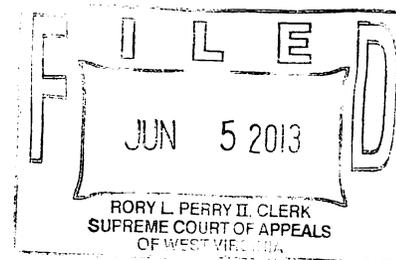


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD, Petitioner

vs.

S. Ct. Docket No 12-0608

MICHAEL S. SANTA BARBARA, ESQ,

a member of the West Virginia State Bar, Respondent

BRIEF OF RESPONDENT MICHAEL S. SANTA BARBARA

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BRIEF OF RESPONDENT MICHAEL S. SANTA BARBARA

COMES NOW Respondent MICHAEL S. SANTA BARBARA, ESQ., by his counsel, Robert H. Davis, Jr. and presents his Brief of argument and authority to the Honorable Supreme Court of Appeals of West Virginia as follows:

I. STATEMENT OF THE CASE

The statement of the case found in the Brief of the Office of Disciplinary Counsel, [hereinafter referred to as “the ODC”] filed in this proceeding is, with only a few corrections and additions, a correct statement of the history of these proceedings and the ultimate findings of the Hearing Panel Subcommittee [hereinafter referred to as “ the HPS”] assigned to this disciplinary matter. We submit the following brief additional statement to augment relevant facts for the further consideration of the Honorable Court as it determines the proper disposition of this matter.

A. Nature of the Proceedings and Findings of the Hearing Panel Subcommittee

The general recitation of the ODC as to the beginning and history of the disciplinary prosecution of the present charges is accurate, although it is important to note that the ODC initially sought a two-year suspension, of the license of Respondent Santa Barbara. This nuance in the narrative of history is

important in that it reflects significant movement in the position of the ODC upon its investigation and learning the true facts surrounding the *nolo contendere* plea and conviction of Respondent Santa Barbara.

An additional important inaccuracy in the statement of the case by the ODC that Respondent believes that the Honorable Court likely already has detected is that the HPS in this matter never recommended suspension of the license of Respondent Santa Barbara for a period of six (6) months, as mistakenly recited by counsel for the ODC. The HPS clearly recommended only a three month suspension and that recommendation was made in tandem with the further recommendation that the 3-month suspension run concurrently with Respondent Santa Barbara's existing period of suspension if such was at all possible. The reasoning for that specific recommendation was clearly articulated as the HPS concluded its "Order of Hearing Panel Subcommittee in Mitigation Hearing Recommending Adoption of Stipulations of Findings of Fact, Conclusions of Law and Recommended Discipline" [hereafter "HPS Order."] [HPS Order pgs. 11, 12.]

We also urge the Honorable Court to note as a part of the history of the case, from its records, that the Petition of the ODC seeking a two-year suspension of the license of Respondent Santa Barbara is date-stamped as filed with the Court on May 16, 2012, exactly one month after the date of Respondent's conviction.

B. Findings of Fact by Hearing Panel Subcommittee

Of note, as to the ultimate element of mitigating cooperation on the part of Respondent Santa Barbara, this Court should note that the core findings in the HPS Order of February 1, 2013, are the result of significant and thorough stipulations of fact and Rule violation, of the degree of appropriate discipline, of a Stipulated Joint Order making an important correction of fact and upon many joint exhibits submitted by the parties, making extended presentation of witnesses and documentary evidence in support of the charges that had been lodged by the ODC unnecessary and resulting in a much shorter and efficient hearing before the HPS. [Hrg.Tr. pp. 159, 170 - statements of Chairman Cooper]

We also note that important findings of the HPS in its HPS Order, which findings depend upon the HPS' assessment of the truthfulness of witnesses as to the overall factual circumstances of Respondent Santa Barbara's conviction include the following findings of great importance in assessment of proper discipline here:

- That Respondent's confrontation on the night of August 14 and 15th occurred when he was an officer of the Whiting's Neck Homeowner's Association [HPS Order, Add'l Finding 1, p.6] and was acting, as a property owner at the request of a neighbor, on a common area in Whiting's Neck on which he owned a boat dock [HPS Order, Add'l Findings 3, p.7]

- That on the night in question, Respondent's community was in a state of alert, had been subjected to weeks of illegal activity, including thefts, vandalism, burglaries, malicious acts against property and a particularly disturbing August, 2011 incident involving a threat frightening children who were next-door neighbors of Respondent Santa Barbara by persons driving a blue jeep with black top, all of which occurred within gated areas of the Whiting's Neck community. These incidents, to which police had not adequately reacted, caused the residents to be in fear for their safety and for that of their children and resulted in establishment of an informal community watch system by residents, some of whom were armed and also caused residents' action to arm themselves. [HPS Order, Add'l Findings ## 2-8, pp. 7-9; Hrg.Tr. pp. 12, 16, 17, 19, 49-52, 55, 87-88; Resp.Exhs. 2-7]
- At the time Respondent drove from his home to the common river pavilion area, Respondent knew that there were a number of unauthorized persons on community property, that the persons were making loud noises, screaming and what a witness heard what they thought were multiple gunshots, that he found that all but one of the persons to whom Respondent spoke at the river pavilion were trespassers and that all who threatened him were trespassers and had breached the peace. [HPS Order, Add'l Finding #9, pp. 9-10; Hrg.Tr. p. 68]
- While the ODC has painted an inaccurate picture that Respondent grabbed

a gun and recklessly allowed his teenage daughter to accompany him into a situation of known potential danger, the facts are that, as Respondent traveled to the river pavilion area, he hoped that he could peaceably confront and disperse the trespassers, thought to be young persons, as he had done on more than one prior occasion [Hrg.Tr. P. 133] and his daughter accompanied him in hopes that she could aid him in this task by identifying young persons she knew and with whom Respondent could reason. [Hrg. Tr. pp. 100, 163]

- After speaking peaceably with the driver of the blue jeep with black top and with the young lady who was a Whiting's Neck resident, Respondent, aware of illegality beyond trespass and disturbing the peace on the part of the persons present, seeing beer kegs and smelling marijuana [Hrg.Tr. 133], was surrounded by a small group of persons who threatened physical violence to him, reasonably placing him in fear for his and his daughter's safety. [HPS Order, Add'l Findings ## 10, 11, p. 10; Hrg.Tr. 122, 164, 165].
- The evidence, un-rebutted by prosecution evidence, regarding public reaction to the fact of Respondent's conviction was that his neighbors thought more positively of Respondent Santa Barbara, not less, after his actions and conviction and while the HPS found that there "may have been" some negative impact on the public's perception about lawyers or Respondent's fitness as a lawyer, there was no evidence that the incident

caused any significant long-term negative impact on the public's view of lawyers or the courts. [HPS Order, Add'l Findings ## 14, pp. 10-11]

C. Conclusions of Law of the Hearing Panel Subcommittee

The Conclusions of Law of the HPS that Respondent Santa Barbara stands convicted of two crimes is not here contested but we urge, as equally important, the Court's acceptance of the assessment of the HPS as to the circumstances of those convictions in its own proper assessment of the degree of seriousness of Respondent's violation of the charged Rules of Professional Conduct and Rule 3.18, W.V.R.L.D.E. The conviction conclusively established the charged violation of Rule 8.4(b), W.V.R.P.C. (criminal act adversely reflecting on honesty, trustworthiness or fitness as a lawyer), the HPS clearly and correctly felt bound by that fact and Respondent's admission of it, but took pains to emphasize that the violation of the Rules, while reflecting somewhat on Respondent Santa Barbara's trustworthiness and fitness, only did so in a minimal way, justifying light discipline, such as that stipulated to by the parties. The HPS strengthened its finding that the conviction involved no dishonesty, fraud, deceit or misrepresentation as it concurred in the Joint Motion to Dismiss Violation of Rule 8.4(c), observing: "There has been absolutely no evidence indicating any such conduct existed in this matter." [HPS Order, p. 6]

Similarly, the HPS correctly found, as stipulated by the parties, that no

timely report had been made to the ODC after the April 16, 2012 conviction of Respondent but also noted the mitigating fact that “Respondent’s criminal counsel had been in contact with the Office of Disciplinary Counsel regarding the criminal charges prior to the date of his conviction” [HPS Order, at Finding 7., p.3] after hearing testimony from Respondent that he had asked his counsel to report the conviction and believed that he would do so. [Hrg.Tr. pp. 145-146]. These facts also clearly impacted, as they should have, the assessment of discipline for the technical violation of Rule 3.18(a), W.V.R.L.D.P. [misstated as “Rules of Professional Conduct” in HPS Order, p.3]

II. SUMMARY OF ARGUMENT

The question of the appropriate discipline to be assessed upon Respondent Santa Barbara may be properly answered only after a careful review of the specific circumstances and facts which explain the actions of Respondent on the night of August 15, 2011. Only such a careful understanding of the August 14-15th incident can inform the Honorable Court as to whether punitive discipline is required and its degree, whether discipline must be imposed to deter like activity by other lawyers and the degree of discipline that will retain public confidence in the integrity of the bar and the courts of West Virginia.

The HPS assigned to this matter have performed with skill and attention and, while accepting a full Stipulation of Facts by the parties, have also made a

number of Additional Findings of Fact more fully explaining the circumstances of violation, and of non-violation, of the Rules of Professional Conduct. Some of these findings Respondent Santa Barbara had requested, some were stipulated and all of the HPS findings are conclusively supported in the record and are not contested here.

The objections of Attorney Santa Barbara to assessment of additional suspension here relate primarily to inaccuracies in argument of the facts suggested by the ODC, clearly the result of mere oversight, the ODC argument that his purely unintended failure to cause his counsel to report his final conviction shows disrespect for the disciplinary system and is a factor of strong aggravation, and, finally, the ODC's misplaced argument of cases and rules of no conclusive use to support aggravation of, or proper disciplinary assessment of, the suggested three-month concurrent suspension to which the parties have stipulated. The stipulation to three months suspension was reached by the parties as fair, if made concurrent with Respondent's present suspension, after assessment of the sole apparently useful guidance, Lawyer Disciplinary Board v. Jennifer D. Hewitt, unreported, Supreme Court No. 35515 (2002) under the assumption that this case reasonably would be decided by the HPS and presented to this Honorable Court and decided as early as very late in 2012 or early in 2013. The cases cited by the ODC from West Virginia and other states are inapposite, factually and legally, to the markedly less-serious actions of Respondent Santa

Barbara, as established conclusively in the record. His actions taken on the night in question, including the carrying and showing of a pistol, were taken to address, peaceably if possible, a serious problem of improper, illegal and disturbing activity by unruly non-residents of his community on property he owned in his neighborhood, at the request of other neighbors. This course of action, while it ultimately subjected him to personal pressures that caused him to make a decision to plea nolo contendere to two criminal charges, was and is viewed by his neighbors as a positive and necessary action to protect them, their children and their property [HPS Order, Add'l Finding #14 p.10; Hrg.Tr p.9-12,16, 17, 49, 54, 67, 87-88] and was clearly thought by members of the HPS to be of such nature as to lead them to conclude that had he forced the charges to trial, he would not have been convicted of them. [HPS Order, Add'l Finding #13, p.10] All of these conclusively-established factors support imposition of minimal discipline in this disciplinary proceeding.

The principal question, therefore, presented to the Honorable Court is how the low degree of aggravation and the substantial mitigation should be applied in this case as evidenced by formal findings and by clear statements by lawyer members of the HPS, both with significant experience as Prosecuting Attorneys in West Virginia as to the essentially minimal nature of the seriousness of Respondent's convictions. While the HPS acknowledges it was obligated to accept the validity of the conviction here admitted, the full HPS stated, with firm

conviction, even before their report of Respondent's firing of the pistol was corrected [Stipulated Agreed Order of 3/19/2013] , that the overall circumstances of the conviction indicate that substantial legal and factual evidence exists to negate any notion that the actions of Respondent Santa Barbara involved any type of dishonesty, were blatantly illegal, or unusually or improperly aggressive, presented a high danger to others or were a wholly inappropriate and gross departure from the law and from the proper exercise of his rights under West Virginia law in the circumstances which developed, and as Respondent Santa Barbara encountered them, on the night and morning of August 14-15, 2011. The transcript, Stipulations and specific Findings [HPS Order, pgs. 2-4 Finding #13, pg. 10, Conclusion of Law, ¶2, pg. 11] reflect that the HPS members experienced in criminal law clearly expressed their conclusions that the actions of Respondent Santa Barbara, seen in their appropriate context as spread before them at the hearing into this matter, were such that citizens of the State of West Virginia would not, given all the facts, seriously question his judgment, his fitness as an attorney nor view the incident as reflecting adversely upon the reputation of the bar or integrity of the judicial system. [HPS Order, Finding #14, pg.10] The HPS also found that Respondent's admitted failure to report the conviction was understandable in light of the history of ODC contacts with his counsel.

Considerable additional factual mitigation in this matter also supports the imposition of minimum, exemplary and deterrent discipline but the whole of the

facts of record in this proceeding clearly indicates that no additional actual suspension time or rehabilitative requirement is required to punish Respondent Santa Barbara or to address any psychological or other deficit of Respondent Santa Barbara and that he ought to be returned to the full practice of law as promptly as possible under terms of his presently-existing suspension and post-reinstatement obligations.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered March 28, 2013, this Honorable Court stated without elaboration that it did not concur with the Hearing Panel Subcommittee's recommended disposition of this proceeding and pursuant to Rule 29, Revised Rules of Appellate Procedure, provided for a briefing schedule and set this matter for oral argument on September 10, 2013.

V. ARGUMENT

The question before this Honorable Court is, of course, how it, in the exercise of its independent power to determine appropriate discipline, as stated in Syl. Pt. 3. Lawyer Disciplinary Board v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377 (1994), should weigh the very unique facts in this case, involving action involving possession and brandishing of a firearm by a member of a community and landowner seeking to end inappropriate invasion and use of his property, held in common with others in the Whiting's Neck community, by trespassers, should be treated in light of the goals of the discipline system: punishment for

misconduct, preservation of public trust in the bar and courts, rehabilitation of the attorney and deterrence of similar conduct by other attorneys. Syl.Pt. 4 MacCorkle, supra; Syl.Pt. 5. Committee on Legal Ethics v. Roark, 181 W.Va.260, 382 S.E.2d 313 (1989); Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993).

A. Factors and Authorities Properly Used to Calculate Proper Discipline

The factors to be considered in assessment of appropriate sanctions necessarily includes well-settled principles enumerated in Rule 3.16

W.Va.R.L.D.P :

Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: “In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the [West Virginia Supreme Court of Appeals] or [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty to a client, to the public , to the legal system or to the profession; (2) whether the lawyer acted intentionally, knowingly or negligently; (3) the amount of actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of any aggravating or mitigating factors.”

Syl Pt 4, Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 286, 452 S.E.2d 377 (1998)

We agree with the ODC position that all issues in a disciplinary proceeding are to be evaluated on a case-by-case basis, carefully considering the facts and circumstances unique to each case, including mitigating facts and circumstances.

Roark, supra . This Honorable Court has also held that in its analysis of each case once the HPS makes its findings, they are afforded substantial deference. Syl Pt 3, Lawyer Disciplinary Board v. McCorkle, supra, (1994). Respondent Santa Barbara reminds this Honorable Court that in this case two of the three members of the present HPS making recommendations of findings and of discipline have now had three days to personally observe and hear Respondent Santa Barbara, to gauge his demonstrated fundamental honesty and credibility and his fitness, and thus the Court should give especially great deference to the Board's factual findings and conclusions as reported in the HPS Order, as amended.

As for claims of the ODC that certain admitted actions of Respondent Santa Barbara indicate lack of judgment or raised a substantial risk of violence, we also recall that “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the [Board].” McCorkle, supra, 192 W. Va. at 290, 452 S.E.2d at 381.

It is thus particularly important when assessing the disciplinary sanction proper in this proceeding to view the admitted violations of ethics rules and the underlying brandishing and firearms possession laws in light of the overall situation as developed on the night in question.

(B) Analysis of the Factors

(1) Whether the Lawyer Has Violated a Duty to a Client, to the Public,
to the Legal System or to the Profession.

In this proceeding, Respondent Santa Barbara, acting with honesty and integrity, has consistently admitted the fact of his conviction, although he also has insisted upon his right to contest the attempts of the ODC from the outset to magnify the extent of any danger involved and to assert that his actions show a lack of judgment or any tendency toward lawlessness. One need only refer to his response to the charges and to his testimony to see that he suffered great remorse for his actions, although the reality of the situation is that his actions, taken in the full context of the situation he found developing before him, do not show culpable lack of judgment nor any propensity to wilfully violate the law or to seek to injure any member of the public.

Given the findings and conclusions of the HPS in this matter, particularly its Finding #13 that Respondent “very likely would have been acquitted had he chosen to contest the charges” and that the evidence establishes that Respondent “was acting out of concern for his safety and property and that of the others in the subdivision, not for a criminal purpose.” [HPS Report, p.10] as well as its extensive findings, the majority of which reflect carefully-negotiated stipulations of fact by counsel for the ODC and Respondent Santa Barbara, and are largely

favorable to him both as to violations of Rules and as to mitigation, the assessment of appropriate discipline in this matter should not proceed as in more typical cases involving the same Rule violations and same criminal statutes. In this case the HPS and this Honorable Court are presented with a Respondent, Attorney Michael Santa Barbara, who found himself called upon by his neighbors, who considered themselves in a state of siege by outsiders to their community, [HPS Report, Add'l Findings ## 2-10 pp. 7-10; Hrg.Tr.pp. 9-12, 49-54, 65, 87-88; Resp. Exhs. 2-7] to investigate a situation about which he knew only that neighbors had heard loud noises, possible gunshots and seen lights in an area of his community. Such action can only be seen, as the HPS did, as the actions of a person exhibiting a positive support for his family and threatened community. These facts, so heavily emphasized by the HPS in its additional findings, clearly distinguish the actions of Respondent Santa Barbara from those in the only available West Virginia authority relating to armed attorney confrontations resulting in minor criminal convictions, Lawyer Disciplinary Board v. Jennifer D. Hewitt, Supreme Court No. 35515 (not reported in official reporter), which case is discussed below in the Sanctions section. The facts in this case show, viewed objectively, that while Respondent's admitted and binding conviction evidence a failure to observe the criminal laws, admittedly a duty to the legal system, there is utterly no involvement of clients or the members of the bar in his actions, other

than his action, pleading guilty when some say he should not have, to deflect or minimize publicity and thus criticism of the bar. [Hrg.Tr. p. 160]

(2.) Whether the Lawyer Acted Intentionally, Knowingly or Negligently

While final conviction of any crime justifies the conclusion that the attorney possessed the requisite intent to support the admitted finding of guilt, the unique facts in this case indicate that the overarching intent of Respondent Santa Barbara, as he left his home and drove to the river pavilion area into a situation which was very unclear, was not criminal, but was peaceably to simply drive away persons, whom he previously experienced to be non-aggressive young persons, from the community pavilion. [Hrg.Tr. 111, 133] An attorney is not required to possess godlike omniscience when beginning a course of conduct. It is not fair to argue that Respondent intended to engage in violence or create a risk of violence when he was properly licensed to carry a firearm in West Virginia [Hrg.Tr. p. 139] , having armed himself after receipt of reports of possible gunfire and an unacceptably loud and unapproved gathering of trespassers on restricted common property in his community and he only had scraps of information about the situation into which he was proceeding. It is also not clear that he intended to act, or did act, illegally by carrying a weapon placed out of sight in a

compartment in his automobile where it remained until he anticipated the potential of a threat to himself, once he arrived at the river pavilion area, after having just minutes before left the firearm stored in his car while interviewing a person, the driver of the "blue jeep with a black top", he believed to be a trespasser and who, he quickly concluded, was very likely a person believed to have also terrorized his community and the sole young resident present.

Respondent Santa Barbara admits that he showed the firearm, amounting, he thought, to brandishing, by showing it in public only after dealing peaceably with most of the young persons he found at the river pavilion and then only when confronted by a large number of persons at the unauthorized party at the private river pavilion, but the law and his actions do not lead to a conclusion that he had the intent illegally to possess a concealed weapon or to brandish his weapon in any way that affronts a fundamental public policy relating to such crime. In such a situation, the overall facts established on the record, not facts imagined by the prosecution as ones which *might* have occurred, relating to the admitted *nolo contendere* plea and resulting conviction indicate that the conviction of the crime, while admitted to establish sufficiently the element of intent to commit the crimes of possession of a concealed weapon and brandishing, admitted here, does not evidence any malicious or life-endangering intent but rather reflects clearly that, throughout the evening Respondent, while under understandable stress,

generally exercised the type of good judgment and self-control requisite for attorneys in West Virginia.

Similarly, the intent necessary for a brandishing conviction, that he simply intended to show a firearm to force those surrounding him in a threatening way to reevaluate any intentions they may have had to attack him or his daughter, indicates a desire for peace and order, not a significant threat of, and certainly not a desire for, actual violence by him or those he faced. His un-rebutted testimony is that he was in control of the weapon at all times so as never to point it at any individual, never fired it, wanted to harm no one and the record is also clear that he did not shake the weapon menacingly at any time but simply held it up to be seen, finger outside the trigger guard, with the butt of the firearm down and the muzzle pointed safely upward. [Hrg Tr. p.138, 163] In the situation of menace toward him and perceived personal danger described in the record, this type of brandishing amounts to, at most, a technical violation of the law, and was so thought by two HPS members, both of whom are experienced and knowledgeable in criminal law.

The definition of “mental states” found in the A.B.A. Discipline Standards is particularly important and instructive in this matter:

The mental states used in this model are defined as follows: The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable state is that of knowledge, when the lawyer acts with

conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

A.B.A. Standards for Imposition of Lawyer Discipline, as amended February 1992.

Careful review of the record and of HPS findings establish clearly that Respondent Santa Barbara's intentions with regard to his pistol did not begin with the intent to commit any crime or violate the law. His action of arming himself, given the factual situation, and as validated by another armed neighbor's arrival at the river pavilion just minutes after Respondent arrived there [Hrg. Tr. p. 138] reveals that Attorney Santa Barbara's actions were logical and taken to afford himself and his community protection and were not taken with the conscious objective to violate any firearms law nor commit any criminal action. The intent necessary to the specific violation of law here involved was the intent to possess a firearm and to show it to others to try to maintain the peace and his personal safety. Such bare intent sufficient to support the conviction does not, in light of evidence of other intent and mitigating explanation, reflect negatively upon Respondent Santa Barbara, upon his judgment or fitness as a lawyer or indicate lack of qualities required of an attorney.

Similarly, the possession of concealed firearms conviction, given the

narrative of where the firearm was located during each of the events of August 14-15th, 2011, and Respondent's careful control of the weapon, even when under pressure and perceived threat, suggests that the possession was never intended by Respondent to be for use in illegality, to injure or even to frighten any specific person, and was one which is generally legal in West Virginia for situations such as Respondent Santa Barbara believed he was facing, especially by a person licensed to carry a firearm, [Hrg. Tr. p. 139], was legal for Respondent's use to defend his property, himself and his daughter and such possession and showing of the firearm was appropriate when Respondent reasonably felt he was threatened with violence. State v. Mitchell, 214 W.Va. 516, 590 S.E.2d 709 (2003), State v. Whittaker, 221 W.Va. 117, 650 S.E.2d 16 (2007). In short, while Respondent's plea admittedly established his admission of basic intent to do what he did that resulted in the plea and conviction, the facts clearly show his broader intent, significant to the broader question here of his culpability for discipline, as he began his contact with various persons at the river pavilion was not to act illegally or to injure anyone, rather to give peaceful, legal direction that the trespassers must leave Whiting's Neck property.

(3.) Actual and Potential Injury Caused by Attorney Santa Barbara's
Misconduct

First, it is clear that there was *no actual injury* to anyone resulting from Respondent's actions on the evening and morning of August 14-15, 2011, so that such nonexistent fact cannot fairly be considered as aggravation of the admitted violations in this proceeding. The argument of the ODC that the actions of Respondent regarding the firearm created or increased the potential for violence and thus reflect somehow on his fitness is based on a false premise - that the mere act of arming himself, at the time and under the circumstances known to him, necessarily would lead to violence or increase the likelihood of violence. The pistol carried by Respondent, as any firearm, did not raise the odds that violence would occur. In fact, the record here clearly establishes that Respondent's controlled showing of the firearm caused a volatile and threatening situation to become one in which the trespassers, even the most aggressive ones, ceased threatening Respondent, retreated and awaited law enforcement officers' arrival without further incident. [Hrg.Tr. pp. 124, 134-138].

It is a fact, we repeat, conclusively established on the record, that violence did **not** result and no person was injured due to the actions of Respondent during his confrontation of the trespassers. It is fundamentally unfair to attempt to aggravate the punishment of Respondent by speculating about "what might have

happened” or to argue any set of “facts” other than the facts on the record in this proceeding: that Respondent re-established the peace and safety in his neighborhood on that night and thereafter and no one, not one single person, was harmed in the process. While Respondent admittedly later expressed remorse and related his personal concern about what might have happened had he tripped and an accidental discharge of his pistol had occurred, even that scenario is speculative, did not in fact occur and thus is not proper for consideration in assessment of the degree of discipline appropriate here.

The argument by the ODC about “what might have happened” also illogically attempts improperly to transfer to Respondent responsibility for the improper and aggressive actions of the 15 or so persons who surrounded Respondent and threatened him. Respondent had gone to the river pavilion area to try peaceably to break up what he believed was a party attended by young persons, which he had done at other locations in Whiting’s Neck, peaceably, on prior occasions. [Hrg. Tr. p. 133] While seeing “the blue jeep with black top” that he reasonably believed was driven by a person who had been involved in vandalism, illegal activity and threats to neighborhood children raised his apprehension that some in the crowd of trespassers might be violent, [Hrg. Tr. pp. 122-123] it was only the negative and threatening reaction of the driver of the blue jeep and a small number of persons to his arrival and their threats to him

after his peaceful discussion with the one young local resident, not his firearm, that raised the risk that violence might occur. Let us say it plainly, the trespassers first threatened violence, not because of the firearm but because he was breaking up the unauthorized party. Fundamental fairness and logic suggest that Respondent must not be called upon to answer for the threatening and potentially violent actions that were initiated by others in the crowd, or shall we call it a mob, toward him and his daughter on the night of August 14-15th, 2011. The HPS got it exactly right in their report - Respondent was reacting rationally and with courage to heed the call of his fellow neighbor, as a Whiting's Neck Association officer, to investigate the disturbance, carrying a firearm into an unclear situation and any attempt to draw dark conclusions as to Respondent's character and fitness as an attorney from that action is simply illogical in light of all the evidence in the record in this proceeding to the contrary.

Additionally, the ODC has argued that Respondent's snap agreement that his daughter accompany him shows lack of judgment, which argument also fails. Respondent had earlier peacefully broken up gatherings of young persons on the Whiting's Neck property [Hrg.Tr. p.133] and despite the reports of loud screams, possibly of females, and what might have been shots, it was thought, at the time he allowed his daughter to get into his car, before the crowd confronted him, that she could help the situation, including serving to identify any teenagers involved.

[Hrg.Tr. p. 100] The criticism of such action, utilizing 20/20 hindsight, is simply illogical and unfair, given the confusing situation that existed as Respondent and his daughter quickly left their home for the river pavilion area. We urge the Court to disregard such inflammatory and, frankly, irrelevant argument as evidence of a claimed lack of judgment necessary to law practice. The logical reaction in the situation known to exist as Respondent left his home was that while the situation was unclear and that a breach of the peace, at the very least, existed, Respondent and his daughter hoped it was a situation that could be easily ended but, prudence also logically indicated, in such an unclear situation that Respondent was justified in taking with him a means of self-defense.

(4). The Balance of Aggravating and Mitigating Factors Justifies

Discipline Less than Suspension

As for aggravating circumstances, the HPS and the ODC have identified all that exist: the basic, admitted criminal violations and the fact that Respondent is presently under disciplinary suspension, due to be successfully completed before this matter will be argued, which suspension will have involved a sufficient period of specific counseling for a condition of depression that is not shown to have been involved in the facts of the present disciplinary proceeding.

On the record before the Court, Attorney Santa Barbara is entitled to

significant mitigation, under case law and mitigating factors listed in Syl. Pt. 3, Lawyer Disciplinary Bd. v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003) and Syl. Pt. 8, Lawyer Disciplinary Bd. v. Cavendish, 226 W.Va. 37, 700 S.E.2d 779 (2010), for the following reasons:

(1) Attorney Santa Barbara's cooperative attitude and openness and candor with the prosecution during the criminal matter, with disciplinary counsel and during the formal disciplinary proceedings is evidenced by his provision of information, through counsel, to the ODC before his conviction, [Hrg. Tr. pp. 94-95] the agreement to extensive stipulations of fact, admission of a violation of three of the rule violations charged, while reserving the right to bring evidence of mitigation, joint stipulation with the ODC of documentary evidence at hearing and non-objection to ODC evidence, his stipulations aimed to make testimony by prosecution witnesses unnecessary, are all indicators that Attorney Santa Barbara is entitled to mitigation on the basis of the cooperative attitude factor. Scott Syl. Pt. 3, factor 5.

(2) Testimony of Attorney Santa Barbara's good character was provided by unopposed character witnesses. [Hrg.Tr.p.19, 20(Eifert), 55-56 (Bittle)]; and is a strong mitigation factor. Scott Syl. Pt. 3, factor 7.

(3) Attorney Santa Barbara, in his presentations to the ODC and during the

hearing, showed remorse for having become involved in the confrontation involving a firearm and for the adverse publicity it might cause the bar. His action in entering a *nolo contendere* plea was established, in part, to also have been motivated by a desire to avoid a trial and the adverse publicity that such trial would generate concerning him and the bar. [Hrg.Tr. p.159-163] Scott Syl. Pt. 3, factor 12.

C. The Sanction Appropriate Here

We find that we agree with the ODC recitation in its brief, page 19, that a principal purpose of attorney disciplinary proceedings is to safeguard, in a broad number of applicable situations, the public's interest in the administration of justice, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984), particularly that a disciplinary sanction "is to not only punish the attorney but should also be designed to reassure public confidence in the integrity of the legal profession and deter other lawyers from similar conduct." Syl. Pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va.645, 542 S.E.2d 466 (2000). We do not agree that these authorities lead to the conclusion, argued by the ODC, that "a severe sanction is necessary" in any situation in which lawyers' conduct might reflect adversely, to some degree, on the members of the West Virginia State Bar. The reaction of the two members of the West Virginia State Bar who are most

knowledgeable of the conduct of Respondent Santa Barbara in this proceeding, HPS Members Cooper and Haught, accurately reflects that the amount of discipline appropriate when a criminal activity tends to subject the some negative reflection is that the discipline ought to be proportional to the actual facts of the criminal conviction, not a Procrustean formula such as is suggested in the ODC argument. Clearly, the HPS as a whole has been in the presence of Respondent, has seen his evidence and has concluded that the overall facts leading to his conviction do not include facts that support serious discipline, as suggested by the ODC.

The cases chosen by the ODC to argue for severe sanctions simply do not support appropriate discipline if proportion and achievement of the goals of discipline are seriously considered. Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d313 (1989) involved convictions by a public official of six federal drug charges and on those vastly different facts alone is conclusively of no aid in adjudging the seriousness or proper discipline for Respondent's conviction. Committee on Legal Ethics v. White, 189 W.VA. 135, 428 S.E.2d (1993) would be useful in some cases regarding criminal convictions, but it is inapposite as it deals with a suspension of White for two (2) years resulting from three federal drug misdemeanor convictions by yet another public official. In contrast, Respondent Santa Barbara is no public official, was convicted, as we have shown, of a violation

of the law in a significantly different situation as to seriousness of the violation, as to planning, repeat offense and extent of intent as to committing the crime. The suggestion that a one (1) year suspension is justified because of the discipline of Attorney Galford fails as the case differs from the instant case in a significant way, in that there was a conspiracy to commit a misdemeanor relating to a function as an attorney, clearly reflecting on respect for the judicial system and functions as an attorney, factors not present here. Office of Disciplinary Counsel v. Galford, 202 W.Va.587, 505 S.E.2d 650 (1998).

The case utilized by the parties to this proceeding as a gauge to determine the upper limit of appropriate discipline in this case of firearm-related criminal conviction, made known to Respondent by the ODC during the initial stages of this proceeding, is Lawyer Disciplinary Board v. Jennifer D. Hewitt, Supreme Court No. 35515 (not reported in official reporter) involved the three-months suspension of an attorney who had become involved in improper relations with a client, a serious professional mistake, who carried a firearm with her to a situation in which it was clear that her client/boyfriend likely would become involved in, and did become involved in, a heated disagreement with the boyfriend's child's mother at that mother's home. The three-month suspension imposed in Hewitt is not, in Respondent Santa Barbara's view, appropriate as Respondent's travel was with a legitimate reason to investigate a disturbance, the

nature of which was not clear, to go onto property which he owned to confront persons with no right to be there, to restore the peace and to await law enforcement which had been summoned. When this Court considers that at the time Respondent agreed to, and the HPS belatedly agreed with, the three (3) month suspension, it was clearly with the anticipation that the suspension would, while imposed concurrently with his existing suspension, serve to deter others from improper brandishing and weapons offenses and then looks at the clearly less serious overall facts involved in Respondent Santa Barbara's offense, the imposition of a lesser discipline than that suggested by the HPS, a public reprimand for deterrent and exemplary purposes, seems fully appropriate to the convictions and resulting disciplinary rule infractions of Respondent. This result is supported by the decision of the Iowa Supreme Court in Iowa Supreme Court Disciplinary Board v. Keele, 795 N.W.2d 501 (2011), cited by the ODC in a footnote, which case is a vivid illustration of a rule of fundamental fairness that discipline for a firearms crime, or any crime, more generally, ought to reflect the unique facts surrounding the conviction which speak to the degree to which the criminal action illustrated sufficient disrespect for the law, a pattern of criminal conduct, or lack of some trait necessary to integrity in the practice of law. Keele admittedly involves a harmless, although intentional and ongoing, technical violation of the law and resulted in dismissal of the action; its logic properly

informs this matter as to the proper range of discipline that ought to be imposed where the violation is technical, involves split-second decisions resulting in no harm and is, on its broader facts, minor in nature.

Similarly, the purpose and plan of the actor in displaying the firearm should make a difference in the determination of necessity for any discipline greater than a reprimand. Unlike Respondent Santa Barbara's carrying and ultimate, delayed, display of a firearm and then only when he was put in fear by the actions of others, the conviction and six (6) month suspension in In the Matter of Phillip Franscinella, 1 Cal. State Bar Ct. Rptr. 543 (1991) was assessed in a situation in which the respondent attorney who had been evicted from his office in a building tore up the notice to quit, moved to at least two different floors in the building and, on each, pointed and pulled the trigger of a replica firearm directly at persons, the sole specific intent of which and result of which was to threaten and terrorize a number of persons because of the eviction, resulting in conviction of two criminal misdemeanor counts. Franscinella is clearly distinguishable from the facts in this matter for all of those significant factual differences. That he received only a six month suspension for such intentionally threatening, repeated and aggressive conduct wholly disrespectful of the fears of innocent others, supports our position that discipline here ought to be significantly less than that imposed in California.

The South Carolina decision discussed by the ODC, In the Matter of Ervin, 387 S.C. 551, 694 S.E.2d 6 (2010), in which a six (6) month suspension was assessed, retroactive to the attorney's interim suspension, involved a road rage incident in which the facts showed that Ervin's threat toward a fellow driver with a firearm could have been broken off and the dangerous situation avoided by the attorney without the necessity of reaction, showing his own firearm. That the other driver had first shown a firearm in a threatening way and that a false version of the incident was reported to the police and that the motive for the false report was a desire to bring a civil claim, that is, the overall clearly illegal and aggressive conduct of the complainant, also mitigated the charge. The Matter of Ervin case also shows the wisdom of courts' allowing careful exposition of the overall facts in an attorney discipline matter involving a conviction before assessing final discipline. It is important to emphasize the fact, as illustrated by Matter of Ervin and this case, that the charges initially filed and the hearsay statements and apparent evidence supporting them as filed with courts in attorney discipline cases are often not complete nor true and that such situations compel a fresh look at each conviction case and decision only on record evidence received strictly according to the law of evidence, as the HPS obviously has done in its hearing of the present case and recommended final discipline.

VI. CONCLUSION

In light of the entirety of the evidence in the record of this proceeding the sanction of public reprimand is now, with the completion of Respondent's initial one-year suspension, most appropriate in light of the goals of the disciplinary system, including punishment, deterrence, rehabilitation of the attorney and restoration of public respect for, and confidence in, the bar.

An additional period of actual suspension as deterrent or as an opportunity for rehabilitation, as was the case in Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101, 1999 W.Va. LEXIS 72 (1999) is not appropriate here, as this record clearly illustrates that the actions of Respondent Santa Barbara do not involve any clients or any client matters and, while they had the potential to cause some embarrassment to the bar, that there is insubstantial reason to punish him given the overall facts of this case. Additionally, of particular importance is that this incident has not been shown to relate to his depression or use of any intoxicants - the specific reason for the counseling that was begun after the August 2011 incident and which is now nearing the 1 year length thought needed to address the problem of Respondent but which will very likely continue until decision of this matter - and thus there is no evidence that any aspect of his conduct here at issue requires additional counseling. The counseling stipulated to by the parties was primarily expected to be provided concurrently with that which

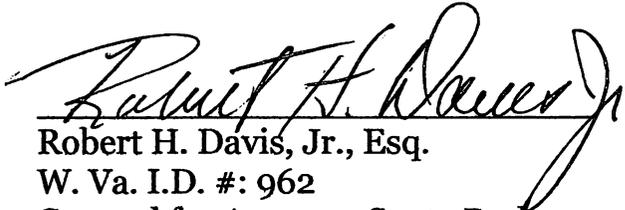
would be ongoing if the period of Respondent's suspension had been, as planned by the stipulating parties, fully or partly concurrent with the present suspension period.

A reprimand, upon its administration and its report to the public and the bar, will serve sufficiently to deter like conduct on the part of bar members and assure the public, to the degree appropriate and to those who will listen, that the bar and this Honorable Court do not allow criminal conduct, even minor criminal conduct, to go without appropriate, properly proportioned, discipline. The public's view of Attorney Santa Barbara and his reputation for character as clearly shown on the record here is presently very good and its view of the integrity of the bar will be enhanced by assessing appropriate proportionate public discipline in the form of a reprimand.

WHEREFORE, upon all the foregoing enumerated authorities and arguments, we respectfully urge this Honorable Court to reject the now-inappropriate disciplinary recommendation of suspension in the HPS Order in this proceeding, that the Court confirm the other HPS Findings of Fact and additional findings as here urged, upon the testimony and documentary evidence properly in the record here, that they make the findings as to Rule violations as stipulated and again urged here, and that this Honorable Court recognize the

unique convergence of facts and circumstances clearly found by the HPS and shown in the record, and assess discipline appropriate to this matter as described and justified here.

Respectfully submitted this the 4th day of June, 2013.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: MICHAEL S. SANTA BARBARA, Esq
a member of the West Virginia

Bar No.: 5625
S. Ct. Docket No: 12-0608

CERTIFICATE OF SERVICE

I Certify that I have served the foregoing document, Respondent's **BRIEF OF RESPONDENT MICHAEL SANTA**, concurrently with transmittal to the Supreme Court of Appeals for filing, upon the Office of Disciplinary Counsel and the members of the hearing panel by United States Mail, as shown below:

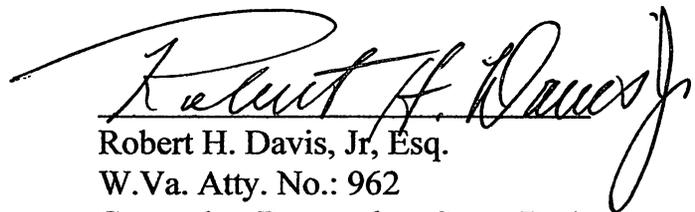
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This the day of June 2013.



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