IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NUMBER 78,242

GEORGE H. CARSWELL, JR.,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent will use the nomenclature and abbreviations used by The Florida Bar in its Brief.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent acknowledges the accuracy of The Florida Bar's statement of the case and of the facts. However, testimony was elicited at final hearing relating to Respondent's character and in mitigation of discipline that Respondent believes should be set forth at this point in the brief. Accordingly, Respondent supplements the Bar's statement of facts.

At final hearing Respondent presented the testimony of nine witnesses who attested to his good character, his standing in the legal community and in his home town of Monticello, Florida and to the fact that his conduct on November 7, 1988 was completely out of character for him. Those witnesses included sitting Circuit Judges George Reynolds and Sanders Sauls; retired Circuit Judge Kenneth Cooksey; Jefferson County Sheriff Ken Fortune; Second Judicial Circuit State Attorney Willie Meggs; the publisher of the local newspaper, Ron Cichon; Clerk of County Court Eleanor Hawkins; Cliff Davis, a local practitioner; and Steven Dukes, a retired customs agent and a former client of Respondent's.

The first of the witnesses to testify on Respondent's behalf was Circuit Judge George Reynolds. Judge Reynolds has been on the bench for almost eight years, the last three and one half years as a circuit judge. He has known Respondent for 33 or 34 years, having met him as a seven year old boy.

Respondent has appeared before Judge Reynolds probably a dozen times and has always been a well-prepared and able advocate. Respondent has a very good reputation with the judges of the Second

Judicial Circuit. Judge Reynolds observed that

> I have always trusted George and I have always found in his presentation to the Court that he has been very straight forward and honest with the Court. TR 11.

Judge Reynolds believes that Respondent is very honest and he is confident that Respondent's misconduct will not occur again. The Judge observed that Respondent's conduct on November 7, 1988 is just not consistent with the way Respondent has conducted himself in the 30 years that Judge Reynolds has known him. TR 15,16.

Judge Sanders Sauls, a Circuit Judge since 1989 and a bankruptcy judge for ten years before that, has known Respondent ten or fifteen years. Judge Sauls acknowledged that Respondent has always represented his clients well and he is a competent lawyer and a good advocate. Respondent cares for his clients and articulates himself well. TR 19,20.

Judge Sauls, who was raised in Respondent's community of Monticello (in fact, Judge Sauls' mother was clerk of court there for twenty-four years) pointed out that Respondent was highly regarded and has a good reputation for truth and honesty. TR 20,21. Judge Sauls testified that Respondent's conduct was "a bad lapse or a serious mistake in judgment" and observed that it's "totally out of character" for Respondent. TR 22.

Judge Sauls ended up his testimony with the following statement to the referee

> I would just urge the Court to take into consideration the totality of all of the circumstances, and respectfully urge due consideration of leniency in any disposition if the Court finds reprimand or other

> disposition is required. I just genuinely feel that this was a isolated one time, aberration really in George's otherwise exemplary conduct of his life. TR 23.

Kenneth Wayne Fortune, the Sheriff of Jefferson County, Respondent's county of residence, also testified on Respondent's behalf. Sheriff Fortune has been the sheriff of Jefferson County since April 16, 1984. Prior to that, he was with the Florida Highway Patrol for approximately fourteen years. TR 25.

Sheriff Fortune observed that Respondent is a "solid citizen of the county" and that he has a good reputation with the deputies in the department for honesty and for being straightforward. TR 25,26.

When asked if his opinion of Respondent's sense of ethics and morality changed as a result of Respondent's nolo plea to the misdemeanor of witness tampering, Sheriff Fortune replied

> No, I've been in the business too long. I mean, I think he made a mistake, but a lot of people do, but you know, you can't beat somebody in the head forever over a mistake. TR 27.

Monticello lawyer Cliff Davis, who was admitted to the Bar in December 1970, also attested to Respondent's good-standing in Monticello. Mr. Davis, who was a prosecutor for either the State Attorney or the U.S. attorney for five years, has known Respondent since 1973. Mr. Davis attested to Respondent's good reputation for legal ability and his belief that Respondent is a person of good moral character. TR 32. Mr. Davis holds Respondent in high esteem notwithstanding the witness tampering plea. He would not feel awkward appearing as co-counsel with Respondent in Leon or

Jefferson county and he has no qualms about referring clientele to Respondent. TR 32,34.

Willie Meggs, the State Attorney for the Second Judicial Circuit, which includes Jefferson County, also traveled to Pensacola to testify before the referee on Respondent's behalf. Mr. Meggs was in law enforcement from 1965 until he started law school in 1973. Since he was admitted to The Florida Bar in 1976, he has always worked as either an Assistant State Attorney or the State Attorney for the Second Judicial Circuit.

Mr. Meggs testified that he has always had a good working relationship with Respondent. Respondent was always straightforward with Mr. Meggs. The different assistant state attorneys that have worked in Jefferson County over the years have all enjoyed a good working relationship with Respondent. TR 41. In addition to having a fine reputation in the legal community, State Attorney Meggs pointed out that Respondent is highly regarded both as a lawyer and as a citizen in his community. TR 41.

When asked if Mr. Meggs' opinion of Respondent's integrity and moral character was diminished as a result of his plea, Mr. Meggs observed

> No, sir. That's troublesome but, you know, the politics in a small county gets somewhat out of control sometimes. And the heat of the situation, I think, probably contributed more to it than George being a bad person who was trying to do something wrong. I don't sense that in my contact with George. TR 43.

When asked if he still trusted Respondent, State Attorney Meggs answered

> Yes, sir, I would. My experience with George was -- my personal experience with him was a positive experience. My information that I obtained from members of the office has been positive. TR 44.

Retired Judge Kenneth Cooksey also testified on Respondent's behalf. Judge Cooksey, who retired after 38 years from the bench on December 31, 1988, has known Respondent between 20 and 25 years. TR 46. Judge Cooksey observed that Respondent was a lawyer of integrity and honesty. TR 47. Respondent has a good reputation in Monticello. TR 48.

Judge Cooksey observed that Respondent's conduct during his election was inconsistent with the George Carswell that the judge has known over the years. Notwithstanding Respondent's plea, Judge Cooksey continues to trust Respondent and to take him at his word. TR 49,50.

During cross examination, Judge Cooksey was asked if Respondent's conduct was something that could be excused by being in the heat of a political race. Judge Cooksey replied

> Mr. Watson, it is hard for somebody that's never been in a heated political campaign, it is really a war between George and Judge Johnston -- to appreciate the kind of battle you get in that sort of situation. I think in that situation and I'm, as I say, I've been in a -- I'm not going to say the situation that he's been in, but I have been in a couple of pretty good political campaigns. I think opponents are subject to saying things that in the heat of battle they wouldn't otherwise say. That's not necessarily to say that, you know they should have said them at the time, but I think it's done. TR 52.

As was true with the other witnesses, Judge Cooksey opined that Respondent's conduct was "an isolated incident,...." TR 52.

Steven Dukes, a friend, fellow Mason and former client of Respondent's also testified on his behalf. Mr. Dukes recently retired from the United States Customs Service after twenty years service. He has lived in Monticello approximately five years and has known Respondent throughout that time period. TR 53,54.

Mr. Dukes attested to Respondent's fine reputation in the community and to his charitable services to the citizens of Monticello and Jefferson county. Among the activities that Mr. Dukes alluded to were Respondent's cooking at fund raisers, free legal services, donations to the poor and his sponsorship of unfortunate children in the Jefferson County Watermelon Festival. TR 57,58.

Mr. Dukes pointed out that Respondent has been a credit to the legal profession in Monticello. TR 58.

Mr. Dukes noted that Respondent's judicial campaign with Judge Johnston was very heated and very close. TR 58.

Notwithstanding Mr. Dukes' twenty year career in law enforcement, his opinion of Respondent's integrity was not diminished by the witness tampering charges. Mr. Dukes observed that everybody makes mistakes in life and that Respondent's conduct was inconsistent with Mr. Dukes' personal experiences with him. TR 59.

Mr. Dukes also pointed out to the referee that Respondent has a policy of representing grandparents seeking custody and adoptive parents in adoption proceedings for no fee. He observed that "George doesn't believe in charging for young kids, which I think

is outstanding". TR 56.

The Clerk of Circuit Court of Jefferson County, Eleanor Hawkins, who has served in that capacity for twenty-four years, attested to Respondent's excellent reputation in Monticello and Jefferson County. Ms. Hawkins, who has known Respondent for twenty years, pointed out he has a fine reputation in the community as to legal ability. Both the lawyers and the judges in Monticello hold him in high esteem. TR 62,63.

Ms. Hawkins testified that she would have no reluctance to refer family or friends to Respondent for legal services not withstanding his plea. Finally, she observed that he still has the trust of his community. TR 64,65.

The voice of the Monticello community, Ron Cichon, also testified on Respondent's behalf. Mr. Cichon is the publisher of the Monticello News and is an ordained Methodist minister. He has lived in and published the News in Monticello for over sixteen years and, as such, believes that he has a feel for the pulse of the community in both legal and nonlegal matters. TR 66. The News is the only local newspaper in Jefferson County and is published on Wednesdays and Fridays. TR 66.

Mr. Cichon attested to George's excellent reputation in the community as both a lawyer and as a citizen who works for the betterment of the community. Mr. Cichon and Respondent have worked together on community projects to feed hungry people and to help the needy in the county. TR 66. Mr. Cichon pointed out, when asked about Respondent's reputation in general, that

> It's very good. George is a very kind, giving, caring man who has helped many, many people in our community. I'm almost embarrassed to say all of this in front of him because I don't want to give him a swelled head, but he is very helpful and does many, many good things for the people in the community. From giving needy people a place to live in his apartment complexes or mobile homes to -- I can remember him giving me a check out of his pocket to help someone -- he didn't even know where the money was going. And working in our Rotary Club which is involved in a number of good projects. So I have seen all of this close up. TR 69.

Mr. Cichon also attested to the occasions when Respondent has waived rent for the needy and to his donating a free apartment to use in Mr. Cichon's ministry. TR 69. Mr. Cichon also noted that people have reported to them that George helped them with their legal problems for free. TR 70.

Mr. Cichon covered the judicial campaign of 1988. He observed that it was very hotly contested and that in the middle of the campaign the Florida Department of Law Enforcement (FDLE) started an investigation into campaign practices. As Mr. Cichon testified, "agents were everywhere". TR 71. Ultimately, Mr. Cichon ran a front page story on Respondent's plea to witness tampering as a result of the campaign. TR 72.

Notwithstanding the publicity, Mr. Cichon pointed out that Respondent's plea did not adversely affect his reputation in the community. In fact, Respondent is still held in high esteem by the citizens of Jefferson County. TR 72.

Most significantly, Mr. Cichon pointed out that Respondent's mistake on November 7, 1988 did not overshadow the general

excellent tenor of Respondent's campaign. As Mr. Cichon stated

> And, you know, it ought to be noted many very good decisions were made by the Carswell campaign and I thought he and his family conducted themselves in a very, very responsible fashion in a very, very difficult time in a small community like we live in. You know, families get divided over candidates and colleagues are divided over candidates. And it's a very tense, personal kind of campaign. It's very difficult to keep a sense of equilibrium in that kind of atmosphere and I think George and his wife of twenty years, Lynn, did an exceedingly good job. So many good things were done in that campaign. TR 73.

When asked if the people of Monticello have put Respondent's witness tampering episode in the past, Mr. Cichon answered

> Yes. This is not a character flaw, this was a mistake. This was a misjudgment in a very tense time of an exhausted candidate. This is not a character flaw as I see it. And I think the great majority of people in our community, even those who were for his opponent, realized that, so there has not been a big hew (sic) and cry about this complaint or his pleading guilty to a misdemeanor. It was unfortunate. It was an error in judgment by a candidate that had been going day and night for months in a very tense, exhausting situation and that's not a character flaw. TR 74.

Finally, Mr. Cichon testified to Respondent's personal acknowledgement of his regret for his conduct and, furthermore, to Respondent's public apology to the Rotary Club for his conduct. TR 77.

Respondent also testified on his behalf. At the outset of that testimony, he gave the referee some of his background. That included the fact that he is 43 years old, has lived in Monticello for over twenty years, having moved there to marry his wife of twenty years, the former Lynn Boland. Lynn and Respondent have one

daughter, Betty Lynn, a thirteen year old. TR 80. Respondent's father was George Harold Carswell, who retired from the federal bench in 1970 after having been a district judge for eleven years and a circuit judge for one year. Prior to becoming a federal judge, Judge Carswell was the United States Attorney for the Northern District of Florida for five years. TR 81.

Respondent was admitted to The Florida Bar in December 1982 and has always been a sole practitioner in Monticello. He has handled domestic work, real estate and some criminal work, including both felonies and misdemeanors. TR 81,82. Respondent has no prior disciplinary history. TR 88.

Respondent is one of twelve to fifteen lawyers in Jefferson County. TR 82.

Respondent advised the referee that he is very active in his community. When asked what organizations he is active in, Respondent replied

> A small town, you pretty well participate and you have to participate in a lot of different things. There's just not enough people to go around. I have coached little league and T-ball and worked with the recreation board. I've been a member of Kiwanis and later a member of Rotary. I am in the Masons. I am in the Shriners club.
>
> ...
>
> I attend the church my wife grew up in and have been active in that church in various capacities for twenty years. TR 83,84.

Respondent has participated in fund raisers for schools and has been active in raising $30,000 to $40,000 for the Jefferson County recreation department. TR 84.

Respondent's dedication to his community is also evident in the manner in which he handles the legal matters of the poor. There is no formal legal aid organization in Jefferson County. TR 85. Accordingly, Respondent testified that he takes many cases that he knows he will never get paid for. In fact, Respondent testified that a third of his practice is probably that way. TR 86.

Respondent confirmed Mr. Dukes' testimony that Respondent did not charge Mr. Dukes for securing custody of his grandchild. As Respondent put it

> No, I didn't. I have never charged -- I would charge a parent fighting with another parent, but a grandparent who has taken over or a third party who is not a parent of a child, I have never charged for helping them get custody if it was appropriate and they really needed to have custody of their granddaughter.
>
> ...
>
> To be honest with you, my father told me in his practice that the people that owned Mutt & Jeff's in Tallahassee adopted a child and he didn't charge for that and I just picked up on that. I just never thought it was appropriate. If somebody was going to take on that much responsibility, not the parent, I felt it was appropriate to not -- the Dukes have money to have paid it, but they took on a lot of responsibility taking their granddaughter and I didn't mind doing that. TR 87.

Respondent also acknowledged that he, as do other landlords, sometimes donates housing to the needy of the county. TR 88.

The accusations made against Respondent for witness tampering is the only time he has been accused of criminal misconduct. TR 88.

Respondent advised the referee of the circumstances surrounding his campaign against incumbent county judge Felix Johnston. Judge Johnston, a Jefferson county native with strong family ties in the area was running for reelection. Backing Respondent was the Boland family, another well known and well established family. In fact, Respondent's father-in-law has been on the school board in Jefferson County for over 30 years. Tr 90.

Respondent corroborated the testimony of other witnesses that the Johnston/Carswell judicial race was hotly contested. Feelings in the county ran very deep. TR 90,91.

There had initially been a primary involving Respondent, Judge Johnston and Chris Anderson, Respondent's secretary's son and the son of former county judge Anderson. Respondent led that primary by 66 votes and Chris Anderson, who was eliminated, had received 749. TR 94. The election between Respondent and Judge Johnston was to occur on November 8, 1988. TR 91.

In October, Respondent started getting reports that FDLE was investigating various campaign practices. The feedback that Respondent got gave him the impression that FDLE was only investigating Respondent's campaign and the tactics of his father-in-law Mr. Boland. Although no allegations came out of their suspicions, it appeared FDLE was investigating "vote-buying". TR 93. Respondent confronted one of the FDLE agents in the matter and was rebuffed in his attempt to give the agent information regarding possible improprieties by Judge Johnston's campaign workers. TR 93,94.

Respondent was worried that FDLE's one-sided investigation would cost him the election. His suspicions were justified. Respondent testified that he believed over 90% of the electorate in Jefferson County voted in the judicial campaign of 1988 and that he lost by 45 votes out of approximately 5,030 votes cast. TR 92.

It was in this atmosphere that on November 7, 1988, the day before the election, Respondent received a series of calls from Mike Matthews asking for Respondent to return his call. Within one half hour after returning Mr. Matthews' call, Respondent visited him at his mobile home. It was there that Respondent's conversation with Mr. Matthew was intercepted. Respondent acknowledged to the referee that during that meeting he told Mr. Matthews to lie to the FDLE if they contacted him. TR 101-103.

Respondent advised the referee that he had never done anything like that before. He had never counseled a client to lie and he had never lied to a court. TR 103,104.

When asked if Respondent had ever been under pressure like that before, he testified that

> I had never been in the seat. I had worked on other people's campaigns, but it's no comparison. And my opponent was under pressure, and I'd say he didn't tell anybody to lie to FDLE, so I'm not excusing it just from the campaign. I was wrong. It was a terrible mistake and I regret it. TR 106.

When asked if he thought the pressure may have been a contributing factor Respondent answered

> I have to think that. That has not been my lifestyle or nature. It's not been how I face a problem or how I deal with a problem or how I would want my child or a person on a team I

coached to deal with a problem. TR 107.

Respondent testified to the referee that, despite the fact that there was front page coverage on his plea and that the Monticello newspaper printed excerpts from his conversation with Mr. Matthews, he didn't lose any clients. He thinks he still has a good reputation in Monticello. TR 107.

Perhaps most importantly, Respondent testified that he gets along well with Judge Johnston. Judge Johnston has appointed him to cases since the election and, perhaps of paramount significance, when Respondent asked Judge Johnston if he still trusted Respondent, Judge Johnston replied in the affirmative. TR 107,108.

At the end of his direct testimony, when asked if he could promise the referee and through him the Supreme Court of Florida that such conduct would never be repeated, Respondent replied

> I can. I just never had anything close to that or even approaching that in my life up to that time and I haven't had it since. So I still don't understand -- I can't understand why it occurred.

Respondent's attitude towards his misconduct was elaborated upon during cross examination. When asked by Bar Counsel to describe his feelings about soliciting someone to lie, Respondent testified

> I think that's horrible. I can't believe I did it.
>
> ...
>
> I know who I am, Mr. Watson. I'm not the person that -- I'm the person that did that but I'm not that kind of person. That's not my -- that had not been my day to day life up to then. It has not been my day to day life

> since then, and it isn't going to be my life whether I'm a lawyer or a well driller; that's now how I do business. That's not how I operate my life. And that's not how I want my child to operate her life either. And that's what I'm most ashamed of. TR 117,118.

When asked by Bar Counsel if the pressure of the campaign excuses his conduct, Respondent unequivocally answered that there is no excuse for his misconduct. He stated that

> I don't feel that. No sir, I don't. I've tried to say it. If I have implied to you or the court that I think that that excuses that behavior, I repudiate that now; I don't think it excuses that behavior.... I am ashamed of it occurring when it did and it hasn't occurred since.
>
> I'll admit, that's the most pressure I've ever been under in my life.... TR 119,120.

In Section III of his report, the referee stated

> I am well satisfied that the violations complained of constitute a one time departure from what has otherwise been demonstrated to be a career of exemplary professional conduct. The Respondent appears to the undersigned to be a competent, trustworthy and ethical practitioner with a deep sense of commitment to the members of his community. It is further the undersigned's belief that although a period of suspension is appropriate, proof of rehabilitation should not be required as a condition to reinstatement.

The referee then recommended that Respondent be suspended from practice for 90 days with automatic reinstatement.

In Section IV of his report, after noting that Respondent had no prior disciplinary convictions, the referee found the following significant mitigating circumstances: (1) full and free disclosure to the Bar and a cooperative and remorseful attitude during the proceedings; (2) Respondent's reputation for honesty, integrity and

fair dealing and the fact that his good reputation remains uncompromised despite common knowledge of his misconduct; (3) the testimony of Respondent's professional community that, notwithstanding his misconduct, they have "unflagging confidence in his professional ability and integrity". RR 3.

Finally, the referee noted that

> It is the undersigned's belief that any aggravating circumstances which may exist are far outweighed by the elements of mitigation referred to above.

SUMMARY OF ARGUMENT

The referee's recommendation that Respondent be suspended from the practice of law for 90 days is afforded a presumption of correctness and should be upheld unless clearly erroneous or not supported by the evidence. In fact, the evidence before the referee shows beyond question that a suspension not requiring proof of rehabilitation is the appropriate discipline for this case.

Respondent's misconduct was an isolated incident that occurred the day before the election in a hotly judicial race. Respondent was under incredible pressure and was exhausted. His conduct was completely out of character and was an aberration in an otherwise exemplary career.

Respondent's character witnesses, including two sitting and one retired circuit judge, the sheriff of his county, the state attorney for his judicial circuit, the editor of his newspaper, the clerk of court, a local lawyer and a former client, all attested to Respondent's excellent reputation for honesty in the community. They all testified that he is still held in high regard by his community and that all believe that his conduct was completely out of character and a one-time incident.

The witnesses also testified that Respondent has been a pillar in his community. He has donated free legal services to the citizens of the county, has provided free housing for the needy of Jefferson County and has actively participated in numerous community organizations in an attempt to raise money for charitable causes.

The mitigating factors, when coupled with Respondent's remorse, cooperation with the Bar and his prior clean record, all point towards a short-term suspension.

There are numerous instances of lawyers engaging in conduct similar to Respondent's who have received suspensions of 90 days orless. The cases relied upon by the Bar involve conduct far more serious and, accordingly, those cases should be disregarded.

Because there is no showing that Respondent poses a future risk to the public, there is no need to make him prove rehabilitation before reinstatement from a suspension. The referee's recommendation is imminently correct.

ARGUMENT

THIS COURT SHOULD UPHOLD THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR 90 DAYS FOR HIS ONE-TIME SPONTANEOUS MISCONDUCT IN LIGHT OF THE NUMEROUS ELEMENTS OF MITIGATION AND THE REFEREE'S RECOMMENDATION THAT PROOF OF REHABILITATION NOT BE REQUIRED PRIOR TO REINSTATEMENT.

On November 7, 1988, the day before the election of an incredibly hotly contested race, Respondent made the most grievous mistake of his life. He counseled a prospective witness in a criminal investigation to lie. Respondent's misconduct is beyond dispute and he sincerely regrets his actions.

While Respondent acknowledges the propriety of discipline, he disputes the necessity of a suspension requiring proof of rehabilitation for his single act of misconduct; one that occurred almost four and one half years ago.

In DeBock v State, 512 So.2d 164 (Fla. 1987) at page 166 this Court noted that disciplinary proceedings "are designed for the protection of the public and the integrity of the courts." Representatives of both the public and the court appeared before the referee in these proceedings and expressed confidence in Respondent's integrity notwithstanding his misconduct. These representatives, including two sitting circuit judges and one retired judge, the state attorney, the sheriff, the clerk of court, and the editor of the local newspaper, basically stated that they do not feel that they need to be protected from George Carswell.

There can be no doubt that the representatives of the bench and the public that appeared before the referee agree

wholeheartedly with his observations that Respondent's conduct constituted "a one time departure from what has otherwise been demonstrated to be a career of exemplary professional conduct." (Judge Reynolds, TR 16; Judge Sauls, TR 23; Sheriff Fortune, TR 27; State Attorney Meggs, TR 43; retired customs agent Dukes, TR 59; and editor Cichon, TR 73,74.)

When the Court, in a case such as this, is faced with misconduct that is clearly a single instance in an otherwise exemplary career, the necessity of a severe sanction to protect the public is materially lessened. See, for example, The Florida Bar v Childers, 582 So.2d 617, 618 (Fla. 1991). There, a lawyer was suspended for only 90 days for misappropriating $950.00 from her firm because

> Her action in this instance [was] totally out of character and a one-time unexplainable aberration.

As was true with Ms. Childers, Respondent's conduct in the case at Bar was a one-time aberration. Unlike Ms. Childers, however, there is an explanation (not an excuse) for Respondent's conduct. He was at the end of an exhausting, incredibly heated political campaign that was as close as any race could be. In fact, it was decided by 45 votes out of about 5,030 votes cast. TR 92.

Respondent, to his credit, did not blame his misconduct on the pressure of the campaign. In fact, he specifically stated to the referee

> I'm not excusing it just from the campaign. I was wrong. It was a terrible mistake and I regret it. TR 106.

During cross examination, when asked if he felt the pressure of the campaign justified his actions, Respondent stated

> I think that's horrible. I can't believe I did it. TR 118.

Respondent went on to say, regarding the pressure of the campaign

> I don't think it excuses that behavior. I think it may explain and I'm not sure it explains it, because it doesn't necessarily to my satisfaction explain it, but I know I've never had that occur in my life before. TR 119.

When a lawyer of impeccable credentials, for the first time in his life, acts completely out of character and engages in misconduct, the reason for the misconduct is essential to the analysis of the sanction to be meted out. If the reason for the misconduct can be ascertained, the likelihood of it not being repeated is easier to predict. In the case at Bar, there is a reason, not an excuse, for Respondent's misconduct -- the exhaustion and pressure of the campaign. That situation is not likely to arise again and accordingly, there is no likelihood of the misconduct being repeated.

The atmosphere of the campaign must be comprehended to understand why Respondent acted so out of character. As Respondent described it,

> We operated a war zone for two months. I mean, I got caught up in it. TR 115.

Lest this Court think Respondent's testimony regarding the intensity of the campaign was self-serving, it only has to look at

the testimony of other witnesses to glean the intensity of the judicial campaign. Judge Reynolds, for example, observed

> I can tell you from my experience and just having been in a number of elections, I noticed the date was November 7 and that had to be very close to the election day, you get very emotional. It is very -- it's the most civilized form of warfare that there probably is and I can understand that after having read all of that, how a person might panic and do something that's very dumb and do something that's against all of what lawyers should do and that is to advise somebody not to tell the truth and that is highly out of character for George, and I have never seen any other evidence or known of any other instance where he has conducted himself in such a fashion. TR 14.

State Attorney Willie Meggs alluded to the nature of the campaign when asked if Mr. Carswell's plea to witness tampering diminished his opinion of Mr. Carswell's integrity or moral character. He responded

> No sir. That's troublesome, but you know, the politics in a small county gets somewhat out of control sometimes. And the heat of the situation, I think, probably contributed more to it than George being a bad person who was trying to do something wrong. TR 43.

Retired Judge Cooksey continued the analogy to warfare when he testified. In response to cross examination by Bar Counsel, Judge Cooksey said

> Mr. Watson, it is hard for somebody that's never been in a heated political campaign, it is really a war between George and Judge Johnston -- to appreciate the kind of battle you get in that sort of situation. I think in that situation and I'm, as I say, I've been in a -- I'm not going to say the situation that he's been in, but I have been in a couple of pretty good political campaigns. I think opponents are subject to saying things that in

> the heat of battle they wouldn't otherwise say. That's not necessarily to say that, you know they should have said them at the time, but I think it's done. TR 52.

Editor Cichon that the Carswell/Johnston judicial campaign was very hotly contested. TR 70. However, he also pointed out that the Carswell candidacy ran a very good campaign despite its being "very tense, personal...." TR 73.

If the subject of disciplinary proceedings has the trust of the bench and the public, and Respondent surely does, and if all concerned, including the referee, believe that Respondent's misconduct was a one-time occurrence that is not likely to be repeated, there is no necessity to impose a discipline requiring proof of rehabilitation before reinstatement. In other words, a suspension of 90 days or less is appropriate. That is precisely what the referee recommended.

The three purposes of discipline were set forth in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970) at page 132. There, the Court stated that

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

In addition to the Pahules criteria, this Court must bear in mind its pronouncements in DeBock v State, supra, that the purpose of discipline is not punitive but is remedial. DeBock, supra, p. 166.

Respondent submits that the 90 suspension recommended by the referee is the appropriate remedial discipline for his misconduct. Any suspension longer than that, i.e., one requiring proof of rehabilitation, stresses the punitive aspect of discipline in completely disregard of the protection of the public aspect of Pahules.

The Childers case, cited above, is an example of an appropriate sanction for an isolated act of misconduct. Ms. Childers misappropriated $950.00 belonging to a law firm. She acted, basically, on impulse. So did the Respondent. As is true in the case at Bar, the referee had recommended a suspension of 90 days and the Bar appealed the referee's recommendation.

A referee's recommended discipline, while subject to a scope of review broader than that afforded to his findings of fact, is still cloaked with a presumption of correctness. It will not be overturned unless his recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v Poplack, 599 So.2d 116, 118 (Fla. 1992).

The Poplack decision, cited above, is a perfect example of a limited, though stern, sanction for an isolated event. Mr. Poplack in May 1989, lied to a police officer during an investigation involving a possible car theft. Mr. Poplack told the police

officer that the car in question belonged to a friend. Later, after being arrested, Mr. Poplack changed his story and indicated that he was pulling a practical joke on a friend. (Ultimately it was adduced that the owner of the car did not even know Mr. Poplack or the other individual charged with the theft).

At final hearing, numerous witnesses portrayed Mr. Poplack as

> An honest, hard-working young man who had suffered from the dissolution of his marriage. The witnesses held the general view that Poplack had overcome the adverse emotional effects of his marital dissolution. Id. 117.

Interestingly enough, Mr. Poplack did not testify at his final hearing and he did not personally express any remorse about his actions.

Notwithstanding the fact that Mr. Poplack lied to a police officer on two separate occasions, and that he may have been involved in an attempted car theft, this Court affirmed the referee's recommendation that he be suspended from the practice of law for 30 days. The Court also ordered eighteen months probation during which time Mr. Poplack should receive psychological counseling.

Ms. Childers and Mr. Poplack and the Respondent at Bar have all engaged in a single act of misconduct totally out of character. The former two lawyers received suspensions of 90 days and 30 days respectively and the referee in the case at Bar has recommended a 90 day suspension. His recommendation is entirely in line with past precedent, is not clearly erroneous and is certainly supported by substantial evidence. It should be upheld.

Other cases analogous to the case at Bar show that the referee's recommendation is sound. For example, in The Florida Bar v Simons, 391 So.2d 684 (Fla. 1980) a lawyer was suspended for three months for recommendeding to four people that they lie under oath during an investigation and for himself submitting an affidavit that was misleading. In The Florida Bar v Oxner, 431 So.2d 983 (Fla. 1983) a lawyer was given a 60 day suspension for lying to a trial judge in order to obtain a continuance. Another case involving a lack of candor was The Florida Bar v Rose, 607 So.2d 394 (Fla. 1992) in which a lawyer received a 30 day suspension for forging his ex-wife's name on stock certificates and on $77,000.00 worth of checks in contravention of court orders. Finally, Walter Bell received a public reprimand for falsely acknowledging and witnessing a deed and two other documents. The Florida Bar v Bell, 493 So.2d 457 (Fla. 1986).

The foregoing cases all involve lawyers who engaged in isolated incidents of misconduct involving dishonesty ormisrepresentation and who received suspensions of 90 days or less. None of these lawyers had to prove rehabilitation before reinstatement.

The Bar, in seeking a one year suspension would have this Court discipline Respondent far more harshly than sanctions imposed on other lawyers for engaging in more serious misconduct. For example, in The Florida Bar v Kirtz, 445 So.2d 576 (Fla. 1984) the lawyer received a four month suspension for charging and collecting a clearly excessive fee, for neglect, and for suggesting to a

client in a worker's compensation case that the client go out and deliberately strain his back so as to exaggerate his injury. In The Florida Bar v Shupack, 523 So.2d 1139 (Fla. 1988), a lawyer received but a 91 day suspension for fraudulently recording a purchaser's mortgage before the seller's mortgage. Despite the fact that he defrauded the seller and falsified documentary stamps, Mr. Shupack received far less than the one year suspension that The Florida Bar is seeking in the instant case.

In The Florida Bar v Colclough, 561 So.2d 1147 (Fla. 1990) the respondent lawyer received a six month suspension for making numerous misrepresentations during litigation to a judge and to adverse counsel. Specifically, Mr. Colclough lied when he hold adverse counsel and a judge that a hearing on costs to be awarded to him had already been held and that a judgment had already been entered. Mr. Colclough's case differs from Respondent's in that his conduct was not a spur of the moment act but was one that was planned and executed over a period of time.

Finally, The Florida Bar would have Respondent in the case at Bar suspended for the same length of time as the suspension imposed in The Florida Bar v Broida, 574 So.2d 83 (Fla. 1991). There, Ms. Broida was suspended for a course of conduct involving numerous instances of misrepresenting facts to the Court, engaging in exparte communications with judges for filing frivolous claims and for personally attacking the integrity of the lawyers against her and the judges before whom she appeared. Ms. Broida's conduct is far, far worse than that before the Court. Yet, The Florida Bar

would have Respondent suspended for the same amount of time as was Ms. Broida.

The cases cited by The Florida Bar in support of the discipline it is recommending are easily distinguished. For example, in Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960) the lawyer was disbarred for urging several persons, including clients, to lie during two different personal injury actions. Similarly, in The Florida Bar v Agar, 394 So.2d 405 (Fla. 1980) the accused lawyer knowingly perpetrated a fraud upon the Court by allowing a client to testify falsely. Ultimately, Mr. Agar pled nolo to the misdemeanor offense of solicitation to commit perjury. (As to Mr. Agar, while it is true that the aforementioned discipline was his first brush with The Florida Bar, he had substantial problems being admitted to The Florida Bar. In re The Florida Board of Bar Examiners v Agar, 283 So.2d 361 (Fla. 1973). There, the Supreme Court temporarily denied Mr. Agar's admission until such time as he complied with the rules regulating his admission to practice.)

In The Florida Bar v Lancaster, 448 So.2d 1019 (Fla. 1984), a lawyer was suspended for two years for numerous acts of misconduct. Among them were his nolo pleas to the misdemeanors of altering identification on a boat, his improperly trying to influence a witness not to appear at his trial, his lying to law enforcement authorities and his lack of candor before the court. Mr. Lancaster engaged in a long-standing course of conduct with repeated instances of deception. His misconduct is so far removed from the misconduct before the Court in the instant case that it

is of no persuasive force whatsoever.

Although the Bar correctly points out that Bernt Meyer was allowed to resign after a conviction of witness tampering and conspiracy to commit witness tampering, The Florida Bar v Meyer, 529 So.2d 1098 (Fla. 1988), it must be pointed that Mr. Meyer had a long history of disciplinary problems with The Florida Bar. In 1967 Respondent received a 30 days suspension after his conviction for making a false statement to a governmental agency. The Florida Bar v Meyer, 194 So.2d 255 (Fla. 1967). In 1985, he received a 17 month suspension, to run concurrently with his automatic three year felony suspension for failing to candidly advise The Florida Bar of a prior felony conviction at the time he sought reinstatement for a dues delinquency. The Florida Bar v Meyer, 472 So.2d 461 (Fla. 1985). It is no wonder, in light of his prior disciplinary history, that Mr. Meyer chose to resign from The Florida Bar rather than awaiting the outcome of disciplinary proceedings. More importantly, however, is the fact that Mr. Meyer neither had a one-time isolated incident of misconduct nor was he possessed of a clean disciplinary history.

The Bar urges this Court to suspend Respondent for the same amount of time that the lawyers were suspended for in The Florida Bar v Rood, 569 So.2d 750 (Fla. 1990) and in The Florida Bar v Lopez, 406 So.2d 1100 (Fla. 1982). Neither Mr. Rood nor Mr. Lopez was guilty of a spontaneous, isolated instance of misconduct. Mr. Rood participated in an extended course of conduct involving falsifying an expert's memorandum and causing his client to sign

false answers under oath. He did so for a monetary gain. On page 752 of the Court's opinion, it is pointed out that there were five fraudulent acts committed by Mr. Rood over a long period of time.

In Lopez, the lawyer was suspended for one year after urging numerous witnesses and or parties to lie under oath. Once again, a course of conduct was involved.

In Section IV of his report, the referee listed the mitigating circumstances involved in the case at Bar. In so doing, he specifically referred to the Standards For Imposing Lawyer Sanctions and alluded to the mitigating factors listed in Standard 9.32. Among those factors are: (a) an absence of a prior disciplinary record; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (g) Respondent's good character and sterling reputation in the community; and (l) Respondent's remorseful attitude.

The referee could have, but did not, observe that in the four and one half years since Respondent's misconduct, he has rehabilitated his good name. Standard 9.32(j) specifically allows interim rehabilitation to be a mitigating factor.

The referee obviously focused on the testimony of the character witnesses before him in determining the sanction to be imposed. The referee specifically observed on page 2 that

> Respondent's reputation for honesty, integrity and fair dealing in his community remains uncompromised notwithstanding common knowledge of the events which gave rise to these proceedings.

Respondent's reputation remains untarnished despite the fact that the local paper published on the front page of one if its editions Respondent's plea and excerpts from the intercepted conversation he had with Mike Matthews.

Perhaps part of the reason that Respondent is still trusted is his past dedication to his community.

Retired customs agent Dukes testified about Respondent's willingness to represent individuals for free, his working for fund raisers and his sponsorship of children in the watermelon festival. TR 56,58. Mr. Dukes testified that he thought Respondent was a credit to the legal profession in Monticello.

Editor Cichon elaborated on Respondent's good works in the community. He alluded to Respondent's working on projects to feed the hungry, TR 66, to his giving needy people free housing and to donating money to Mr. Cichon to help the needy without question and to offering a free apartment to assist in a ministry. TR 69. Mr. Cichon also testified that various individuals in the community have advised him that Respondent represented them for free. TR 70.

Respondent testified, without contradiction, to his personal policy of representing the needy in Jefferson County for free. He testified that approximately one third of his practice is the representation of the needy without requiring a fee from them. TR 85,86. He also attested to his policy, inherited from his father, of representing individuals in adoptions and grandparents seeking custody for free even if they have the wherewithal to pay for it. TR 87.

Respondent's continued good standing with this community, despite his plea, is obviously the well-deserved result of his attitude of working for his community. As Respondent testified when asked what organizations he participates in, he answered

> A small town, you pretty well participate and you have to participate in a lot of things. There is just not enough people to go around. I've coached little league and T-ball and worked with the recreation board. I've been a member of Kiwanis and later a member of Rotary. I'm in the Masons. I'm in the Shriners Club. TR 84.

Respondent went on to testify that he has been active in his church for 20 years, that he participates in fund raisers for schools and that he has been a member of an organization that has raised $30,000.00 to $40,000.00 for the Jefferson County Recreation Department. TR 84. Respondent also testified to his policy of donating free housing to the needy.

> I have done that before [donated housing to the needy]. It's different in a small town as opposed to a big place, there's a different need. We don't have the agencies that are always funded in a small county to handle situations and I'm not the only person that does that; there are other landlords there that do the same. TR 88.

Respondent's good deeds for his community obviously affected the referee's deliberations on Respondent's case. But, more importantly, the referee was impressed by the witnesses' continued trust in Respondent. On page 3 of his report, the referee observed

> Members of the Respondent's professional community including the Clerk of Court, Sheriff, State Attorney and members of the Bench (both active and retired) uniformly express a high degree of confidence in Mr. Carswell and, notwithstanding the events which

> gave rise to this complaint, still express unflagging confidence in his professional ability and integrity.

The testimony justifies the referee's finding. Judge Reynolds testified that he still trusts Respondent today and that Respondent's misconduct will not occur again. TR 11, 14. Judge Sauls testified that Respondent is highly regarded and that he holds Respondent in high regards himself. TR 20. Judge Sauls still, notwithstanding his plea, "absolutely" believes Respondent is a man of his word. TR 23. In fact, Judge Sauls urged the referee to consider the totality of all of the circumstances contributing to Respondent's misconduct and to recommend a lenient discipline. TR 23.

Sheriff Fortune considers Respondent an honest person, as do his deputies, and that Respondent's plea has not changed his opinion of Respondent. TR 26,27.

Monticello lawyer Cliff Davis has no reservations about Respondent's integrity and believes he is a person of good moral character. He holds Respondent in high esteem notwithstanding the witness tampering charges. TR 32,33.

State Attorney Willie Meggs stated that Respondent enjoys a very good reputation in Monticello as well as with his assistants working in that county. TR 41. Notwithstanding Respondent's plea, the chief prosecutor for the Second Judicial Circuit continues to trust Respondent. TR 44.

Mr. Dukes testified that most of the people in Monticello knows about Mr. Carswell's investigation and that he still has a

high standing in that community. TR 60.

Clerk of Court Hawkins testified that both the lawyers and the judges in Monticello hold Respondent in high esteem and that he still has the trust of the community. TR 63,65.

Finally, Editor Cichon who sits on the "50 yard line" of community affairs, testified that Respondent is considered an honest lawyer, TR 66, that his plea did not adversely impact on his reputation and that he is still held in high esteem by the citizens of Jefferson County. TR 73.

The referee's finding that Respondent has expressed a remorseful attitude is also very justified. In addition to Mr. Cichon's testimony that Respondent has personally expressed his sorrow for his misconduct and that he stood before the entire Rotary Club while he was president of that organization and admitted his errors, TR 76, it is more important to look at Respondent's testimony to glean his attitude towards his misconduct.

Respondent has never equivocated in any way about his wrongdoing. He told the referee point blank that

> I was wrong. It was a terrible mistake and I regret it. TR 106.

During cross examination, he described his conduct as "horrible" and expressed his disbelief that it ever happened. TR 118. More importantly, he has never tried to use the pressure of the campaign as an excuse for his misconduct. TR 119.

While remorse is a very intangible factor, and hard to determine, there are numerous elements one can look at in

determining it. The first is a recognition of wrong-doing. Secondly, is an avoidance of any excuses for the wrong-doing. Both of those elements are present. Thirdly, is a failure to blame others for your misconduct. That is clearly evident in the case at Bar when Respondent talked about Mike Matthews, the person wearing the wire in 1988. Respondent testified that

> I have no ill feelings at all towards Mr. Matthews, he was not wrong, I was. TR 103.
>
> ...
>
> I don't harbor any bad feelings for him at all, I mean. TR 112.

A fourth element in determining remorse is a lack of self-pity. Clearly, Respondent qualifies in this regard. His testimony was completely devoid of any trace of feeling sorry for himself. To the contrary, Respondent was more concerned with the effect that his misconduct had on his family name and, perhaps even more significantly, his in-laws' reputation. Respondent specifically alluded to the Bolands' five generation history is Jefferson county as well as the effect on his wife and child in describing the impact of his conduct on him. TR 104,105.

Simply put, Respondent is a good person, who, on the spur of the moment after being exhausted in a hard-fought campaign, acted wrongfully. While a suspension is certainly warranted, requiring him to prove rehabilitation in reinstatement proceedings is simply unfair. It is undeniably punitive. The referee observed that he was

> Well satisfied that the violations complained of constitute a one-time departure from what

> has otherwise been demonstrated to be a career of exemplary professional conduct. The Respondent appears to the undersigned to be a competent, trustworthy and ethical practitioner with a deep sense of commitment to the members of his community. It is further the undersigned's belief that although a period of suspension is appropriate, proof of rehabilitation should not be required as a condition of reinstatement. RR 1,2.

The referee's recommendation that Respondent be suspended for 90 days, the longest suspension not requiring proof of rehabilitation, should be upheld.

CONCLUSION

This Court should reject The Florida Bar's appeal and should adopt the referee's findings of fact and his recommendation that Respondent be suspended from the practice of law for 90 days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed to James N. Watson, Jr., The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 16th day of March, 1993.

JOHN A. WEISS