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IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.:SC11-2311
TFB File No.: 2010-71,157(11G)

THE FLORIDA BAR,

Complainant,

v.

ANA I. GARDINER,

Respondent.

/

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent notes that the Florida Bar's Statement of the Case and of the Facts is incomplete but relatively accurate,[1] with the following exceptions: It fails to relate all of the evidence and testimony taken at the Final Hearing before the Referee, which will be added later under this Section; and there are several inaccuracies present in the Statement of the Case and of the Facts that will be discussed seriatim, to wit:

1) This matter was referred to the Fifteenth Judicial Circuit for appointment of a Referee, not the Eleventh, as indicated in the Bar's Initial Brief;

2) The Florida Bar's Statement of the Case, in many instances, intersperses argument, as opposed to facts, for instance, on page 3 of the Initial Brief, the Florida Bar opines that "this failure (to disclose the Timpano's and Blue Martini encounters, or phone calls exchanged over a weekend) when disclosure was required, left the defense with the misleading impression that there was nothing to disclose, and that there was nothing that could give rise to the appearance of impropriety in this case."

3) On page 4 of the Initial Brief, the Florida Bar suggests that Respondent "dissuaded" Scheinberg from taking any action regarding the Timpano's encounter and cites to page 513 of the Transcript. Nothing in that section suggests that Respondent "dissuaded" Scheinberg to do any such thing.

4) On page 4 of the Initial Brief, the Florida Bar suggests that they "helped each other" through the most traumatic events of their lives – death of family members, divorces, raising children as single parents. It should be noted that their divorces were already complete for years and that the Florida Bar's suggestion that Respondent "shut out people" except those who were "most close to her, including ASA Scheinberg" is belied by the very transcripts and exhibits referred to – that is, that Scheinberg was not a "close friend," but "a friend," which was discussed with and admitted to before the Judicial Qualifications Commission and at the hearing conducted before Judge Cox.

5) The Florida Bar continues to argue, at page 10, their theory as opposed to a Statement of the Case and Facts.

6) Additional facts were presented at the hearing which the Florida Bar fails to acknowledge in its Statement of the Case and Facts. The Florida Bar put on two witnesses in this matter: Michael Tenzer, the guilt phase attorney for Loureiro in both the trial (I) and re-trial (II); and Bruce Rogow, the "Special Prosecutor" hired by the State Attorney to review the Loureiro case after the publication of the multiple telephone and text contacts between Respondent and ASA Scheinberg during the Loureiro. Mr. Tenzer testified that he and Scheinberg were "friendly,"

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1 . Respondent adopts the Symbols and References as used by the Florida Bar in its Initial Brief.

but that he did not have a "social relationship" with him (TR 74-75). He did not know what the term "social" meant, although he agreed that there were times when he would "go out with" Mr. Scheinberg, watch football games, but did not have any "social relationship with him." (TR 75), the same question basically asked by Judge Wolfe of Ms. Gardiner concerning the Timpano's incident – concededly the sole area of inquiry by the JQC (R. Ex. 1) at the time of Respondent's testimony on November 13th, 2008. He further conceded that he had no knowledge of any of the contacts relating to the trial resulting in a denial by Judge Brown of his motion to secure those records (TR 81).

The Florida Bar then placed Bruce Rogow before the court as a witness. Mr. Rogow, further, was the individual hired by the State Attorney on this death penalty case who testified that he came to a conclusion that caused him to recommend to Mr. Satz that the matter should be vacated and set aside for a new trial (TR 90-92). On cross-examination, Mr. Rogow admitted that he had only handled two death penalty cases in his entire 40 year career: one was a plea at the trial level to a life sentence, and one was as a habeas corpus procedure – not a trial – where the Defendant was eventually executed (TR 92-93). He looked at less than one month's worth of records (TR 96), couldn't remember the records he even reviewed (TR 97), never interviewed either Respondent or Mr. Scheinberg (TR 98), researched not one single case (TR 99), did not know the substance of the contacts (TR 99), was in the case for a 30-day period (TR 100), never discussed the matter with any expert or anyone else (TR 99), never had any student or himself research the issue as to whether a "mere appearance of impropriety" was sufficient to vacate and set aside a conviction (TR 102), but concluded that because of that "appearance" arising from undisclosed and ongoing conversations, the case should be vacated (TR 101-102) – on an 11-1 jury verdict for death (TR 94). He made no determination as to whether or not there was a difference between an "appearance of impropriety" or an "actual" impropriety that should affect a verdict, with no authority, no case law, no similar facts, nothing other than his own opinion based on his "sense of how this would play." (TR 107). He then agreed with the Public Defender to set aside the verdict on the facts as set forth herein (TR 110).

7) The Respondent then put multiple witnesses on the stand for purposes of the findings of the court as to guilt and in mitigation.

a) Brian Cavanagh, the actual trial prosecutor in Loureiro II (TR 128). Mr. Cavanagh, besides being the Prosecutor in Loureiro II, had been with the State Attorney's Office since May 1978 (TR 129). Since 1988, he was in the homicide division of the State Attorney's Office and had, since 2005, been the Chief of that Division (TR 130). He tried over 100 homicide cases, only very few had resulted in death, and had reviewed Loureiro I because of the suggestion that he had possibly not received a fair trial - in the public venue (TR 131). He testified, "We

knew he had gotten a fair trial, no ifs, ands, or buts about it." (TR 131). He had appeared before Respondent "many times," and felt that she was "one of the finest trial judges we have ever been privileged to have in our county," knew her to have the "highest, most impeccable reputation as a judge and a lawyer," and "her word, if she said something, you knew it was golden. This was what it was." (TR 132-33). At the second trial, a new second chair lawyer, Mr. Rosenbaum, raised the issue of whether or not a previous conviction of the defendant from Nicaragua could be used as an aggravating circumstance (TR 134), and that Mr. Rosenbaum was "night and day, heads and shoulders, much more insightful, thorough, and zealous," than previous counsel (TR 135). He testified that an 11-1 death recommendation was "exceptionally rare" (TR 135). He eventually decided to leave out the Nicaraguan issue as an aggravator (TR 136). In addition, at the second trial, the children of the defendant testified and the penalty phase was conducted in a "night and day difference." (TR 138), so much so was the representation at the second trial more effective that Mr. Cavanagh, despite the 11-1 death verdict in the original trial, expected that the second trial verdict would not be death (TR 139).

He would believe Respondent "implicitly," would have no reason to disbelieve her, and if she advised him that she did not recall something or didn't think she should have said something, would believe her (TR 144). The red herring of the alleged conduct had nothing to do with, nor did it undermine, the integrity of the trial, and it was more a "perception, rather than actuality." (TR 146). He was "morally certain" there was no impropriety that affected that case (TR 147), and that the decision to vacate was an internal decision of the State Attorney, despite what he saw on the Record (TR 148).

b) Dr. Michael Brannon. Dr. Brannon is a forensic psychologist who has handled over 20,000 cases and been declared an expert in forensic psychology over 2,000 times (TR 152). He knows Respondent to have a reputation, from both sides of the bench, as "superb" (TR 158), always prepared, extremely efficient, knew the law, and worked her way through cases without unnecessary stalling (TR 159). There have never been questions raised as to her truthfulness, honesty, or integrity (TR 159). In October 2008, Dr. Brannon met with Respondent in the criminal division (this was one month before Respondent's testimony before the JQC) (TR 160; TFB Ex. 3). He knew of the "horrific comments" about Respondent on the local blog (TR 160). When he spoke to her, she seemed visibly upset and distressed, and it was different than she presented in the courtroom (TR 163). She had been crying a lot, dark circles under her eyes, her face was very puffy, slumped in her chair, lethargic without much energy, "almost in a shell," and not saying very much (TR 164). She was tearful throughout their entire conversation, could not stay on track, and was distraught (TR 165). She was despondent over the

situation and talked about her children – she talked about them being exposed to some horrific things being said about her on the local blog and around the courthouse (TR 165). These were all anonymous posts about her on a blog allowing them to say "the most awful things about other people but not have to take responsibility for what they said." (TR 166). He had never seen her in this condition, and so overwhelmingly upset that she was having trouble speaking about what was going on, and concerned about her children, as a single mom (TR 166). She discussed two deaths in her family that she was very upset about, and very close together – her grandmother and father (TR 167). She talked about having worked "very hard to be a judge," but had not recovered about the loss of these two family members (TR 167). She displayed signs of a deep depression, a major depressive disorder, clinically depressed, change in her weight, pessimistic, lethargic, irritable, tearful, despondent – all of the things you look for in depression were very clear (TR 168). On a scale of 1-10, 10 being the most severely depressed that he has seen in his practice, "she would be a 10." (TR 170). She talked about how "life was too much for her, and that if she didn't wake up, that would be okay with her" (TR 170). He opined that this type of level of depression, in October 2008, could have a "tremendous impact on someone's ability to think clearly." (TR 170). People just don't have the energy to think things through or think about what they are doing or saying, thus depression is not only an emotional disorder, but also has a large component of cognitive and behavioral contributions (TR 171). She was extremely highly impaired in her ability to organize her thoughts or weave consistency through her thinking, (TR 171-172). Those triggers continued with Respondent throughout the contact that she was forced to endure with the chief writer of that courthouse blog, who waited frequently outside her door to take pictures, talk with her, or make some other accusation (TR 174). It was hard for her to escape from these triggers (TR 175). Although she had had treatment in the past for depression, she made the mistake of discontinuing it because she felt better, which is a normal reaction that people have (TR 175). Even early to mid-2009, after the JQC hearing, he observed her condition continued to worsen (TR 177). He had never in his forensic psychology history, since 1994, in 5 surrounding counties, seen judges addressed with such disrespect as this anonymous blog (TR 178). "There had almost seemed to be a reveling in that, a celebration in that, people's misery and misfortune, to the point they are willing to make things up and talk about attorneys and willing to say things anonymously to cause other people pain. It's remarkable." (TR 178).

The second time he saw her was not much different than the first time: dark circles under her eyes, gain in body weight, tearful, slumped in her chair, disorganized in her speech, no energy, listless, and was talking in a helpless way saying she didn't know what to do (TR 179). She had sought help, spoken to

someone, was starting treatment, but it really hadn't taken hold or she hadn't begun the process – there had not been a lot of intervention at that point (TR 180). If there was any abatement of the symptoms that he first observed in October 2008, "it was negligible." (TR 180). However, it was possible to operate on a high-level as a circuit judge, because it doesn't trigger any depression, serves as a distraction, and it is a "safe island." (TR 181). Most people get through such a depression who don't get immediate treatment by finding some hobby, some activity, some person removed from their situation, and something that they can do that distracts them from what usually makes them feel sad or depressed (TR 181-82). There was no need to test her to see this happening, and he looked and considered other collateral sources in reaching his conclusion (TR 183).

Crying, distraught, isolated – they don't know how to fix it (TR 184), and they are desperately looking at other people to try to help them (TR 184). It would give a person in such a condition an extra burden to respond to questions or be clear and concise in those responses, they have less emotional energy to think through clearly, and it would be more difficult for a person in that situation especially if it was stressful (TR 185). A person having that kind of depression doesn't usually go to friends because "friends don't help people through with major depression, number 1, and, number 2, people who have major depression feel like other people don't want to be burdened by what they have to say. They feel like other people are going to be troubled by it, and they realize the depths of their own anguish and don't want to put that on someone else." (TR 185). It is certainly not unusual for people with severe depression to isolate themselves (TR 185). A person with this severe type of depression would just shut down in terms of their ability to functions (TR 186). They stay at home, they don't leave their house, they don't want to go out and address the world, they wouldn't answer the telephone -- and what he heard from Respondent was consistent with that "shutting down." (TR 186). It may not look that way, but their brain is in quick-sand (TR 186). They are stuck, they know they are stuck, reach out trying to get through it, but cannot describe what they are feeling to somebody else who hasn't experienced that (TR 187). It is normal to retreat into work as an escape, if it distracts you from the things that make you depressed, and when the depressive things raise their head again, it exacerbates the depression, makes it worse, and "you retreat." (TR 187), like having to testify in front of the JQC would be a trigger (TR 187). She looked exactly the same in October 2008 as she did in July or August of 2009, and there is no question in his mind that the depression that he saw in October was a sustained depression that continued until he saw her in July or August of 2009 (TR 196). His opinion is that it would be highly unlikely that she would have any type of emotional energy or ability to pull out of that depth of depression in the three week period between October 2008 and November 2008 (TR 196).

c) Mr. Larry Davis. Mr. Davis testified that he is an attorney and knew the Respondent as an attorney and when she was practicing law as a family law lawyer as well as when she was appointed to the hospital district as a commissioner (TR 201). He worked with Respondent at St. Thomas Law School as a teacher in a trial advocacy class for six years (TR 202). Respondent became close with a lot of her students, helped many get jobs, and impressive as a professor (TR 202). She began the internship program, placing students with judges as a practicum (TR 203). The students were very responsive to her, and she was a leader in the classroom (TR 203).

d) Judge Michelle Tobin-Singer. She has been a circuit judge for six years, and the Respondent was her mentor in the mentoring system (TR 208-09). Respondent was a wonderful mentor, and "the dream mentor judge" (TR 210). Judge Tobin-Singer also had students assigned to her by Respondent from the judicial internship program and "they loved her. They loved the class." (TR 211). Respondent had a reputation as a very hard worker, and her work was her life – she worked long hours and Judge Tobin-Singer would see her there at 8:00 pm at night with Judge Holmes and Judge Lebow (TR 212). Judge Tobin-Singer had never heard anything bad about Respondent's truthfulness or honesty, and knows she possessed a good reputation for honesty and integrity (TR 213). Judge Tobin-Singer knew that there were many difficult things going on in Respondent's life, personal tragedies and things where she was very emotionally upset and distraught (TR 214).

e) Kelly David Hancock. Mr. Hancock has been an attorney for 23 years (TR 216), and served as chief of the homicide division in the State Attorney Office for 8-9 years (TR 217). He is the co-managing partner with the law firm of Krupnick and Campbell, which he joined in 1989 (TR 217). He has known Respondent since she was in private practice, where he would refer her family and marital law cases (TR 217). He followed her through her legal career, knows she was involved in charitable matters, active in the Broward County Bar, helped start and found the Hispanic Bar Association, was active in Legal Aid, and knew that she taught at St. Thomas Law School (TR 218). He knows her reputation in the community to be a person with the "utmost highest integrity," and believes that she "made a difference in so many lives and also our community." (TR 219). He could never conceive of a time when she would intentionally mislead anyone, whether under oath or not (TR 219).

f) Bob Butterworth (TR 222). Mr. Butterworth was a practicing lawyer in the Dade County State Attorney's Office, for one year, in the Broward County State Attorney's Office for approximately 4 years, the legal advisor for the Broward County Sheriff – one of the first legal advisers in the country – another year in the State Attorney's Office, an Assistant County Administrator under

Robert Kauth, was elected a County Court Judge in 1974, appointed by the Governor as a Circuit Judge in approximately 1977 where he was mostly in the criminal division for one year, and then appointed by the Governor in 1978 to be the Sheriff of Broward County. He remained there for four years (TR 226), and was appointed by the next Governor as the Director of the Department of Motor Vehicles, for approximately 22 months (TR 227), and then further was appointed by the same Governor as the Mayor of Sunrise on the indictment of Mayor John Lomelo (TR 228). That lasted 10 months, and he went back to private practice, from where he ran for Attorney General of the State of Florida and was elected in 1986 (TR 228). He spent 16 years as Attorney General, and then became a Senior Judge in approximately 2003 (TR 228), after which he became Dean of the law school at St. Thomas University (TR 229). During his tenure at St. Thomas, he led a fight for increased minorities in law school, and St. Thomas University was ranked number 1 in the country for diversity (TR 231). Under his tutelage, St. Thomas gained the largest increase in bar passage rate of any other law school in the State of Florida (TR 232). During that time, he brought on Respondent as an Adjunct Professor, to assist in teaching the TAP (Trial Advocacy Practice) program (TR 233-35). He had known Respondent since the time that she had been an unpaid Commissioner of the North Broward Hospital District throughout her assension to the Chairperson of that District, still unpaid (TR 235). As Attorney General he was instrumental in her appointment as circuit judge (TR 236). He thought that she was the best person to be appointed by Governor Chiles based on his knowledge of her in the community, his meetings with her, her dedication in the Hospital District, her opening of the first clinic for the Hispanic community, her general activities in her community, and her relationship with Hispanic Unity, a group formed in order to help Hispanics and others in the community (TR 237-38). While he was a retired judge, she actually was his "boss," as Administrative Judge of the Criminal Division (TR 238), and mentored him in his return to the bench (TR 239). He knows her reputation in Broward County as a judicial officer, lawyer, administer, and it is "everything exceptional." (TR 239). "Everyone had respect for her in the legal community, and everyone got a fairness in the courtroom." (TR 240). Because she was so exceptional as a professor, he asked her to take on additional duties (TR 240) and to take on an internship for students to be placed with judges (TR 241). Her evaluations were "tremendous" and many of her students were at the top of the class (TR 241). He appointed Respondent to the Board of St. Thomas Law School, aiding them in opening an official office in Broward County (TR 243). She also dealt with the Moot Court Team and became a coach (TR 244). In all of the conversations with people in the community, his appointment and oversight of Respondent, feedback that he has received over 20 years, he knows that her reputation in the community for truthfulness, honesty, and

integrity is "the highest." (TR 245). He knows her character to be "outstanding," and if Respondent said something to you, he would never consider that she was being untruthful or misleading (TR 245).

g) Judge Paul Backman. He served as county judge since 1984, circuit judge appoint 1983 (TR 252). He served on the Repeat Offender Court (ROC) (TR 253), and also serves on the Judicial Qualifications Commission, and was Administrative Judge for the Criminal Division in Broward County for about nine years (TR 254). He is a representative from the Circuit Judge's Conference (TR 255). He served as Respondent's mentor judge when she was appointed to the bench (TR 257). While she was on the bench, he saw Respondent on a daily basis numerous times and she was his partner in ROC court (TR 257-58). Respondent has an extremely high level for reputation of truthfulness, honesty, and integrity, and was known as a "tough but fair" judge (TR 259). He remembers November 13th, 2008, the date she testified before the JQC – "I remember it like it was yesterday." (TR 259). He saw her just prior to the proceeding on that date, and afterwards as well (TR 261). On those two occasions, just before and just after her testimony, he "saw an individual that was in absolute hysterics. She was just hysterical. Crying, barely catch (sic) her breath." (TR 261). He is aware of the courthouse blog and the types of comments, salacious remarks, and things of that nature that were made on that blog about Respondent, both before and after the proceeding, and would define them as "libelous, scandalous, and scurrilous." (TR 262). He described that most were inappropriate to the point where "if they disclosed their names, if they were lawyers or judges, they would be in front of the Bar or they would be in front of the JQC," and they were continuous and subject of courthouse discussion and banter (TR 262-63). Despite all of this going on around her, Respondent was able to conduct herself and maintain her duties as a judge because, "I think what she did is she took the opportunity to get lost in her work to take her mind off of everything else." (TR 263). It wasn't about the work – they attacked her as an individual, and it "took a great toll." (TR 263). He suggested she get help and there were times that she did, but she got well and figured she no longer needed them and would relapse, and there were times where she "hid under the covers." (TR 264). She handled her duties as a judge at a high level, especially with trial statistics, but when it came to personal issues, "let's just say she was a disaster." (TR 264). Her reputation for honesty and truthfulness was outstanding to a point where, not only was she Administrative Judge, but she held positions in the Conference (TR 266). He was concerned and disappointed when he heard of the multiple contacts that she had in the Loureiro trial with ASA Scheinberg (TR 267). He stayed away from discussing those allegations with her because she was "totally noncommunicative." (TR 268). He ranks her as a Circuit Judge, with all of the attributes you would expect a circuit judge to have, as either number 2 or

number 3 (TR 268), but also believes that she "should have known better." (TR 269).

h) Richard Cole. He is an AV rated lawyer with Cole, Scott, & Kissane (TR 274). He was a founding member of ABOTA, served on federal grievance committee for judges in the Southern District, and spent ten years as its chairman (TR 275-76). He is a member in essentially all of the periodicals referencing attorneys, Bar Register, Best Lawyers in America, as well as serving as the Chief Judge's Counsel in the Eleventh Judicial Circuit, and the Dean's Counsel at the University of Miami, despite being a University of Florida graduate (TR 276-77). Cole, Scott, & Kissane has approximately 235 lawyers, by far the largest in the State of Florida for the kind of work that they do (TR 277). Mr. Cole tried a case with Respondent, became impressed with her abilities (TR 277-79), and subsequently offered her a job with his law firm (TR 280). She was helpful with dealing with minorities in her firm, and he wanted her to be a role model to create "an open firm" (TR 281). Mr. Cole was contacted by the Blog owner, Mr. Gelin, who attacked Respondent as being dishonest (TR 283-84). He never knew Mr. Gelin before (TR 284). Respondent did high quality legal work (TR 285), she was viewed, "and rightly so," by many of the female lawyers as being an "aspirational" model, and her absence is felt by the young lawyers, as a person that they wished were there to talk privately to (TR 285). As a result of the Respondent, they became more active in the Broward Bar Association and in the Hispanic community (TR 286). Her reputation for truthfulness, honesty, and integrity is impeccable, both inside the firm and outside (TR 286). She was the first Hispanic woman ever elected or appointed in Broward, "and has done nothing but enhance that reputation and led the way for many other people to move ahead." (TR 286).

i) Thomas E. Scott. He is an attorney with Cole, Scott & Kissane (TR 288). He was a Circuit Judge at age 29 (TR 289), appointed by a Democratic governor. He was then nominated by President Regan, a Republican, in 1985, and appointed to the United States District Court, where he served for almost 6 years (TR 290). He was appointed as United States Attorney for the Southern District of Florida in 1997, for four years (TR 291). He then started with Cole, Scott, & Kissane, which started with 20 lawyers when he joined the firm, and now is over 200 (TR 291). He is an AV-rated attorney, and has taught at St. Thomas Law School, the University of Miami, the Florida Bar, and received his Masters in Law from the University of Virginia (TR 292). He served as Chair of the Florida Bar's Program on Ethics and Professionalism while he was a judge (TR 293). He met, and eventually hired, Respondent in early 2010 (TR 294). Prior to that, he made "a lot of inquiries," as he had good contacts in Fort Lauderdale (TR 294-95). He was her unofficial mentor at the firm (TR 295). Respondent was a remarkable woman, she was able to adapt to the law practice quickly, and he was impressed with her legal

ability and with her integrity (TR 296).

j) Valerie Small Williams. She has been practicing criminal defense law for over 15 years (TR 302) and has appeared before Respondent over 100 times (TR 303). Respondent has an excellent reputation for honesty, and it was a pleasure for the witness to appear before her (TR 303). She was always fair and truthful, and her knowledge of the law was "vast." (TR 304). She knows William Gelin, the "blog" writer, and was approached by him when her name became public as a potential witness at the Final Hearing (TR 305). He asked her if she thought she was listed because she was black, "and I asked him what does that have to do with it?" (TR 306).

k) Judge Susan Lebow. She served as a hearing officer for two years and was elected in 1984 as a county judge (TR 309). Most of her career was in the criminal division as a judge, but she now sits in dependency court (TR 310). She met Respondent at a Conference when she first became a judge, but became friendly with her in 2007 when Respondent became her Administrative Judge in criminal court (TR 311). They developed a friendship (TR 311). She became familiar with Respondent's family situation, her children, and discussed her issues personal in nature as well as professional (TR 311). Her reputation for truthfulness, honesty, and integrity was excellent, and she was also an excellent circuit judge who was "brilliant." (TR 312). She knows Respondent is a single mother raising two sons, and has seen the great relationship she has with her two boys (TR 313). She became aware of Respondent's appearance at the JQC hearing in November, 2008 (TR 313). Before that, Respondent had developed a severe depression – she could not get out of bed, but would come in and work incredibly long hours, 10:00-11:00 pm at night, to the extent that the witness and another judge would be concerned about her being alone at night since it is an isolated area and in a separate building (TR 314). It was pretty regular that this would happen, and the witness would go home, take care of her dog, and then come back, to be at the courthouse with Respondent (TR 315). She knew about the death of Respondent's father, and knew it had devastated her, and that she threw herself into her work (TR 315). She remembers occasions which concerned her that she would not answer the door at her house, even though her car was in the driveway, and the next day came back, and the housekeeper let her in, to find Respondent in bed (TR 316). She also had a lot of digestive problems (TR 316), and dealt with a lot of the rumors being started that the witness knew were not true and were "really scandalous." (TR 316). It affected Respondent "terribly," it was "embarrassing, humiliating," and there was no way she could respond to it – there was just no response to those things (TR 317). Respondent has never intentionally misled or deceived anyone (TR 317). She is one of the most "brutally honest people that I've ever met" (TR 317). The loss of her judgeship was devastating to her, and after all

of her achievement and everything that went into becoming successful as a lawyer, especially as a person who came into this country not knowing the language, it was crushing (TR 318).

l) Bill Scherer. He has been an attorney for the past 38 years (TR 358). He has represented the North Broward Hospital District Board of Commissioners for approximately 20 years (TR 360). He had frequent interaction with Respondent while she was a commissioner (TR 361). "Nobody spent as much time and energy on it as Mrs. Gardiner during that period of time." (TR 364). During that time, the Hospital District was one of the largest in the United States, with four hospitals and clinics and around 30 separate facilities – with a budget of over a billion dollars (TR 364-65). Both he and the Respondent were instrumental in creating the Heart Center of Excellence (TR 365). He believes this was their best work, as it is probably the best specialty practice in the District (TR 366).

Mr. Scherer is friendly with the Respondent and her family – Respondent's former husband is his law partner, and their children went to St. Anthony's Catholic School together, where they thrived (TR 366). His daughter was an Assistant State Attorney and was assigned to the Respondent's division while she was a circuit judge (TR 36-68). He is familiar with the courthouse blog and has personally observed inaccurate statements and false comments written about himself and his daughter (TR 369).

He knows the Respondent's reputation for truthfulness, honesty and integrity in Broward County and "she was as good as we had on the bench, hard working, and also working hard in the community" (TR 381). "You could always be assured that she would read the file, everything in the file, before the hearing and be prepared in the trial and work late at night to get her job done. Took on extra work. I mean this has been a tragedy in a lot of levels in my mind." (TR 381).

m) Attorney Anthony J. Karratt. He has been the Executive Director at Legal Aid Services of Broward County for 37 years (TR 383-84). He initially met the Respondent because she and her firm provided a lot of pro bono services to his program, and she then became a member of the Board of Directors for about six years, ending that service as president of the Board (TR 384). She was a very active participant as board member and especially as chair, both non-paid positions (TR 385). She left the board when she went to the bench (TR 386). "She was an excellent board member, an excellent friend of the program, very giving person, somebody who whenever we needed anything we could always call on Ana to assist us, again with raising – friends raising funds, doing the work that is needed to be done to make our program strong and do the work we do within the community." (TR 386). She helped encourage lawyers to do more pro bono work for Legal Aid (TR 386). He knew her reputation in her community as the "very highest reputation" and she was 'very well respected, and very well regarded." (TR

386-87).

n) Judge Dale Ross. He began practicing law in 1973, and became a judge in 1981 (TR 288). He was elected county court judge, served for 6.5 years, and was then appointed circuit judge by Governor Martinez (TR 389). He was the Chief Judge of Broward County for nearly 17 years, supervising from 64 to 93 judges, in combined circuit and county level (TR 390). He first met the Respondent prior to her being a judge, when she was primarily a family practitioner and he was in the family division (TR 391-92). She appeared before him when he was a family judge, "countless" times (TR 392). Regarding her reputation during that time, he observed that she was a "very good lawyer," who litigated vigorously on behalf of her clients (TR 392). He assigned her to the criminal division even though she had little to no criminal experience because he "knew her to be very bright, a hard working person," and he was "confident putting her in the criminal division would not be a problem for the circuit." (TR 393). He was involved in the inception of a statewide mentoring program for new judges on the bench to be assigned a mentor to help with the trials and tribulations of transitioning, particularly from private practice (TR 393-94). The mentor judges were ultimately chosen by him, and, before becoming a mentor to another judge, they had to successfully complete a training course which was expensive and time consuming (TR 395). The Respondent was selected as a mentor, and, not only with that position, but with any assignment she had, "she was always very enthusiastic and fulfilled her responsibilities." (TR 397). He appointed the Respondent the Administrative Judge in the criminal division "because I knew she could handle the job and she did a good job." (TR 399-400). "She is a hard worker. She was respected I think by the other judges. She is a self-motivator." (TR 400). She did a good job in handling her duties as administrative judge, and he never had a problem with her (TR 401). He knew her reputation among lawyers that were dealing with her and also among the fellow judges during the period that she was administrative judge of the criminal division: "I think the folks thought that she was a good judge, she did a good job, she was a hard working judge, she was conscientious, all of the attributes of a good judge." (TR 402). He is familiar with the courthouse blog, and he and his family (particularly his daughter, who also serves on the bench) have been the subject of "attacks." (TR 403-04). Every single thing that has been written about himself as well as his family has been inaccurate (TR 404-05). "A lot of things said were not only untrue, they were vicious. There was some kind of motive attached to it." (TR 405).

o) Respondent Ana Gardiner. She left Cuba when she was six years old, and the Government moved her family to Jackson, Michigan (TR 321). She did not speak a word of English when she got here and learned it later (322). The Salvation Army gave them a place to live in Michigan, and her paternal

grandmother became her roommate and literally raised her (324). She graduated from Dickinson College and from Temple Law School (TR 324). Her first job after the Bar was with Patterson, Maloney, and Gardiner, who later became her husband (325). She did 100% family law (325) and founded the Hispanic Bar Association, becoming President of that around 2000 (TR 326). She later started a firm, Gardiner & Gardiner, with her former husband, until she was appointed to the bench in 1998 (TR 328). She volunteered for the Guardian Ad Litem program, and became familiar with Legal Aid (328). She was appointed to the Board of Legal Aid of Broward, and served as a Board member for Legal Aid for six years, and in her last year, was chairperson (TR 329). During that period of time, she had two children, and became very involved with the Broward County Bar Association, being elevated to the chairmanship of the Family Law section, and part of the nominating committee for the Broward Bar (TR 329). She was also involved with the pro bono committee of the Florida Bar, and is a member of the American Inns of Court – Stephen Booher division (TR 330). Under her direction, the Hispanic Bar Association started providing scholarships, meals during holidays, and legal pro bono for Hispanics in Broward (TR 330-31). She received an award for her work with Hispanic Unity, and was named a "Woman of Distinction" by the March of Dimes (TR 331-32). Her grandmother lost her first leg after she came to live with Respondent full-time, and was helping her raise her children during that time (TR 336). In the summer of 1993, she was appointed by Governor Chiles as a Commissioner in the North Broward Hospital District, which had an annual budget "in the billions" (TR 336). She opened a Hispanic clinic for the Hispanic community of Broward County, operated the legal review committee (TR 337). North Broward Hospital District oversaw four hospitals, plus a number of clinics (TR 338). Throughout her legal career in a contentious family law practice, she never had a single complaint from clients (TR 339). During her career as a judge, with the exception of the incident that gave rise to these proceedings, she never had a JQC complaint (TR 339). Women of Tomorrow identifies female students in highschools who are at-risk but have a potential and mentors volunteer their time through the program (TR 343). When she reached the bench, she would try up to three trials a week (TR 345-46), and worked with Judge Backman in Repeat Offender Court (TR 347). This lasted for five years, trying three cases every week (TR 348-49), and during that time, she took one two-week vacation (TR 349). She had always wanted to be a teacher, and so she took a job at St. Thomas University teaching law students (TR 350). She was an AV-rated attorney for Martindale-Hubbell, and that rating remains today (TR 352). During her teaching time, the bar passage rate increased at St. Thomas Law School to either the highest or second highest passage rate in the State (TR 417-18). She was responsible for starting the legal internship program in Broward County (TR 418). She retired

from the bench in 2010, and went into practice with Cole, Scott, & Kissane (TR 418).

Respondent succeeded in having every judge in Broward County become a member of the Broward County Bar, and was the only Circuit in Florida to achieve that (TR 422). She was appointed to the judicial mentor program in Broward County by Justice Lewis, and reappointed by Justice Pariente (TR 422), and mentored six judges who are still sitting in Broward County (TR 423). She taught at the Florida Conference of Circuit Judges and served as the chairperson of Civil Circuit judges (TR 424). She has never misrepresented, lied, or created any deception for anything in her career (TR 427).

The "blog" became "incredibly incredibly brutal and offensive," and took a sexual nature to it, because she was 36 and single when she came to the bench (TR 429). She tried to get some of the more offensive blog posts taken down, but this was refused, and these continue until the present date (TR 429).

She opened the Heart Center of Excellence in Broward County, which gives and provides tremendous service, including to people from outside the United States, who do not have facilities in those countries (TR 432). She has participated in pro bono work from the very start of her practice, including working with Legal Aid, and providing pro bono work for Spanish speaking individuals (TR 433). The death of her grandmother affected her "like I never thought it would." (TR 434). She had never lost anyone close to her in her family (TR 434), but it didn't affect her job as a circuit judge because that had been her life and her priority – "that's what keeps me going." (TR 435).

Her mother has had a history of clinical depression, and Respondent had her first episode in the summer between college and law school, and, during her divorce, she had her second episode, and sought help and medication (TR 436). She took herself off medication because she was doing better (TR 436). When her grandmother died, she was the caretaker who took her for her amputations, sought help, and was medicated again (TR 437).

When her grandmother died, Respondent was not on medication, and Loureiro I started immediately that March (TR 437). She appointed Mr. Tenzer to be the guilt phase lawyer in this case (TR 438). She saw Mr. Tenzer almost every morning at the Einstein's after she dropped her kids off at school, and they would all have a cup of coffee (TR 439). He was on the pre-approved list of lawyers for a capital case (TR 440). One Friday night she received a call from Charlie Kaplan, asking if she wanted to go out that evening, and she decided to do it (TR 444). Judge Kaplan showed up, unbeknownst to the Respondent, with Howard Scheinberg, the trial prosecutor in that case (TR 446-47). She had never socialized before with Mr. Scheinberg, nor did she know his cell phone number (TR 448). "Socialize" to her meant lunch meetings, dinner, doing special things, other than

appearances before her (TR 448). They eventually all went to another Bar-Restaurant and she could see that something was upsetting Mr. Scheinberg (TR 451). He left (TR 451). Several calls were made between Kaplan, Scheinberg, and Gardiner, after they had all gone to their respective homes, concerning what had occurred that evening (TR 452-54). After the verdict, the following week, Mr. Scheinberg called Respondent to discuss what happened that previous evening (TR 455). She later went to New York with two friends of hers, and learned while she was there, that her father had passed away in Puerto Rico, on March 31st, 2007 (TR 461), only 3 months after her grandmother had died (TR 462). The penalty phase on the homicide took place at the end of April, and she imposed the sentence of death in August (TR 465-66).

While in Puerto Rico, with her family at her father's funeral, she was crying all of the time, and stayed in his room by herself, and Mr. Scheinberg called her and they began sharing his mother's death from cancer, and his children (TR 467). She was shocked at the number of telephone contacts from the records she received, after the verdict and prior to her second appearance before the JQC (TR 468). Her mental state was something she could not describe, and she was "under the blankets all the time" (TR 469). She was going to work in the criminal division, but once she got into Civil, she was missing work (TR 469). She couldn't get out of bed (TR 470). In 2009, she went to get some help, but not successfully, and started treatment with Dr. Joseph Henry (TR 470). She has no idea how many of the text messages or telephone calls were actually connected, where she actually responded or saw the text, because the bills did not reflect that (TR 471).

An article came out called "Judging Ana," and she got her first JQC inquiry (TR 472). It "totally devastated me," and contained false rumors (TR 473). She decided to go to the JQC for November 13th, 2008, rather than reset it until January (TR 475). School children started saying things about her to her oldest son, and she had to sit down and explain what was happening and the article in the New Times: "It was very, very difficult for me to do that." (TR 478). She took her phone records to the JQC on the advice of her lawyer, but the only ones she had were one month's worth (TR 480-81). Judge Backman was at the JQC (TR 481). She was terrified and crying before she even started talking; she couldn't control it; she was ashamed to be present, and very scared and intimidated (TR 482). Her testimony in the JQC indicates that she was already crying (TR 483). Right from the opening statement, she admitted that she had lacked judgment in dealing with this incident at Timpano's (TR 483-84). Throughout the entire testimony, she was remorseful, sad, and felt horrible about having placed the judiciary, friends, and everyone else in this position by her bad judgment to stay at Timpano's (TR 485). "I still feel the same way." (TR 485). She admitted that the Timpano's incident gave an appearance of impropriety, and people could have questioned the ability of

the judge to be fair and impartial (TR 487). No one asked for the records at that time – in fact, Judge Wolfe indicated to her that he did not want them (TR 489). She understood a "social relationship" is a relationship "where you get together, maybe you have lunches, maybe you go shopping, maybe you do whatever, but you get together physically, and you socialize." (TR 490). She did not have that relationship with Mr. Scheinberg (TR 490). She answered the question as she understood it (TR 490). She later had a fireside chat, and until April 30th, 2009, no one asked her anything about telephone calls (TR 493).

Mr. Schneider (the JQC counsel) was concerned specifically about Timpano's and the telephone calls from that evening (TR 492-93), and that is what Judge Wolfe was concerning himself with as well (TR 493). April 30th was the first time anyone asked questions concerning telephone calls and texts (TR 494). She knew that there would at some point be a 3.851 proceeding, and she would eventually have to testify and they would take her deposition (TR 495). She was not trying to mislead the JQC relating to the "social relationship" (TR 496), she was answering the question as she understood it (TR 496). In her deposition testimony, she admitted to having continuing conversations with Mr. Scheinberg on her cell phone (TR 497), which was not asked in the JQC (TR 498). The only thing they were interested in were the phone calls that led to that evening, because Timpano's was the focus of that whole investigation (TR 498). No judge asked her about disclosure of those calls at the JQC, although they knew about some of them (TR 498-99). She was going through some of the "hardest times in my life." (TR 502). She appeared during the Bar hearing, testified, and under oath gave records voluntarily at her deposition, appeared for deposition voluntarily (TR 503-503), sat for 3.5 hour at a second JQC proceeding (TR 503). If there was anything within her power that she could do to take away her actions or inactions in this incident, and not put anyone through this hurt, she would do it "without blinking." (TR 503). She has given up everything, including one of the things "that I loved the most, which was my job." (TR 504). She could not handle continuing to work in "that place" (TR 504). She was missing time, and the "guy from the blog" would wait for her every morning to take pictures of her (TR 504). She couldn't even resign unless she agreed to certain other penalties (TR 505) – that she would not seek a judicial position in the future, and would not serve nor seek to serve as a senior judge (TR 505). St. Thomas asked her to stop teaching over the same thing (TR 506).

She developed a close emotional relationship by phone with Mr. Scheinberg (TR 515). Judge Wolfe did not allow her to finish her chronological answer in her statement to the JQC, and the phone calls and texts may have come up (TR 520). The only thing they were interested in were the events from the night at Timpano's (TR 520). The JQC knew that she had telephone conversations with Mr.

Scheinberg after the night at Timpano's (TR 521). They never asked her if she had disclosed those conversations (TR 522). It was very, very intense in a short period of time, and she was the last person from a long day, that they were asking questions about (TR 522). One person would go after the other without breaks (TR 522). She told them several times during this period that she was friends with Howard Scheinberg, since 1987 (TR 523). None of the judges asked about the nature of the discussions, or whether they were disclosed, and she does not think that anyone did this intentionally (TR 524). She admitted that people might question actions of other judges, and legal issues were caused in a criminal death penalty case (TR 527-28), and some of her colleagues were embarrassed regarding her actions (TR 528). She suffered very severe penalties. She lost her job forever, lost her ability to ever sit as a judge (TR 529). She never intended to commit the appearance of impropriety, but it occurred (TR 529). She is aware that there is not a concomitant Bar violation that talks about the "appearance of impropriety" (TR 530). She never intended to mislead, deceive, commit a crime, do an immoral act (TR 529).

SUMMARY OF THE ARGUMENT

The Referee's recommendation of one year suspension in this cause is amply supported by the evidence, the Standards for Imposing Lawyer Discipline, and has a reasonable basis in existing case law. It should be accepted by the Court. Although the defalcations alleged by the Bar occurred, they did so in an atmosphere of extreme depression and psychological upheaval, where Respondent's ability to think clearly was significantly impaired. Moreover, the overwhelming mitigation evidence, separate and apart from the psychological and mental anguish and detriment, vitiates any need for further discipline and supports unquestionably the Referee's findings.

The one-year suspension meets each of the three factors upon which lawyer discipline is grounded, and the singular violation of the Code of Ethics over a several-decade career of public service, community activities, and personal reputation for integrity and honesty that Respondent has placed before this Court through the Referee, outweigh any further discipline that may either be considered, or requested by the Florida Bar.

The Referee's Report and recommended discipline should be accepted in this matter.

ARGUMENT

THE REFEREE'S RECOMMENDED SANCTION OF A ONE YEAR SUSPENSION HAS AMPLE REASONABLE BASIS IN EXISTING CASE LAW, AND IN THE STANDARDS FOR IMPOSING LAWYER DISCIPLINE, ARE NOT CLEARLY ERRONEOUS, AND THEREFORE SHOULD BEACCEPTED BY THIS COURT

While a referee's findings of fact should be upheld unless clearly erroneous or without support in the record, this Court's scope of review is broader when it reviews a referee's recommendation of discipline because this Court has the ultimate responsibility in determining the appropriate sanction. *The Florida Bar v. Rue*, 643 So. 2d 1080 (Fla. 1994); *The Florida Bar v. Grief*, 701 So. 2d 555 (Fla. 1997). In *The Florida Bar v. Paules*, 233 So. 2d 130 (Fla. 1970), this Court held three purposes must be kept in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter other attorneys from similar conduct. This Court has further stated that a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So. 2d 1284 (Fla. 1997). In the instant case, the referee found support for his suspension recommendation in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

Here, especially in view of the overwhelming mitigators found by the Referee and which were amply, and equally overwhelming in the record, each of these three purposes is easily met by the suspension recommended by the learned Referee.

Fairness to society would keep this attorney being active as in the past, in Hispanic issues, pro bono work, and mentoring, while at the same time suffering the penalty of suspension but not removing a person with great societal resources.

Fairness to the attorney would be satisfied by the suspension, but coupled with humiliation and penalty for her defalcation while at the same time recognizing the enormous length and breadth of her lifelong contributions.

The severity of a suspension sanction handed down to a former Circuit Judge, Hospital District Chairman and well known attorney, on her <u>first</u> and <u>only complaint</u>, would send a clear and unequivocal message that such activity will <u>not</u> be tolerated by the Court without some sanction, regardless of the attorney's good works, and former positions of trust and importance to the Bar and the community.

Although the Respondent does not contest the finding of guilt by the Referee in this Brief, it cannot be overlooked that the prejudice to the administration of

justice was based upon a trial proceeding that was not judicially recognized as faulty, as even the trial prosecutor in Loureiro II conceded that the vacatur of the judgment and conviction was solely an administrative decision, internally, by the State Attorney, because of perception not reality, and that the Loureiro I trial was pristine and absent of reversible error (TR 131, 146, 147, 148). The Court should then factor into its finding not just the fact of the vacatur, but also whether or not it was really necessary, except for the political, unilateral, decision of the State Attorney, which augurs a dangerous precedent to then place in the hands of the prosecutor the ability, for no legal or equitable reason, to make a decision that affects, or causes, a bar grievance. Nevertheless, it is a fact that but for the actions of the Respondent and Mr. Scheinberg, such a decision may not have been made. Thus, the prejudice to the administration of justice.

In reviewing a referee's recommendation for discipline, this Court's scope of review is, indeed, broader than afforded to findings of facts because it is this Court's responsibility to order the appropriate punishment. *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989). However, a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or without support in the evidence. *The Florida Bar v. Lipman* , 497 So. 2d 1165, 1168 (Fla. 1968); *Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The one-year suspension recommended by the Referee was based upon competent substantial evidence.

The Referee considered all sanctions appropriate, presided over a two day hearing observed not just this Respondent, but also eighteen (18) separate witnesses, only two of which were called by the Florida Bar.

AGGRAVATING FACTORS

***Dishonest or Selfish Motive*:**

In the instant case, no motive, no selfishness, no dishonesty permeated Respondent's actions. *Compare The Florida Bar v. Karten*, 829 So. 2d 883 (Fla. 2002) (attorney's misconduct in improperly profiting from selling his client's property involved blatant self-dealing conduct for his own selfish benefit, to the detriment of his client). They were, and all evidence supports they were, the product of mental and emotional difficulties, misunderstandings, and errors in judgment and law.

Cumulative Misconduct

From 1988 to the present date, this respondent has not had the first complaint, much less discipline, save and except these issues, in a practice wildly considered to be the most contentious and grievance driven area of specialty—family law. All of the JQC and Bar issues revolve around a small microcosm of a career respondent with character and noteworthiness, as well as a stellar record of public service. This ground cannot be sustained.

Refusal to Acknowledge Wrongful Nature of Conduct

Indeed, from her first appearance before the JQC through her deposition and Grievance Committee testimony, Respondent has always admitted that her actions were detrimental to the bench that she served as an appearance of impropriety. The actions were limited to her status as a judge, and she acknowledged that failure. This ground cannot be supported. *See The Florida Bar v. Lipman*, 497 So. 2d 1165, 1168 (Fla. 1986) ("It was improper for the referee to consider in aggravation the fact that [the Respondent] refused to acknowledge wrongful nature of his conduct. [The Respondent's] claim of innocence cannot be used against him."); *see also The Florida Bar v. Mogil*, 763 So. 2d 303, 312 (Fla. 2000) (court refused to accept this as an aggravating factor because the Respondent always denied – and continued to deny – the misconduct at issue).

Vulnerability of the Victim

No untoward or problematic issue arose from Omar Loureiro's trial. The record is replete with evidence that nothing that this judge did either prejudiced or affected him except that his death penalty in Loureiro I was mitigated to life imprisonment in Loureiro II. He actually benefited from a re-trial – this ground is uniquely unsupported.

Substantial Experience in the Practice of Law

Counsel's experience as a judge and attorney stretched over 24 years with no blemish except this one which emanated from her status as a Judge. This ground for aggravation cuts in two directions: that lack of discipline or complaint in that time period also should qualify as a mitigating factor separate and apart from this issue.

MITIGATION FACTORS

Absence of Prior Disciplinary Record

An attorney's lack of prior disciplinary history may be considered as a mitigating factor in disciplinary action. *The Florida Bar v. Shankman*, 41 So. 3d 166 (Fla. 2010). *See The Florida Bar v. Grosso*, 647 So. 2d 840, 841 (Fla. 1994) (Respondent's 15-year unblemished record was considered as mitigating factor). Here, Respondent has a 24-year unblemished record of even a complaint, except for this incident. This factor is applicable.

Absence of Dishonest or Selfish Motive

All testimony in this cause supports this factor – not even the Bar's testimony implicates any dishonest or selfish motive. *See The Florida Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009) (Referee's evaluation of the credibility of several witnesses, documentary evidence, and the Bar's concession that attorney had "no dishonest intent" supported the finding of absence of dishonest motive as mitigating factor in attorney disciplinary proceeding arising from misconduct that included taking over for client as CEO of company without full disclosure to client

and accepting and supporting cancellation of the client's shares in another corporation in which the client was a majority shareholder). This factor is applicable.

Personal/Emotional Problems

Examples of some personal or emotional problems that have been considered include: poor health condition (*The Florida Bar v. Neale*, 432 So. 2d 50 (Fla. 1983)); psychiatric treatment (*The Florida Bar v. Parsons*, 238 So. 2d 644 (Fla. 1970)); marital difficulties (*The Florida Bar v. O'Malley*, 533 So. 2d 1159 (Fla. 1988)); spousal abuse (*The Florida Bar v. Burkich-Burrell*, 659 So. 2d 1082 (Fla. 1995)); death in the attorney's immediate family (*The Florida Bar v. Weaver*, 356 So. 2d 797 (Fla. 1978)); and mental illness (*The Florida Bar v. Condon*, 632 So. 2d 70 (Fla. 1994)). *See The Florida Bar v. Shoureas*, 913 So. 2d 554, 560 (Fla. 2005) ("Under the Standards, personal or emotional problems and interim rehabilitation may properly be considered in mitigation"). Here, Respondent displayed significant personal and emotional problems – not one witness who testified and who knew her with any intimacy, did not affirm and testify that she displayed significant personal and emotional problems that directly affected or were contributory to her lack of judgment. The Referee easily found this mitigator, and it is applicable. *See The Florida Bar v. Shoureas*, 913 So. 2d 554 (Fla. 2005).

Full and Free Disclosure to the Disciplinary Board/ Cooperation

A timely and good-faith effort to make restitution or rectify the consequences of misconduct is a mitigating factor in attorney disciplinary matters. *See The Florida Bar v. Tauler*, 775 So. 2d 944 (Fla. 2000). At every instance, Respondent cooperated and participated in these proceedings, testifying freely and openly about her involvement and the sadness and remorse that she felt as a result of her actions. This ground is applicable.

Character or Reputation

Consideration is given to an attorney's good character and reputation, *See The Florida Bar v. St. Laurent*, 617 So. 2d 1055 (Fla. 1993); *The Florida Bar v. Diamond*, 548 So. 2d 1107 (Fla. 1989), and to the attorney's record of service to the community and to the legal profession *See The Florida Bar v. Goodrich*, 212 So.2 d 764 (Fla. 1968).

Several lawyers, including a former US District Court Judge and United States Attorney, Thomas E. Scott, and one of the most highly respected individuals in this State's long and celebrated history – Former Judge, Sheriff, Mayor, Director of DMV, and four term Attorney General Bob Butterworth – attested to Respondent's exceptional honesty, integrity, truthfulness, fairness, industry, and community involvement. Not a single witness called by the Florida Bar contradicted those views. In fact, one of the witnesses, Brian Cavanagh, the Chief of the Homicide Division of the Broward State Attorney's Office, who <u>should</u> have

been called as the Bar's witness, as he was in Scheinberg unequivocally and emphatically described her as "one of the finest trial judges we have ever been privileged to have in this county" and her word was "golden." (TR 132-33). He would believe her "implicitly" (TR 132-33), and questioned the action taken as he believed that the Loureiro I trial contained no error (TR 131, 146-48).

The combination of her obvious and barely treated mental and depression shortcomings, and the enormous pressure that Respondent and Dr. Brannon discussed, were integral to the actions complained of in her responses to the JQC in November 2008, as well as her contacts with ASA Scheinberg. Her judgment was obviously compromised. That does not, nor should it necessarily excuse the conduct ab initio. It should, and does explain at least some portion of it, and qualifies as a mitigator, especially when her honesty and credibility were supported by august members of the bench and bar, as testified in this Final Hearing, without contradiction. Not one person testified that she was unworthy of belief; thus, her statements as to what she believed "socialization" meant, with English as a second language, and under the stress of a debilitating depression, and emotionally distressed as she was both before and after that November 13th, 2008, as testified to by Judge Paul Backman who was a member of the JQC at that time, may not excuse her responses, but certainly places them in context. The character of the Respondent was shown by respected and unimpeached testimony of 15 exceptional witnesses to be, in the words of the Referee who observed them and their demeanor, "overwhelming." (ROR at 19).

Physical/Mental Disability or Impairment

The existence of a mental disability, such as depression, may demonstrate that certain aggravating factors do not apply. *The Florida Bar v. Broome*, 932 So. 2d 1036 (Fla. 2006); *The Florida Bar v Condon*, 647 So. 823 (Fla. 1994). Although this dovetails into the factor above, certainly, the clinical depression described by Dr. Michael Brannon, and targeted by Judge Paul Backman at precisely the time she was testifying at JQC-I, as well as its continuing nature, unabated, throughout the next many months, are powerful indications that this Respondent was impaired in her thinking when she considered Judge Wolfe's question – assuming that telephone calls and texts were in his mind when he asked about the "social relationship," – and impacted significantly her mindset and any requirement, perhaps erroneously, that she was required to disclose purely personal contacts, with a friend, contacts that were clouded by this depression, that had no connection to, or impact upon, the Loureiro case or any other case, to defense lawyers, especially one whom she also knew well, Mr. Tenzer. This ground is applicable.

In a case related to the instant cause, the Referee found that Howard Scheinberg "presented me with no evidence or testimony of a psychological or

medical nature establishing any actual basis for his lapse in judgment and misconduct." *See* Brief of the Florida Bar, in *The Florida Bar v. Scheinberg,* SC 11-1865 (opinion entered June 20th, 2013).

In this instant case, as more fully set forth in the explicit sworn testimonies of Dr. Michael Brannon, Judge Paul Backman, Judge Susan Lebow, and Judge Michelle Towbin-Singer, the Respondent was severely clinically depressed, near suicidal, felt helpless in the face of this growing cataclysm, and in the words of Dr. Brannon, who has handled 20,000 cases and 2000 expert testimonies in his career, "The most severely depressed that he has seen in his practice" – a 10 on a 1-10 scale. The severity of that depression was palpable and had a tremendous impact on her ability to think clearly. It was a depression that had no end, despite the several times that she tried medication and treatment. The Bar's suggestion that respondent go no help until 2009 is belied by the testimony of Dr. Brannon (TR 175). And Dr. Brannon's observations braced the time immediately before and after her JQC appearance in November 13th, 2008.

Throughout the testimonies of Dr. Brannon, Judge Backman, and Judge Lebow, the thread and spectre of a constant badgering by a courthouse "blog" was seen to severely affect the psychological condition of an already wounded and vulnerable person.

Her psychological and emotional trauma was a direct link giving rise to not only the alleged misconduct of the numerous contacts with ASA Scheinberg. She was, and overwhelmingly non-rebutted testimony supports this, not just depressed, but severely clinically depressed to the extent that it clouded and tremendously impacted her ability to think clearly, although, from the testimony of several witnesses, she was able to retreat to the "safe island" of her work where she could be distracted from these horrors – although only for a short time.

Imposition of Other Penalties or Sanctions

As to the imposition of other penalties or sanctions, the referee noted loss of her judgeship which the Respondent further alluded to in every forum, including the Final Hearing (TR 504). But more than that, she was required, even to be permitted the ignominy of resignation after a lifetime of service to the bar, the bench, her community, numerous mentorships with at-risk young women, and young law students, to give up the ability to ever run for judicial office again or to sit as a senior or retired judge (TFB Ex. 11). Furthermore, she lost her teaching position, one she dearly loved, at St. Thomas Law School where she had equally given her time, effort and energy (TR 506). The Referee noted, and it is uncontrovertible, that these are severe and life changing sanctions for precisely the same acts as set forth in the Bar's Petition. *The Florida Bar v. Graham*, 662 So. 2d 1242 (Fla. 1995). This factor is applicable.

Remorse

The Respondent's absolute remorse as set forth in her various testimonies and her courtroom testimony are far more eloquent than can be argued here. This factor is absolutely applicable.

The Bar's suggestion that Respondent was not remorseful not only shows a complete ignorance of the record, it could not be an aggravator even if true. *The Florida Bar v. Lipman*, 497 So. 2d 1165 (Fla. 1986). The record is replete with the admissions and confessions of remorse, not only at the Final Hearing, but at the JQC hearing (TFB Ex. 3) and at the Bar Grievance proceeding (TFB Ex. 2, p. 100). The Referee, an outstanding, respected and experienced jurist, observed her testimony and demeanor, and categorically found that "sadness and remorse that she felt as a result of her actions." (ROR C(c). *See The Florida Bar v. Broom,* 932 So. 2d 1036, 1043 (Fla. 2006).

Extraordinary Public Service

Besides more than a decade of service in many leadership roles, as a Circuit Judge of the Seventeenth Judicial Circuit, as well as leadership roles in the Conference of Circuit Court Judges, on the Executive Committee, and as Chairperson of the Civil Circuit section and in the Educational Section teaching several courses, Respondent has given her time, unpaid, to other worthwhile community projects: she has mentored fellow judges and at-risk women, in the Women of Tomorrow Mentor Program, she has taught and mentored young law students, placing them in internships and finding many employment after law school. She has been a leader in Hispanic Unity, honored as a Woman of Distinction in 2011, founded and became president of the Hispanic Bar, served six years at a North Broward Hospital Board Commissioner, her last as its Chairprson, held a Martindale Hubbell A/V Rating for over 17 years, served as Judicial Liaison to the Broward County Bar Association, served on the Seventeenth Judicial Circuit Nominating Committee for the Florida Bar's Pro Bono Service Awards, served on the Board of Advisors of St. Thomas Law School, was a Gubernatorial Appointment to the Southeast Florida 2005 Steering Committee, was a Board Member of Legal Aid Service of Broward County for 6 years, and its Chairperson in 1997-98 before she took the bench, and served the Broward County Bar Association as Chairperson of the Family Law section and in other committee positions.

The Referee quoted, with approval in adopting counsel's summary, "The litany of community service is, truly extraordinary and compels consideration." (ROR at 20).

In recommending a one year suspension, the Referee noted: "The Respondent has already lost her judicial position, suffered public humiliation, and shows genuine remorse. The actions which are the subject matter of the current proceedings appear to be an aberration at the time of emotional and personal

turmoil and should not end an otherwise distinguished career" (ROR at 18-19).

This Referee had the benefit of observing Respondent's demeanor, and that of her witnesses, through the prism of his judicial and life experiences. The Bar seeks this Court's reversal of the Referee's findings without a scintilla of evidence to the contrary for the majority, if not all of the mitigators presented.

The sanction of disbarment is, and must be reserved for those individuals whose actions have evinced a serious reflection on the lawyer's "fitness to practice." Nothing could be further from the truth in the case of Respondent. She committed acts in an aberration of her entire life that were the product of, or were significantly contributed to by, severe emotional and psychological depression caused by outside influences, deaths of extremely close family members, and constant and disgusting false accusations that not only affected her, but even her own children.

Through it all she managed an exceptional attention to the duties of her judgeship, her community activity, and had never so much as received a client or JQC complaint until this set of unfortunate circumstances. She determined to accept the Referee's findings and to not appeal them as a further act of responsibility and contrition.

Her life is now tenuous, the defalcations herein are approaching 6 years old, she has lost the polestar of her career – her judgeship – the ability to ever serve again, and her beloved teaching position. She is a single mother trying to support two growing and grown sons.

Surely the measure of a person's worth, and her reputation and the respect of and with community leaders and friends who grew this State, and still grow it, and the good that her life has meant to her community for decades speak in stentorian tones in support of this one year suspension.

The Referee's recommendation of discipline and his accompanying recommendation of one (1) year suspension, thus, must be approved.

CONCLUSION

For the reasons set forth herein, and in light of the evidence presented at the Final Hearing, the Referee's recommended sanction of one year suspension is not clearly erroneous, has a reasonable basis in existing case law, meets the Standards for Imposing Lawyer Discipline, and this Honorable Court should accept the recommendation as made by the Referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been e-filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399, using the e-filing portal; and that a copy has been furnished by Federal Express, Priority Overnight Delivery, to Jennifer Falcone Moore, Bar Counsel, The Florida Bar – Miami Branch Office, 444 Brickell Avenue, Rivergate Plaza Suite M-100, Miami Florida 33131-2404 (and e-mailed at jmoore@flabar.org), and to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson St., Tallahasse, Florida 32399-2300 (and e-mailed at kmarvin@flabar.org) on this 12th day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14-point proportionally spaced Times New Roman font, and that this brief has been E-filed with the Honorable Thomas D. Hall, Clerk of the Supreme Court of

Florida, using the E-filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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