The circumstances of the bankruptcy in the case at Bar show that the bankruptcy laws were properly invoked and that Petitioner's discnarge in bankruptcy shows no lack of character.

In two Bar admissions cases, Florida Board of Bar Examiners. Re: G. W. L., 364 So.2d 454 (Fla. 1978) and Florida Board of Bar Examiners. Re: Groot, 365 So.2d 164 (Fla. 1978), this Court held that the discharge of debts in bankruptcy does not automatically show a lack of good character. In essence, the Court requires an examination of the circumstances attendant to the bankruptcy in determin ng if the conduct was mora ly reprehensible.

While Board of Bar Examiner cases are not exact y on point with reinstatement cases, the parallel is significant. They both involve proof of integrity.

In essence, the focus of the investigation, be it by The Florida Bar in reinstatement proceedings or the Board of Bar Examiners in admission proceedings, is whether the applicant has

good moral character. A finding that the applicant or petitioner has sought bankruptcy under legitimate circumstances does not indicate, by itself, a lack of good character or morally reprehensible conduct.

The Bar argues on page 6 of its brief that Petitioner's bankruptcy demonstated a failure to provide restitution to those harmed as a result of his misconduct, apparently in contravention to the restitution of funds requirement listed in In Re: Dawson, 131 So.2d 472 (Fla. 1961). The plain language of Dawson indicates the restitution element is only applicable "in cases involving misappropriation of funds,...." Dawson, supra, page 474. No misappropriation is involved in the case a Bar.

Two of the three women who have sued Petitioner with allegations that he forcibly injected them with cocaine appeared before the Referee in Petitioner's earlier disciplinary proceedings. The Referee found their testimony to be "highly unreliable and worthy of little weight,...." Jahn, supra, page 286. The Referee in those proceedings (who is the same Referee in the instant case) specifically rejected the Bar's contention that Petitioner forcibly injected the witnesses with cocaine against their will. Id, 286. The Bar should be estopped from continuing this line of argument.

The two witnesses that testified against Petitioner in his original disciplinary proceedings were the women involved in his two criminal convictions. It cannot be repeated enough that those convictions were for possession of cocaine and delivery of

cocaine to a minor. There was no conviction for battery or anything that smacks of forcible de ivery of cocaine to any of those women.

Interestingly, the physician that treated Petitioner for his cocaine addiction, Dr. Smith, was an anesthesiologist for twenty years. He testified that one had to have assistance to inject a person with anything when they were unwilling. D/S-167.

The circumstances surrounding the suit by the third woman did not even give rise to criminal proceedings.

Petitioner testified that he sought bankruptcy because he couldn't afford to defend himself in circuit court against the suits brought against him. T-68, 69. The suits brought by Brenda Miller and Kim Bailey were summarily dismissed. Petitioner settled the case with Tanya Stepp (the minor that testified in his earlier disciplinary proceedings) for $1,500, payable at $125 per month for one year. T-69. The settlement was pursuant to the advice of Petitioner's lawyer in the bankruptcy, Steven Milbrath (a witness by deposition on Petitioner's behalf at final hearing in the reinstatement). D/M-6.

Petitioner's financial situation ever since his discharge from incarceration in October, 1986, has been bleak. During that entire period he has lived at home with his parents. T-41, 89.

Two weeks prior to final hearing in the case at Bar, Petitioner bought the first car that he has owned since being released from jail. T-42. The purchase price was $500. T-89.

Petitioner's salary during the time period from October, 1986 until petitioning for bankruptcy ranged from $16,500 to $19,000. T-68. During that time period, Petitioner was required to pay the costs assessed against him in his original disciplinary proceedings in the amount of $1,800, Jahn, supra, p. 287, and was required to post a $500 cost deposit with The Florida Bar prior to petitioning for reinstatement. P.Ex. 3.

Petitioner originally thought that filing for bankruptcy would be a relatively simple matter. However, the three plaintiffs in the civil actions against him elected to pursue adversary proceedings and he could not afford to pay for a lawyer in bankruptcy. T-85. Fortunately, a lawyer that used to work with Petitioner's sister (who is also a lawyer) and who handled bankruptcy matters agreed to take his case "in spite of the fact that [he] couldn't pay them a dime." T-85, 86. Steve Milbrath agreed to handle the Tanya Stepp matter as a favor. T-86. Basically, however, Petitioner did all of the research and drafted the pleadings on his bankruptcy matter. T-86.

With the exception of the $1,500 nuisance value settlement with Tanya Stepp, the claims of the women were summarily dismissed. It is important to note that if the Court found that there was either fraud or an intentional tort by Petitioner, the civil actions against Petitioner would not have been discharged. 11 U.S.C., sec. 523(A).

Petitioner cannot emphasize strongly enough to this Court that he did not forcibly inject any individual with cocaine. He

did not inject any individual with cocaine against their will. There has never been a finding by anyone to the contrary. The only time the issue has appeared in a judicial forum, the Court found for Petitioner and against the claimants.

The failure of Tanya Stepp, Kim Bailey, Brenda Miller, or any of their lawyers to speak against Petitioner's reinstatement is extremely significant. At least two of them should have known of the reinstatement proceedings because the Bar's investigator talked to their lawyer about Petitioner. T-100.

In Florida Board of Bar Examiners Re: Kwasnik, 508 So.2d 338 (Fla. 1987), the Board recommended against admission of an individual who had discharged a civil judgment of approximately $200,000. The judgment resu ted from the applicant's killing an individual in an automobile accident while the applicant was driving in an intoxicated condition. This Court rejected the Board's position and stated on page 339 of its opinion that:

> Given the fact that our bankruptcy laws are designed to provide a fresh start for those who are overburdened with debt, we cannot say that the subsequent failure to make payments on the discharged debts may be considered as a basis to deny admission to the practice of law.

Petitioner's discharge of his obligations in bankruptcy was a legitimate exercise of his legal rights. He could not afford to defend himself against three civil actions despite the fact that Petitioner would ultimately have won them. His income was minimal, his expenses including restitution to The Florida Bar of its costs in the original disciplinary proceedings, his payment of his cost deposit for reinstatement, and the costs attendant to

his reinstatement, precluded the payment of attorney's fees. In fact, the lawyers representing him in the bankruptcy did so for free.

Petitioner has led a humble lifestyle ever since his discharge from prison in October, 1986. He has continued to live at home and, until two weeks prior to final hearing (two and one-half years after release from prison), he did not even have a car. His discharge of debts was legitimate and does not show a lack of good moral character.

D. Legal Competency

The Florida Bar did not appeal the Referee's recommendation that Petitioner be reinstated without passage of the Bar Exam. However, they allude to Petitioner's egal competency in their brief.

Petitioner should not be required to take the Bar Exam. His competency has never been at issue. He was not suspended for a lack of ability or competency. He was suspended solely because of his criminal convictions which had nothing whatsoever to do with his practice. T-84.

Throughout the four years of his suspension, Petitioner has maintained his competency in the law in an exemplary fashion. During his incarceration, he worked in the law library of his prison. T-11, 84. His first employment with Florida Ranch Lands (from August, 1986 to July, 1987 and from October, 1987 to July, 1988) involved immersion in real estate matters and working with the company's lawyer. T-67, 68, 86, 87. Petitioner did legal

research for the company's lawyer from five to seven hours per month. T-94.

Petitioner has taken at least two continuing legal education courses while suspended, one a Bridge-the-Gap-type Seminar and another on real estate law, T-87, and he has signed up for a Bridge-the-Gap Seminar. T-88. Throughout his suspension, he has kept abreast of legal developments and changes in the law through reading The Florida Bar News and Journal and by reading Florida Law Weekly and various advance sheets. T-84.

Petitioner has also discussed legal matters frequently with his father and two sisters (all lawyers) and with lawyer witnesses Milbrath and Epstein.

Finally, Petitioner was basically forced to work on his own bankruptcy because he could not afford to pay the lawyers that were assisting him. T-86. Petitioner proposed, researched, and drafted the pleadings filed in his bankruptcy matter. T-86.

Perhaps most important is the fact that the Petitioner has maintained an avid interest in the law throughout the four years of his suspension.

The mere lapse of four years is not a sufficient basis to order passage of the entire Bar Exam. Many lawyers suspended as long or longer have been reinstated without such a requirement. Examples of cases where lawyers have been reinstated after long suspensions without having to pass the Bar Exam are The Florida Bar Re: Sickmen, 523 So.2d 154 (Fla. 1988) (four and one-half years' suspension); The Florida Bar Re: Whitlock, 511 So.2d 524

(Fla. 1987) (five years' suspension); Jhe Florida Rar Re: Silverstein, 484 So.2d 5 (Fla. 1986) (five to six years' suspension); The Florida Bar Re: Berman, 372 So.2d 95 (Fla. 1979) (eight years).

Petitioner has maintained an active interest in the law and has maintained his legal competency. Furthermore, he will be required to take thirty hours of CLE courses during the first three years after he is reinstated. There is nothing showing that Petitioner's competency has ever been affected and there is no need to require passage of the entire Bar Exam prior to reinstatement.

E. Petitioner Proved Good Character and Rehabilitation

No witnesses appeared before the Referee contesting Petitioner's reinstatement. Nobody denied that the Petitioner is completely rehabilitated from the chemical dependency that resulted in his criminal misconduct. Nobody testified to the Referee that his discharge in bankruptcy was fraudulant or involved bad moral character. Nobody from NCNB Bank appeared and contested Petitioner's reinstatement.

Perhaps most significantly, not a single lawyer appeared before the Referee and contested Petitioner's reinstatement. Not the lawyers that prosecuted him, not the lawyers representing the civil litigants against him, not lawyers appearing as "spokesmen" for the Bar.

Petitioner, on the other hand, in addition to his extremely candid and forthright testimony, presented three witnesses in

person and one by deposition that attested to his good moral character and his rehabilitation. Furthermore, the testimony of the physician that ran the treatment center in which Petitioner was treated for five months in 1984 attested to Petitioner's rehabilitation from his chemical dependency.

The only evidence presented to the Referee that even faintly hinted at a recommendation against misconduct was a petition submitted by twenty-eight members of The Florida Bar (none of whom Petitioner had ever heard of and, presumably, who did not know Petitioner at all). Bar Ex. 2, T-104-105. The petition did not actually oppose reinstatement. As noted by the Referee on page two of his report, it only urged the Referee to scrutinize closely the facts in Petitioner's reinstatement case and to assure that Petitioner is no longer capable of participating in the type of behavior that brought on his suspension. In other words, the lawyers signing the petition were doing nothing more that asking the Referee to do his job. He did. He recommended reinstatement.

The petition submitted by the lawyers to the Referee should be completely disregarded by this Court. None of the individuals had any first-hand knowledge of the matter and none of them objected to Petitioner's reinstatement.

The absence of any witnesses against Petitioner is made even more profound when one considers that the Bar's investigator actively checked up on the details of his application. That investigator, Charles Lee, contacted Petitioner's former

employers and, obviously, contacted NCNB. T-99, 100. Notwithstanding this active investigation, nobody appeared to contest Petitioner's reinstatement.

The Bar even placed an ad on May 1, 1988 in The Florida Bar News soliciting comments on Petitioner's reinstatement. That periodical is sent to every member in good standing of The Florida Bar. However, out of its circulation of in excess of 40,000 lawyers, nobody appeared to contest Petitioner's reinstatement.

The testimony before the Court as to Petitioner's good moral character and rehabilitation is unrebutted. The five pertinent requirements to proving rehabilitation are set forth in in Re: Dawson, 131 So.2d 472 (Fla. 1961) at page 474. As laid out by the Bar in its brief, they include strict compliance with the disciplinary order, evidence of unimpeachable character, clear evidence of good reputation for professional ability, evidence of lack of malice toward the Bar, and personal assurances of a sense of repentence and a desire to act properly in the future.

The Referee stated in the conclusion of his report that:

> Based on the evidence before me, and applying *the* criteria established in in Re: Petition of Dawson, 131 So.2d 472, 474 (Fla, 1961), I recommend that Petitioner be reinstated immediately, without the requirement of taking and passing the Florida Bar Examination, and with the following conditions:
>
> 1. That Petitioner be placed on probation for three years under the supervision of Florida Lawyer's Assistance, Inc., during which time he shall submit to not less than four random poly-substance drug screens per year as and when determined by that organization;

2. That he participate in any programs, rehabilitative or otherwise, as determined by Florida Lawyer's Assistance, Inc.

The Referee, in a thorough and detailed report, specifically found that Petitioner met the burden of proving the requirements of Dawson. The testimony supports those findings. The cause of Petitioner's suspension was his conviction for possession of cocaine and delivery of cocaine to a minor. The basis for the illegal conduct was Petitioner's dependency on cocaine. He now has a complete handle on his disease and there will be no relapse. There has been no evidence presented in any hearing indicating that Petitioner's addiction and his subsequent convictions in any way affected his practice. There was no evidence before the Court indicating dereliction of duty to clients or misuse of clients' funds.

When, as here, the offenses that led to a suspension can be directly traced to a chemical dependency, the initial focus of the proceedings must be on rehabilitation from the addiction. The thrust of the Referee's findings are that Petitioner will never again be troubled by chemical dependency. Specifically, the Referee found that:

> The evidence clearly establishes that Petitioner has led a drug-free life since the spring of 1984, a period of almost five years. This lengthy period of sobriety is extremely important because the misconduct which lead to the suspension was entirely attributable to chemical dependency, a problem which Petitioner acknowledged at both the original disciplinary proceeding and at this reinstatement proceeding. He has maintained frequent, enthusiastic and continuing participation in AA and other similar chemical dependency organizations. He actively participates in

> religious and community organizations, including a Prison Ministry and Little League team.
>
> ....
>
> Rehabilitation can be demonstrated in a variety of other ways including an analysis of a person's attitude toward life and toward those external and internal factors and pressures which triggered the original misconduct. Petitioner freely acknowledges his prior chemical dependency and recognizes the catastrophic effect of his misconduct on himself, his family and friends and, of course, on his profession. He blames only himself for the effects of his wrongdoing. RR-2, 3.

The Referee then discussed whether the NCNB incident "is an aberration in otherwise exemplary journey toward rehabilitation" or whether it represents a basic character defect. RR-4. After thoroughly discussing the NCNB episode, the Referee found that "the totality of the evidence" leads toward the conclusion that Petitioner should be reinstated. RR-5.

Petitioner's road to rehabilitation has been long, arduous, and not without problems.

Doyle Preston Smith, MD, the Director of Pine Grove Recovery Center, testified on Petitioner's behalf in 1987 during Petitioner's disciplinary proceedings. Dr. Smith's testimony was entered into evidence in the reinstatement proceedings to show the treatment that Petitioner had undergone.

Dr. Smith runs the Pine Grove Recovery Center and an affiliated extended care facility called COPAC. D/S-133. His practice is limited to addictionology and during the five years preceding his testimony he had treated from 1,000 to 1,500 patients. D/S 134.

Dr. Smith first saw Petitioner on August 13, 1984 and diagnosed him as being addicted to cocaine. Petitioner appeared at Pine Grove upon referral from South Miami Hospital. He was treated at Pine Grove from August 13th until September 11th at which time he was transferred to COPAC. He stayed there until mid-December, 1984. D/S 137-139.

Pine Qrove was the third facility at which Petitioner was treated. T-72, 73.

Dr. mith testified that when one is addicted to a mood-altering substance, such as cocaine, one's judgment is altered even when not using the drug of choice. D/S 143. When the substance is removed from the person's system, it wi 1 take from eleven to eighteen months to a restoration of norma ity. If an individua can last two years without the substance most wi 11 not see a relapse. D/S 148, 149.

Dr. Smith opined that next to acceptance of the dependency, the single most important factor to assist an individual in recovering is the support systems with which he surrounds himself. Examples are AA and NA. D/S-149.

Petitioner has gone over five years without a relapse into his chemical dependency. As found by the Referee, he is extremely active in AA and in religious groups. His support mechanisms are superb.

Dr. Smith was asked if he would rather have an operation by a neuro-surgeon who had been treated at Pine Grove or by one who had never been there. Dr. Smith replied that he would rather

have the neuro-surgeon that had been at Pine Grove because he would then know that the person operating on him is free of any dependency. D/S 165, 166. Similarly, the Referee and this Court know that Michael Jahn is not addicted to any addictive substances.

When Judge Norris asked if Dr. Smith had an opinion as to whether Michael Jahn was worth salvaging, Dr. Smith replied:

> If he was worth getting that degree in the first place, I mean to practice or to participate in a profession, he's worth salvaging to get back into that profession. That's my personal opinion. D/S 168.

The issue to be decided in reinstatement proceedings "shall be the fitness of the Petitioner to resume the practice of law." Rule 3-7.9(g), Rules of Discipline. The proceedings are not intended to re-try the Petitioner for his past misconduct, but to determine his present fitness to practice law. petition of Stalnaker, 9 So.2d 100 (Fla. 1942).

Petitioner has accepted his addiction, has acknowledged his wrongdoing and has taken steps to assure that it will not repeated. He knows that he is responsible for his actions and the consequences stemming from them. He has, without complaint, accepted the penal and disciplinary sanctions imposed on him for his wrongdoing. He was incarcerated from June, 1985 until October, 1986. He has suffered catastrophic financial reversals as a resu t of his situation. Although he is thirty-seven years old, Petit oner has been forced to live with his parents since his release from prison in October, 1986 and, two weeks before final hearing, purchased his first car in five years for $500.

Petitioner, once a valued member of our Bar, has been working at a salary ranging from $16,500 to $19,000. His income in 1987 was $14,133. P.Ex. 3.

Petitioner was automatically suspended from the practice of law on June 12, 1985 and, four years later, he is still suspended. Petitioner acknowledges that the three-year suspension received for his convictions was warranted and he recognizes that he could well have been disbarred for his acts. He has no qualms about the manner in which The Florida Bar pursued his case. T-88.

Dr. Smith's testimony related to Petitioner's treatment and rehabilitation until 1987. Petitioner's additional witnesses all confirmed Dr. Smith's optimism about Petitioner's recovery. They all attested to his continuing abstinence from alcohol and cocaine and his recovery from his terrible addiction.

Three of Petitioner's witnesses are lawyers. Steven Milbrath, admitted in 1977, and Murray Epstein, admitted in 1974, are friends of Petitioner. The third witness, George Jahn, admitted in 1948, is Petitioner's father. (Petitioner has lived with his father and mother since his discharge from prison in October, 1986). All of Petitioner's witnesses confirmed his testimony as to his continuing abstinence from alcohol and drugs, his remarkable change from that period of his life during which he was addicted to cocaine, his acceptance of his addiction and his dedication to AA and NA, and his interest and continued education in the law. None of their testimony was rebutted.

Petitioner's fifth witness was neither a lawyer nor a friend. Roger Smith was Petitioner's counselor and indirectly supervised Petitioner's work as a law librarian while he was incarcerated. The Referee specifically referred to Mr. Smith's testimony on pages 2 and 3 of his report. In so doing, the Referee stated the following:

> His [Petitioner's] attitude toward his own problem and his efforts to help others with similar problems was corroborated from a very unusual source -- the testimony of Roger Smith, a seventeen-year employee of the Department of Corrections, who knew Petitioner during his incarceration at Lake Correctional Institution. Mr. Smith also has maintained substantial contact with Petitioner since his release and Mr. Smith was aware of the NCNB employment incident discussed later in this report. To summarize Mr. Smith's very compelling (e.s.) testimony (Transcript, pages 10-21):
>
> 1. This is the first time he has ever testified for a former inmate;
>
> 2. It is unlikely that Petitioner would become a recidivist;
>
> 3. Petitioner has a "handle" on his substance abuse problem;
>
> 4. Petitioner has learned from his mistakes and has turned his life around; and
>
> 5. Mr. Smith would not hesitate to retain Petitioner as an attorney should he be reinstated.

Mr. Smith has been with the Department of Corrections for seventeen years and has never testified for an inmate before. T-11. He highly recommended Petitioner's reinstatement and believed that there was only a "slim" chance of Petitioner's being a recidivist. T-18.

Mr. Smith, a layman working in the prison system, believes that Petitioner will be an asset to The Florida Bar if Petitioner

is reinstated. T-19.

Of course, the most important evidence before the Court in reinstatement proceedings is the Petitioner's own testimony. Everything else is but corroboration or rebuttal.

Petitioner's testimony painted a picture of an individual who accepts responsibility for his actions and who knows that he is the only person to blame for his difficulties. Petitioner knows what he did wrong and what he must do to prevent a recurrence. As part of his continuing recovery, and also as an element of rehabilitation, Petitioner has devoted himself to helping others avoid the problems that he has experienced. (Or, in the unhappy circumstance where it is too late for avoidance, to helping them overcome their problems).

Petitioner acknowledged up front that he was fired from NCNB for failing to disclose his felony conviction. T-58. He acknowledged that he passed the polygraph examination despite his improper denial of ever having been convicted of a crime. T-61. Petitioner did not equivocate or try to explain away his misconduct. His misrepresentation was a bad lapse of judgment, but it was understandable in light o Petitioner's testimony regarding his attempts to secure employment in Miami.

Petitioner had been trying for eight to ten months to obtain work in Miami without any success whatsoever. As was described earlier in this brief, whenever he disclosed his felony conviction, he would not get a job. He related the incident where he was asked when he could start work and then, when he

disclosed his felony conviction, he was virtually thrown out of the interview. T-60.

As observed by the Referee, Petitioner was desperate to get out of the Orlando area. After being repeatedly denied employment because of his conviction, he finally elected to try to get his foot in the door with the thought that, if an employer could see what a good employee he would be, when the disclosure occurred they would keep him on. Petitioner knew that when he petitioned for reinstatement to The Florida Bar NCNB would learn of his background. He hoped that when they saw he was a good employee, they would keep him on. T-91.

Petitioner's desire to leave the Orlando area is understandable. He obviously becomes very emotional when discussing it. He received such negative press when the three-year suspension came down from this Court that he was not well-received in a lawyer's AA group. T-67. When he petitioned for reinstatement there were newspaper write-ups in the local newspaper. T-65, P.Ex. 6. Even the Referee acknowledged that he had received at least three telephone calls from at least two radio stations interested in the proceedings. T-65.

To further show the hostile attitude towards Petitioner in the Orlando legal community, one need only look at the petition submitted to the Referee signed by twenty-eight members of the Bar. Although none of these lawyers know Petitioner and although none of them had the backbone to appear before the Referee in opposition to the reinstatement, they still signed a petition

questioning his reinstatement. Bar Ex.

Petitioner acknowledges that he was, and is now, addicted to cocaine. T-72.

His first treatment, in Brookwood in 1983, which lasted a month, was unsuccessful. T-72. He subsequently went to South Miami Hospital and then to Pine Grove Recovery Center for additional treatment after his 1984 arrests. Ultimately, he went to COPAC. His treatment period from the time he entered South Miami Hospital until dismissal from COPAC was from July until mid-December, 1984. T-73.

Petitioner acknowledged that his acceptance of his addiction was difficult. In his own words:

> I didn't learn anything while I was at South Miami Hospital. I didn't learn anything until about the fourth month of my treatment. I was that thick-skulled about the entire situation.
>
> I was convinced up until that time that I just -- it was everybody else's fault, all my problems. And finally, I was able to step back and take a good long look at things and see that the responsibility for everything that was going on in my life was mine and mine alone.
>
> And I learned that I am a recovering drug addict, and will be for the rest of my life; and I learned the things to keep my disease in check, and I practice them to this day and will for the rest of my life. T-73, 74.

Petitioner attends AA at least three times a week, and sometimes every day, "depending on how I feel my need is." T-66, 74. He has frequently spoken to both church and school functions to young persons in the Orlando and Winter Park area about the consequences of drug use. Petitioner finds a great deal of

satisfaction in ta king to church groups and students. T-74. He has received letters from churches thanking him for his talks. P.Ex. 7.

Petitioner is very active in prison ministries, including a program called Kyros and its gatherings called Ultrayas. Petitioner joined Kyros while in prison and has maintained his participation to this day. T-76.

Petitioner is also very active in a prison ministry called Teleios Ministries, where he helps other persons with problems both in and out of the prison system. T-77. Petitioner enjoys helping others with their addiction problems. T-79.

Petitioner is dedicated to maintaining the AA lifestyle. Every day when he wakes up the first thing he does is read his Day-By-Day book (a mainstay of AA members) and then takes fifteen minutes for meditation and prayer. T-79.

Petitioner acknowledges that he is not cured of his addiction. T-79. That, too, is a mainstay of the AA philosophy.

Petitioner is very proud of the fact that he was an assistant coach for a Little League team, even though they, like their namesakes (the Orioles), never won a game. T-81. Petitioner disclosed to the head coach his criminal background before coaching for the team. T-82.

Obviously, Petitioner's path to rehabilitation has not been without some backwards steps. He clearly made a mistake with NCNB. He has acknowledged his wrongdoing to his friends and he disclosed it to the Bar. He regrets it; he can do no more about

it. The Referee put it best when he said:

> Thus, the critical question is: "Which one is the real Michael Jahn -- the one who kicked cocaine or the one who lied to NCNB?" In view of the totality of the evidence, I opt for the one who kicked cocaine. RR-5.

Nobody from NCNB filed anything in opposition to Petitioner's reinstatement.

Petitioner's bankruptcy does not show a lack of integrity. He filed because he could not afford to defend himself against three simultaneous lawsuits. He settled one of the suits for a minor sum ($1,500) and the other two were dismissed.

Petitioner submits to this Court that he has never forcibly injected anyone with cocaine. The only two individuals who have ever testified that he did so were found to be unworthy of belief. Jahn, supra, p. 286.

This Court should also note that none of the three women that sued Petitioner, nor their lawyers, despite being contacted by the Bar's investigator, T-100, testified against his reinstatement.

The Bar argues against Petitioner's reinstatement almost exclusively because of the NCNB incident. His conduct was reprehensible, true. However, it was not so egregious that it indicates a basic character flaw, a lack of integrity, or an inability to practice again.

The Referee specifically considered the Bar's arguments relative NCNB and rejected them.

The Referee's decision is eminently correct. The NCNB episode occurred during a one-week period in a five-year journey

towards rehabilitation. It occurred almost two years ago and is the only blemish on Petitioner's record since his conviction. Even had Petitioner been disciplined for his misrepresentation to NCNB, it is likely that the discipline to be imposed would have been for less time than the Bar's appeal of his reinstatement will take. In other words, Petitioner will be suspended for longer than he would have been had the Bar brought a separate disciplinary proceeding.

The Bar argues that this Court's decision in the The Florida Bar. Re: Alfieri, 529 So.2d 1116 (Fla. 1988) supports their position that Petitioner should not be reinstated. The facts in Alfieri are far worse than the case at Bar.

Mr. Alfieri was allowed to resign from The Florida Bar in lieu of discipline in 1983. His offenses, all criminal, involved conspiracy to evade and conceal true and correct taxable income, currency transaction reports and a general pattern of illegal activity.

Three years after his resignation, Petitioner sought reinstatement. Subsequent to his petition, it was learned that he had failed to advise the New York Bar of his criminal convictions and his discipline by Florida. It was required by the pertinent New York rules that their Bar be notified of his offenses. Subsequently, he was disbarred in New York, not only for his criminal conduct, but for his failure to report.

This Court denied Alfieri reinstatement. Unlike Petitioner's misrepresentation to NCNB, Alfieri directly violated

an ethical precept of the New York Bar and in a pattern continuing for over three years failed to report felony convictions and his resignation in Florida. For that, he was refused reinstatement.

Michael Jahn's goal was merely to get his foot in the door and to show that he could be a good employee. As was observed by the Referee, his background would obviously be brought to NCNB's attention when he petitioned for reinstatement. At the time of his application to NCNB, Petitioner was but six months away from his petition for reinstatement date.

The Bar alludes to The Florida Bar v. Doyle, 241 So.2d 689 (Fla. 1970), The Florida Bar. Petition of Pahules, 382 So.2d 650 (Fla. 1980), and Petition of Wolf, 257 So.2d 547 (Fla. 1972) as support for their argument that reinstatement should be denied. However, in each one of those three cases, unlike the case at hand, the Referee found that the Petitioner had failed to prove rehabilitation. In each case, the Referee's decision was upheld.

Unlike the three cases cited above, the Referee in the case at Bar found that Petitioner had met his burden of proving rehabilitation and recommended reinstatement.

The Bar's reference to In Re: Stoller, 36 So.2d 443 (Fla. 1948) is correct. Petitioner acknowledges that the practice of law is a privilege and not a right. However, as did Mr. Stoller, Petitioner has proved his worth to be readmitted to practice. He has earned the right to be given a second chance at the privilege of practicing.

This Court has never demanded perfection of suspended lawyers. In numerous instances it has, as did the Referee in this case, acknowledged that the totality of the evidence shows rehabilitation even when there are some negative factors presented to the Court. For example, in The Florida Bar. Re: Whitlock, 511 So.2d 524 (Fla. 1987), this Court reversed a Referee's denial of reinstatement. The Referee had found Mr. Whitlock had failed to meet his burden of showing rehabilitation because he had debts totalling in excess of $300,000. They included arrearages in child support and failure to make restitution to individuals harmed by his misconduct. The Referee held against the Petitioner his failure to reduce any of the debts while suspended. This Court reinstated Mr. Whitlock despite his financial shortcomings. Although the Court did order that arrangements be made to pay the arrearages and the clients' losses, it found that the failure to reduce indebtedness while suspended did not prevent reinstatement.

In the 1985 decision of The Florida Bar. Re: Inglis, 471 So.2d 38 (Fla. 1985), this Court reversed a Referee's denial of reinstatement. The Petitioner, while suspended, bought out two partners' interest in a joint venture for $29,000 and sold it immediately thereafter for $75,000. Mr. Inglis did not inform his partners of his contract to sell the property for some $46,000 more than he was buying it from them for.

Mr. Inglis' purchase and subsequent sale, while certainly raising ethical eyebrows, was not deemed to be such a flaw in his

character that it precluded reinstatement. Nor was Petitioner's conviction for culpable negl gence fifteen years prior to the reinstatement proceedings for shooting a three-year-old neighbor.

Finally, in The Florida Bar v. Raaano, 403 So.2d 401 (Fla. 1981), this Court reinstated the Petitioner despite the fact that

> during the early term of his suspension the Petitioner conducted his checking account privilege with several banks in less than a commendable fashion. Id, 406.

While Petitioner's checking account misconduct was not described in the opinion, the Court held that the misconduct did not preclude his reinstatement. However, the Court did note that

> Were these to be occurring on a continuing basis today or had they occurred without reasonable explanation in the recent past, the recommendation of the Referee might well be different from that reflected herein.
>
> ....
>
> It is noteworthy that Petitioner within a reasonable time recognized the errors of his thinking, took steps to repay the amounts owed and ceased such practices. Id, 406.

Petitioner's misrepresentation to NCNB was a one-time occurrence. It happened a long time ago, and wil not be repeated. Petitioner's mistake should not prec ude his reinstatement.

It is axiomatic that the Referee is in the best position to determine the truthfulness of a witness's testimony. This is equally true whether or not the witness is a party. Only the

Referee can observe the demeanor of the witness. Only he can see the emotion in the witness' testimony.

In the instant case, the Referee personally evaluated Petitioner. Only he can gauge Petitioner's truthfulness. Reading a transcript does not convey the depth of sincerity in Petitioner's testimony. While certain portions of the transcript may convey a hint of Petitioner's emotion and sincerity (for example, on p. 62 of the transcript, it is quite obvious that the Petitioner has become overcome with emotion), only the Referee can really observe whether a petitioner is telling the truth or trying to deceive the Court. The experienced jurist acting as Referee in this case very forcefully and strongly found that Petitioner was sincere and should be reinstated.

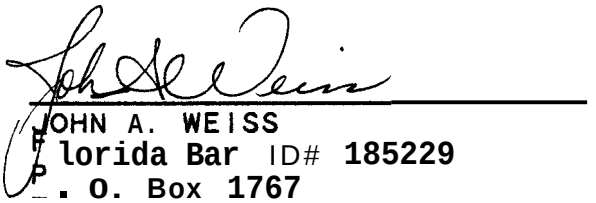
The real issue in these proceedings, as is true with all disciplinary proceedings, is this Court's obligation to protect the public from unethical practioners. Petitioner's past misconduct was attributable to a specific cause -- his addiction to cocaine. That facet of his life has been dealt with and will never reappear. Petitioner will never be before this Court again. He deserves a second chance. The Referee's faith in him is proper and will never be belied.

CONCLUSION

Petitioner, by the overwhelming weight of the evidence, proved that he should be reinstated to practice. The Referee so found.

The Bar has failed to meet its burden of showing that the Referee's report is erroneous. His recommendations should be upheld in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Jan Wichrowski, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801, this 24th day of July, 1989.

JOHN A. WEISS
COUNSEL FOR PETITIONER