

ORIGINAL

IN THE SUPREME COURT OF OHIO

In re: :
Application of : Case No. 2014-1555
Joseph V. Libretti, Jr. :

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND
REPLACE PLEADING OF APPLICANT JOSEPH V. LIBRETTI, JR.

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MOTION

Applicant, by and through counsel, hereby moves this Court to strike and replace the Objections and Brief in Support filed October 28, 2014 with the time-stamped copy of the Objections and Brief in Support attached hereto as Exhibit A. Due to what was presumably an inadvertent clerical error, the Objections and Brief in Support on record with the Clerk does not contain pages 23 through 37 which set forth a portion of the argument in the case.

Applicant submits the attached Memorandum in support of his Motion herein.

MEMORANDUM

Applicant filed his Objections and Brief in Support on Wednesday, October 28, 2014. Due to what was presumably an inadvertent clerical error, pages 23 through 37 are not present in the original filing of record, whether through an inadvertent clerical error in the original filing as transmitted by counsel, the mailing process, the scanning process, or otherwise. For whatever reason, the time-stamped copy returned to Applicant's counsel contains all pages. On Monday, November 3, 2014, Applicant's counsel received word from counsel for the Cleveland Metropolitan Bar Association (CMBA) regarding this omission in the electronic version that had been briefly available on the Court's website and which Applicant's counsel had utilized in providing an electronic copy to the CMBA. (See Affidavit of Counsel attached hereto as Exhibit A). After contacting the Clerk on Tuesday, November 4, Applicant's counsel transmitted an electronic version of the entire time-stamped copy to counsel for CMBA. Upon learning on Thursday, November 6, that counsel for CMBA still was not showing the electronic document in his inbox, Applicant's counsel immediately re-transmitted the missing pages and provided an electronic copy of the entire document to Assistant Bar Counsel

Heather Zirke so that CMBA would not be prejudiced. Applicant has also consented to an extension of time for CMBA to file its Reply Brief based on prior counsel's representations it would be given due to scheduling conflicts created for CMBA by Applicant's request for an extension.

On the basis of the foregoing, Applicant respectfully requests that he be permitted to strike and replace the Objections and Brief in Support with the time-stamped copy that was returned from the Court.

Counsel for the CMBA in this matter was contacted regarding this Motion and had no objection to the relief requested.

WHEREFORE, Applicant respectfully requests the Court grant the within Motion.

Respectfully submitted,



Deborah Zaccaro Hoffman (0071599)

IN THE SUPREME COURT OF OHIO

In re: :
Application of : Case No. 2014-1555
Joseph Victor Libretti, Jr. : ORDER

This matter is pending before this Court upon the Motion and Memorandum in Support of Motion to Strike and Replace Pleading of Applicant Joseph V. Libretti, Jr.

Upon consideration thereof, it is ordered by the Court that the Motion be and hereby is granted. The Objections and Brief in Support that are of record shall be stricken and replaced with the attached time-stamped copy of the Objections and Brief in Support.

IN THE SUPREME COURT OF OHIO

In re: :
Application of : Case No. 2014-1555
Joseph V. Libretti, Jr. :

APPLICANT JOSEPH V. LIBRETTI, JR.'S OBJECTIONS
TO THE PANEL REPORT AND RECOMMENDATION
OF THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS
OF THE SUPREME COURT OF OHIO

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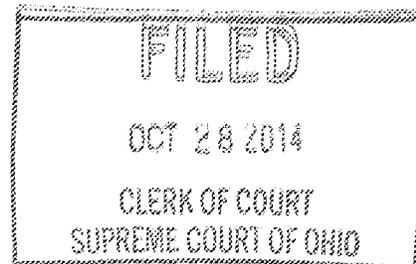


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The term “good moral character” has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

- Justice Hugo Black¹

We thought that we had the answers; it was the questions we had wrong.

- Bono

I. INTRODUCTION

Now comes Applicant, Joseph Victor Libretti, Jr., and submits the following objections to the Report and Recommendations (“Report”) of the Board of Commissioners On Character and Fitness of the Supreme Court of Ohio (“Board”). The Admissions Committee of the Cleveland Metropolitan Bar Association (“Admissions Committee”) determined that Joe’s Application to Register As A Candidate for Admission to the Bar should be approved without conditions. However, after a hearing before a three-member Panel of the Board of Commissioners on Character and Fitness (“Panel”), the Board recommended Joe’s Application be denied and that he never be permitted to re-apply. An Order to Show Cause was issued on September 4, 2014, and Applicant submits his Objections and Brief as cause why the Court should reject the Report.

SPECIFIC OBJECTIONS

Joe objects to the finding that he does not presently possess the requisite character and fitness to register as a candidate for admission to the practice of law.

Joe objects to the adversarial nature of the Panel hearing held on this matter, to the inaccurate renderings of testimony at the hearing, and to the improper use of innuendo during the questioning of witnesses to influence responses.

Joe objects to the Report’s omission of the (D)(3) and (D)(5)(a) character and fitness

¹ *Konigsberg v. State of California*, 353 U.S. 252, 263, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957).

factors it was required to consider under Gov.Bar Rule I.

Joe objects to the Report's narrow focus on his legal conduct between late 2009 and early 2011, its reliance on his state of mind in 2009-2010 concerning it, and its failure to consider his conduct as a whole since his 1992 conviction and his *present* conduct and state of mind.

Joe objects to the assertion that his cessation of this legal conduct because it troubled him morally demonstrates his lack of rehabilitation rather than his complete and full rehabilitation.

Joe objects to the Report's speculation that he would not have ceased his legal conduct had it not been made illegal, especially as other forms of the conduct remain fully legal.

Joe objects to the assertion that he did not express remorse for past conduct when the record demonstrates that he did.

Joe objects to the Report's assertion that when answering a question on the Application regarding grants of immunity he should have known it meant ungranted requests for immunity.

Joe objects to the Report's deeming his views of the harm arising from his conduct in the 1980s "amoral," and to the proposition that applicants can be disapproved for "views."

Joe objects to the Report's distilling his candid self-criticism into simply "greed" as justification for recommending a permanent ban on re-application.

Joe objects to the Report's entering findings based on speculation rather than on any evidence introduced to contradict his testimony and that of the other witnesses.

Joe objects to the Report's utter disregard for the overwhelming positive aspects of his candidacy in favor of a universally negative bias at every opportunity.

Joe objects to the proposition that his conduct past and present merits in any way a permanent ban on re-applying as a candidate for admission to the practice of law.

II. STATEMENT OF FACTS

Joseph V. Libretti, Jr. is the top-ranked student in his law school class and a Senior Editor of its Law Review. Joe received a full scholarship to law school, has earned numerous awards, and has been practicing law under a Legal Intern Certificate for over a year. Linda Hricko, an attorney with the Cuyahoga County Public Defender's Office, who drove three hours to testify on his behalf described Joe as the "smartest clerk we've ever had" (Tr. 241) in her ten years there. He has never lost a motion argued in Court under his Certificate. More than two dozen letters of recommendation from attorneys, law professors, former employers, and others were submitted on his behalf in support of his Application.

Joe also has a felony conviction for drug trafficking² from nearly a quarter-century ago. When he was arrested on December 4, 1991, George Bush, Sr. was in the White House, there was more than one Germany, Ukraine was still part of the Soviet Union, Chile had just begun the exhumation of thousands of victims of the Pinochet dictatorship, and Terry Anderson, the longest held U.S. hostage in Lebanon, had finally been freed after 2,454 days in captivity. At the time of his arrest and subsequent conviction he had not sold controlled substances since 1990, had obtained full-time employment as an accounting supervisor, and was engaged to be married.

Joe spent the first 12 years following his conviction and imprisonment employed full time during the day as an accounting clerk for Unicor (now Federal Prison Industries), a government-owned corporation that manufactured defense equipment (Tr. 63). At night he studied law. On weekends he studied law, ran, or practiced Buddhist meditation (Tr. 65, 67). He had a pristine employment record and always earned the maximum three bonus vacation days per year, which he used for study. (Tr. 64). Despite the ready availability of criminal conduct in prison—including, let's not be naïve—drug trafficking and other criminal enterprises, Joe was not interested. He focused his attention on thoroughly and efficiently fulfilling the

² Technically, 21 U.S.C. § 848, Continuing Criminal Enterprise.

responsibilities entrusted to him, regardless of the lack of personal profit to him. At his suggestion, Unicom implemented a prompt payment discount program that enabled an arm of the federal entity imprisoning him to save money merely by paying bills that it would have paid anyway, again with no benefit to himself other than the satisfaction of a job well done. (Tr. 64).

Joe displayed the same competent, professional conduct upon his release. He went to work for Energy Transportation, whose President, Dan McGlade, testified at the hearing. Mr. McGlade attested that Joe appeared at 6 a.m., though he didn't have to be there until 8 a.m. and had never been asked to come earlier. He just did it. (Ex. 2). Ultimately he was promoted to Company Controller, entrusted with managing millions of dollars on a daily basis (Ex. 2). Mr. McGlade's recommendation letter credits Joe with the company's survival during the worst economic recession in three generations. Due to Joe's inquiry and analysis on his own time the company claimed an overlooked carryback loss in 2009 that resulted in a million-dollar tax refund, a sorely needed infusion of cash. (Tr. 538). Again this was nothing Joe had been asked to do or that represented any personal profit to himself. He just did it.

In late 2007, Joe had been released to a halfway house in Casper, Wyoming with \$600, a toothbrush, and a change of clothing (Tr. 66). He went to the library "every chance he got" because at the age of 44 he had never sent an e-mail or owned a DVD, and he wanted to acquire computer skills to bridge the 16-year gap between his conviction and release. (Tr. 82). Prior to his release he also resided at a new prison in Victorville, California, because it was a common practice to seed a new facility with those exhibiting exemplary conduct, and in Waseca, Minnesota where he persevered to be transferred, despite initial denials, in order to enroll in a counseling program (Tr. 66, 68). Upon release he obtained immediate employment performing quality control for a mobile home manufacturer (Tr. 84). The work ethic, reliability, persistence, and integrity he displayed in his employment would be echoed over and over in the letters and testimony of those who later came to know Joe in law school.

Yet those years, that testimony, and those recommendations are missing entirely from the Report certified to this Court on September 4, 2014, save for a single sentence (Rpt. 17). Except for Joe's initial testimony on direct examination, not one minute of the remaining two days of intensive cross-examination was spent on the years from 1991 to 2008 and the ample evidence of rehabilitation contained therein. Instead, a very narrow focus was placed on the window between late 2009 and early 2011—and more specifically, on the 30 days between March 1 and March 31, 2011. Similarly, anything that occurred after early 2011, when Joe was a 1L just beginning the transition into thinking like an attorney, was also ignored despite the clear charge in Gov. Bar Rule I to assess a candidate's *present* level of character and fitness.

Before his 2007 release Joe sent out more than 200 resumes and had a private residence and employment arranged in North Carolina, but was ordered to reside in Casper, Wyoming—where he knew nobody—at a halfway house, where, by definition, the people one meets have criminal records (Tr. 80-81). There he met Brian Hohlios and William Breeden. In late 2009, Hohlios requested permission to use Joe's credit card to finance the purchase and resale of a product known as "Spice," a product Hohlios would eventually begin to make himself. After researching that its components were legal, Joe agreed (Tr. 91, 94). Joe temporarily ran Hohlios' operation between March and May, 2010 when Hohlios was incarcerated on a probation violation (Tr. 91). This was the first phase of Joe's Spice-related activity. Though Joe initially stated off-the-cuff that the probation office "always" had knowledge of his Spice activity (Tr. 98), he later corrected that to say it was not until the end of those 3 months, in June 2010 (Tr. 462) when Hohlios' house was searched and Joe moved out. In early 2010 Joe spoke with Breeden and got him a job interview to dissuade him from selling methamphetamine. When that failed, Joe offered to teach him how to make Spice, on condition he stay away from methamphetamine (Tr. 470-471). After Hohlios died in July, 2010, Joe made approximately 10 purchases for resale of chemical used to make Spice (Tr. 319, 449, Exs. 87, 88, 90), as well as

herbs, a second phase of involvement. The third phase of involvement was also financing. For three-four months ending in March, 2011 Joe purchased and shipped herbs and chemicals to JPL Marketing, an Arizona LLC that made legal forms of Spice, sometimes via Casper, Wyoming where the herbs were cleaned. Joe received reimbursement for costs and a percentage of the net profits but had no ownership interest in JPL (Tr. 418-423, 427, May 6 Supplement).

While any Ohio attorney could have foreseen why this would send all the wrong messages during character and fitness review, Joe, who had no intention of attending law school when his involvement began and had acclimated to a different set of social mores during incarceration and living out West, did not (Tr. 99). After a lengthy interview and consideration of additional material Joe submitted after the interview, the local Admissions Committee approved Joe's application without conditions. His sale of a legal form of Spice as a moral issue and whether the three phases of his involvement were a unitary "business enterprise" that he should have listed on his Application became the main focus of the Panel hearing.

Joe told the Panel that this involvement troubled him significantly despite its legality (Tr. 449, 454). In November, 2010 the Drug Enforcement Agency announced it would be scheduling five of the numerous chemicals, including JWH-018, used to make Spice at an unnamed future date. He began liquidating what he had aggressively, at or below cost (Tr. 98, 438). He had one last packet of JWH-018 when a client contacted him needing a larger amount. Joe ordered enough to make up the difference, ship it together, and divest himself of it entirely (Tr. 350). He introduced the client to his supplier because he didn't want "anything more to do with it" (Tr. 438-39). The client canceled the order after hearing a rumor that DEA scheduling was imminent. Joe canceled his order but still had one packet. The next morning, March 1, 2011, the DEA announced that JWH-018 was now scheduled as a controlled substance. Joe placed the packet in a box addressed to his attorney in Wyoming (Tr. 98) labeled "attorney-client privilege" (CMBA Ex. 65) and attempted to reach his attorney repeatedly for advice on how to dispose of it (Tr.

340-41). He would later waive any privilege and turn the item in through his attorney in Ohio.

In Joe's second semester in law school, he was, ironically, falsely accused of a crime by Breeden and acquitted after a jury trial. On the day of his arrest he asked his attorney to turn in the JWH-018, which was not in his apartment the police searched, and to request immunity, but to turn it in regardless (Tr. 493). As Professor Kevin O'Neill testified, being wrongly accused "galvanized" Joe's commitment to practicing law even further, will make him a "devoted, committed advocate," who has "turned a corner," "found a calling" and a "real purpose in life" and "could do a lot of good" (Tr. 564-65). Professor O'Neill was fully aware of Joe's involvement with Spice and that he had a packet of JWH-018 left over when it became illegal on March 1, 2011 (Tr. 561). Since early 2011, Joe has continued to excel academically and in the legal profession and in employment as a law clerk for private firms and a legal intern for the Cuyahoga County Public Defender. If permitted to take bar exam, he plans to work as a public defender and, if possible, obtain the release of someone wrongly convicted (Tr. 564-65).

The Report ascribes to Joe the view that it must ask the right questions in order to get a complete answer from him (Rpt. 16). Yet asking the right questions is an inherent part of the character review process. Gov. Bar Rule I, Ohio case law, and United States Supreme Court case law set forth the factors to examine. The goal of the process is to determine whether an applicant possesses the "honesty and integrity which will enable him to fully and faithfully discharge the duties of our demanding profession." *Davis*, 38 Ohio St.2d at 274, 313 N.E.2d at 363. Something clearly went awry in the examination process that resulted in an unconditional approval by the Admissions Committee becoming a recommendation of permanent denial by the Board.

In the present case it is beyond cavil that the Panel did not ask the right questions in evaluating Joe's character and fitness, though not in the way it asserts Joe is demanding of it. The Report did not ask whether Joe's conduct justifies the trust of adversaries, clients, and the court system. It did not ask whether his having engaged in legal conduct of which some

disapprove has any bearing on his ability to serve his clients. It did not ask why his having discontinued that conduct because his conscience bothered him should result in a condemnation rather than a commendation. It did not ask whether a similar penalty would be imposed on an applicant or attorney involved in alcohol or tobacco sales, or who funded an abortion clinic, all legal activities some consider immoral. It did not ask if maybe, just maybe, the approach, tactics, and focus, as reflected in its Report, resulted in an unfavorable impression of a candidate for reasons that had nothing to do with any intention by the candidate to be less than candid. It did not ask why its findings diverged so markedly from the remainder of the record which consists of witness testimony and recommendations that weigh heavily in Joe's favor with regard to his character and fitness, as well as his candor about his past.

This Court is asked to weigh Joe's conduct, accomplishments, and missteps by evaluating his conduct between 1990, when he ceased trafficking in illegal substances, and the present time, a period of nearly a quarter century, and to place any infractions it may find in their proper perspective and context in assessing his character. This Court is asked to question and ultimately to overturn the Board's assertion that Joe lacks the character and fitness to register as a candidate for admission to the bar. The Court is asked to overturn the Board's description of Joe as a person who has not and cannot be rehabilitated in the face of overwhelming evidence that the opposite is true. Joe has already made the decision required to transform his life so his considerable skills can be applied in service to society. This Court should do the same.

LAW AND ARGUMENT

III. APPLICANT PRESENTLY POSSESSES THE REQUISITE CHARACTER AND FITNESS UNDER GOV. BAR RULE I(11), AS THE LOCAL ADMISSIONS COMMITTEE DETERMINED.

- A. The record contains overwhelming evidence that Joe's record of conduct "justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them and that his record of conduct satisfies the essential eligibility requirements for the practice of law." Gov.Bar R. I.**

The record contains overwhelming evidence that Joe's record of conduct justifies the trust of clients, adversaries, courts, and others as to the professional duties owed them (CMBA Ex. 45-46). As Cuyahoga County Chief Public Defender Robert L. Tobik opined,

He also, under the supervision of one of our attorneys, prepared and successfully argued a motion to suppress evidence. His approach to this task was thorough, thoughtful, and studied, coupled with a full appreciation of the importance to and impact on the clients' life (Ex. M-22).

Joe's supervisor at the Civil Litigation Clinic, Professor Doron Kalir, also recalled,

Throughout the semester Joe has demonstrated exceptional dedication and devotion to his clients. In many instances he was the last person at the Clinic, working late hours to ensure his clients' interests are best served. In one such case, Joe was the direct reason for a swift victory: after receiving a letter from the Clinic, the Plaintiff in that case—a national debt collecting agency—waived its claim against Joe's client for collection of several thousand dollars. For that victory, Joe was featured on the law school's website as a prime example of how the Civil Litigation Clinic students assist the Cleveland community, particularly those who could not afford legal advice (Ex. 6).

Other examples were provided at the hearing. The record is likewise replete with evidence that Joe's demonstrated record of conduct satisfies the essential eligibility requirements for the practice of law³ and exceeds the "ability" to perform mentioned in the requirements. Joe

³ Capacity to learn, recall, and analyze; communicate clearly and exercise good judgment in conducting professional business; exercise good judgment in conducting one's professional business; conduct professional affairs with a high degree of honesty, integrity, and trustworthiness, conduct oneself with respect in accordance with the law and Rules of Professional Conduct, avoid acts that exhibit disregard for the health, safety and welfare of others, diligently and reliably perform obligations to clients, attorneys, courts, and others; use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; comply

is the top-ranked student in his class, clearly able to learn, recall, reason, and analyze (Requirement 1). In 2012-13 he received the Federal Bar Association Award for Constitutional Law, Edward Lebit Scholarship, ABA-BNA Award for Labor & Employment Law, Pro Bono Community Service Award, and CALI Excellence for the Future Award for Legal Writing (Ex. N). As Assistant Public Defender Linda Hricko, Joe's supervisor, testified, he already communicates clearly with clients, attorneys, and courts (Requirement 2):

In our job, we have all different kinds of clients and your ability to communicate with them without promising them anything, with giving them a realistic idea of what you think's going to happen but making sure that they understand the process and what's going on, and I thought that Joe did an excellent job at that. Also, he communicated very well with other professionals, working with the prosecutor, working with the judges (Tr. 241).

Former Customs Agent and current J.D. candidate Malcolm Chandler, who spent a summer working with Joe at the Fair Housing Clinic, noted,

Joe's people skills are superlative. Many of our clients would wait until the last minute, just days before they had to be in court or be evicted. Joe had a calming influence on them and the ability to get the necessary facts from them so we could prepare their cases. After a few successful court cases, the word got out and people would call and ask for Joe by name (Ex. 5).

Attorney Hricko also described Joe's ability to conduct himself with honesty, integrity, and trustworthiness in professional relationships and legal obligations (Requirement 4):

He did a suppression motion for me, which we won, and I enjoyed watching him want to see all the evidence and talk to all the witnesses in advance, but he did it in an appropriate way, not trying to hide anything from the prosecutor's offices, making sure they had the opportunity to be there when we discussed the case with them (Tr. 242).

Joe's choices in March, 2011 demonstrated the ability to conduct himself with respect for and in accordance with the law and the Ohio Rules of Professional Conduct (Requirement 5). By voluntarily turning in a substance he had purchased when it was legal, and without waiting for an answer to his request for immunity, Joe demonstrated his respect for the law at the expense of his

with deadlines and time constraints; conduct oneself professionally in a manner that engenders respect for the law and the profession.

own self-interest. He was candid with the Panel about what happened and did not attempt to invoke attorney-client privilege or his right against self-incrimination, preferring to provide the above details and risk possible prosecution. By ceasing involvement with a legal product whose morality troubled him, many forms of which remain legal today, Joe demonstrated the ability to avoid acts that exhibit disregard for the health, safety and welfare of others (Requirement 6). As Professor Kalir observed, Joe conducts himself diligently and reliably in fulfilling obligations to clients, attorneys, courts, and others (Requirement 7):

I could always rely on him to be there, perform his tasks, and report accurately to me. I knew that he would always try his best to assist his clients. Just as an example, this morning I had a hearing at the Cleveland Municipal Court; although Joe is no longer a student of the Clinic, and although the semester has ended weeks ago and now he is working full-time for the Public Defender, Joe showed up for the hearing, on time and prepared. That is but one example of his dedication to his clients (Ex. 12).

Similarly, Assistant Public Defender Cullen Sweeney recalled,

In working with Joe, I have been impressed by his commitment to our clients and the excellent quality of his work. He has diligently completed every assignment he has been given. He is a professional, and his performance has comported with the high ethical standards that our profession demands.

One case in particular stands out. Our office had received a letter from an inmate who, as a result of complicated sentencing issues involving four separate cases, had not received 111 days of jail-time credit. Although the law was somewhat ambiguous in this area, Joe took up this prisoner's cause, advocated for him within the office, and then crafted a well-researched, persuasive brief arguing, among other things, that the improper calculation of jail credit constituted a violation of the inmate's Equal Protection Rights. Had it not been for Joe's strong sense of justice and his diligent efforts this man would have remained unjustly incarcerated for an extra 111 days, his constitutional rights being violated. I am aware that Joe's admission to the bar is a unique situation, but Joe is a unique case.

Joe has also demonstrated honesty and good judgment in financial dealings and professional business on behalf of himself, clients, and his employers Unicor and Energy Transportation (Requirements 3, 8). As Dan McGlade, Joe's former employer and President of a large transportation company, testified,

So, yes, we – we trusted him with our bank accounts, he had our bank

accounts number, he could make deposits, withdrawals. He – you know, he did tax – he had responsibility with our taxes and information on our tax returns.

[O]ne of the reasons we received an IRS audit is because Joe did some research and determined that we had a – we needed to apply for an amended tax return and apply for a refund. He had studied the tax law on his own time. And as I mentioned, we had to come up with some cash in 2009 and he – and on his own time, he did some research in tax law and found where the IRS had – would owe us a million-dollar refund if we applied for it.

And we followed that through and he literally stayed on top of the IRS, and our accounting department doubted we'd get the refund, and he stayed on top of it and followed through, and he kept pushing them and we ended up getting a million-dollar refund.

And as a result of that, that did trip an IRS audit, which is fine. They came in and did an audit on our company. As I say, they found nothing wrong.

Joe obviously complies with deadlines and time constraints (Requirement 9) at school and work, and the number and quality of references he received demonstrate he conducts himself professionally and in a manner that engenders respect (Requirement 10). In the words of Dennis Terez, Federal Public Defender for Northern District of Ohio, who worked with Joe on a case,

[S]ince we normally appear in federal court and not state court, we turned to the Cuyahoga County Public Defender's Office. Joe Libretti was assigned to handle the case, so I speak from first-hand experience when I write this letter of reference for him.

The results speak for themselves here. Judge Nancy Margaret Russo said from the bench that the motion made on behalf of the client was one of the most thorough and carefully prepared requests she had ever seen...His performance on the work he did for our client was first-rate, far better than many other licensed lawyers would have submitted, and the proof is in the results we received in court (Ex. M-24).

An applicant who demonstrates a significant deficiency in "honesty, trustworthiness, diligence, or reliability," may be disapproved (Gov.Bar R. I(11)(D)(3)), but the preceding material demonstrates just the opposite.

- B. Joe's record of conduct fully satisfies the (D)(3) factors that must be considered under Gov. Bar Rule I, which the Admissions Committee approved as to each factor and none of which were addressed in the Report.**
 - 1. The Admissions Committee's findings as to the (D)(3) factors are the only findings that have been made as to them, and should be upheld.**

The Board, like an Admissions Committee, must consider a non-exhaustive list of factors

in assessing character and fitness (“the (D)(3) factors”),⁴ none of which were considered in the Report. Instead, the Report took the factors provided for the purpose of “determining the weight and significance of an Applicant’s conduct” (“(D)(4) factors”) and analyzed them exclusively.

The Admissions Committee, however, did consider the (D)(3) factors and approved Joe unconditionally as to each of them. It proceeded in the full knowledge of Joe’s 1992 conviction, his involvement with Spice, his arrest and acquittal in 2011, the search of his apartment, and specifically considered a past pattern of disregard of the law (CMBA Ex. 45-46). It also discussed Joe’s litigation activity with him and was satisfied with his answers.

2. The record weighs against the Panel’s findings as to the additional factors it considered.

Without reference to the required (D)(3) factors, the Panel’s Report solely focuses on five concerns in support of its recommendation of permanent disapproval. The first was Joe’s decision in 2009 to be involved in the sale of a legal form of Spice despite the fact that it troubled him. Second, it asserts Joe demonstrated a lack of candor in not listing the activity as a business enterprise in response to Question 23(C). Third, it asserts Joe demonstrated a lack of candor by not providing his 2011 request for immunity in answer to an application question that inquired about a grant of immunity. Fourth, the Report alleges Joe lacks remorse for harm done to others despite his clear statements of remorse to the Committee, the Panel, and testifying witnesses. Finally, the Report asserts Joe “may have crossed the line” into litigiousness.

The Report’s assertions regarding these factors range from simply inaccurate and

⁴ The (D)(3) factors are: (a) Commission or conviction of a crime; (b) Evidence of an existing and untreated chemical (drug or alcohol) dependency; (c) Unauthorized practice of law; (d) Violation of the honor code or academic misconduct; (e) Evidence of mental or psychological disorder that if untreated could affect the applicant’s ability to practice law in a competent and professional manner; (f) Pattern of disregard of the laws; (g) Failure to provide complete and accurate information concerning the applicant’s past; (h) Acts involving dishonesty, fraud, deceit, or misrepresentation; (i) Abuse of legal process; (j)-(k) Neglect of financial responsibilities or professional obligations; (l) Violation of an order of a court; (m) Denial of admission in another jurisdiction on character and fitness grounds; (n) Disciplinary action by a disciplinary agency of any jurisdiction. Gov. Bar Rule I(11)(D)(3).

unsupported by the record to conduct that arguably warrants at most a delay with permission to reapply. More importantly, as discussed in Section V., not one of these concerns, nor all of them together, comes close to meeting the standard for permanently closing the door on an applicant.

a. *Involvement With Legal Spice*

To address what is emphasized by the Report as constituting the most damning evidence of Joe's character, Joe testified—honestly and forthrightly—that in 2009 he had been uncomfortable with his decision to help Hohlios finance the sale of a legal product because he had doubts that it was entirely moral. Joe testified he agreed because Hohlios needed to earn money, had asked him for help, and Joe's research indicated it was legal (Tr. 449-50). Joe also testified he was also motivated by the desire to earn money (Tr. 454), a motivation that cannot be said to be inherently negative, particularly before the licensing authority of a state whose Constitution lists "acquiring, possessing, and protecting property" among its inalienable rights (Oh. Const. Sec. 1.01), a motive likely shared by a good proportion of those who have stood before this Court in the hopes of obtaining its imprimatur on their future in the law.

If involvement in an activity one has doubts about for a time prior to discontinuing it is enough of a reason to permanently bar someone from the practice of law, it would necessitate the disapproval of every attorney or law student who ever had an extramarital dalliance in spite of a guilty conscience, or every corporate litigator, defense attorney, or divorce lawyer who wrestles internally with the positions that must be taken in clients' interests and who ultimately elects to pursue other endeavors. The reason our profession does not do that lies in the traditional distinction between actions involving matters of personal morality and actions of which some may disapprove but that have no bearing on the ability to practice law:

"[M]oral turpitude" can be construed to include offenses concerning some matters of personal morality...that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence,

dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Rule Prof. Cond. 8.4, Comment 2.

Here, the conduct the Report focuses on—engaging in an activity against the dictates of one’s conscience four to five years ago—was not even illegal and should be assessed all the more leniently. The focus of inquiry in these matters is evidence that “primarily reflects upon an applicant’s ability to function honestly and effectively in the practice of law.” *In re Davis*, 61 Ohio St.2d at 374, 403 N.E.2d 189, 190. Less relevant is how an applicant conducts personal matters such as “marital or financial relationships, or associations with certain persons or organizations” unless they bear “substantially upon applicant’s ability to execute the professional responsibilities with which he will be charged.” *Id.* Gov. Bar Rule I also prohibits consideration of “factors that do not directly bear a reasonable relationship to the practice of law.”

The Report censures Joe’s conduct as “a function of greed” (Rpt. 16) without mentioning that Joe’s candid self-assessment also included comments about being motivated by “insecurities and resentments,” responding to requests for help (Tr. 39), as well as what he termed “greed and selfishness.” The Admissions Committee also noted his mention of insecurity as a motive for his conduct, and that money might be an attempt at compensating for it (CMBA Ex. 49 p 4).

The Report also condemned Joe’s association with William Breeden as a “blind spot in his moral filter” (Rpt. 8) and ascribes motives to him for so doing that have no support in the record. The Report alleges that Joe recruited Breeden “to enhance his distribution and sale” of Spice (Rpt. 8). The only evidence on the record regarding Joe’s intentions toward Breeden are Joe’s efforts to get him a job and, as a last resort, to get him to agree to sell Spice instead of returning to selling methamphetamine and ending up back in prison (Tr. 169, 470-71).

In return for his troubles, when Breeden was arrested in May, 2010 for the sale of methamphetamine Joe had discouraged him from, he named Joe as an information source to obtain a plea bargain. Joe was subsequently arrested and indicted, but acquitted after a jury trial.

While Joe agreed on the record with Commissioner Fairweather that he should have stayed “100 miles” from Breeden (Tr. 480), it only adds insult to injury to refer to his failed attempts, even if misguided, to keep Breeden from returning to prison as a “blind spot.”

Speculation is the only basis for the Panel’s assertion that Joe recruited Breeden “to enhance his distribution and sale” of Spice. Speculation, without more, cannot be the basis of a Board finding that is entitled to deference and Joe requests that none be given. A hearsay summary of a taped conversation on Breeden’s phone was introduced at the Panel hearing, but not the original transcript (CMBA Ex. 63). Had the panel contacted Breeden or the summary’s author to clarify whether the panel’s hypothesis was true that might have been evidence. However, the only evidence available is Joe’s testimony and a hearsay summary of a transcript. A hypothesis is not evidence. There is no evidence on the record contradicting Joe’s testimony that supports an alternate finding of fact and the record thus weighs heavily against this finding.

Finally, this conduct—the decision to begin involvement with Spice and to associate with Breeden—took place almost five years ago and a character and fitness inquiry should concern present character and fitness, not that of 2009-2010.

b. Alleged Lack of Candor for Not Listing Spice as a “Business Enterprise” On Application

Several other aspects surrounding Joe’s involvement with Spice troubled the Panel, which heard testimony regarding Joe’s (1) loaning funds to Hohlios to purchase substances and herbs used to make a legal form of Spice (2) independent purchasing and reselling of them after Hohlios’ death, and (3) agreement with JPL to provide the same in exchange for a share of the profits and found that the “spice business” should have been listed on Joe’s Application, though it is unclear which phase. Joe realizes it would have been better, as he acknowledged to the Panel (Tr. 491), to list at least his purchase activity (approximately 10 purchases in 8 months) of JWH-018 for later resale (CMBA Exs. 87, 88, 90). In mitigation, Joe respectfully submits that the record shows no evidence of intent to conceal or deceive, however, as he discussed the activity

openly with the Admissions Committee (CMBA Opng. Stmt. Tr. 24-25, CMBA Ex. 45-46) and Panel, and provided tax returns, bank statements, and a Supplement—which the Panel also found unsatisfactory (Rpt. 13). It is not clear what additional steps would have been satisfactory considering the multiple disclosures subsequent to the Application were disregarded.

It should also be noted that financing and owning a business are two separate concepts in the law. *Reilly v. Meffe*, 6 F.Supp. 3d at 770 (2014). Providing use of a credit card as in (1) is a creditor interest, not an ownership interest. Similarly, an agreement to provide materials in exchange for a share of profits, without control, as in (3) is not an ownership interest, particularly as Joe’s initial investment was returned to him within a few months (Tr. 425) and JPL confirmed Joe’s lack of ownership to the Board (May 6 Supplement). *See also* R.C. 1776.22(C)(3)(e). As the transactions Joe made on his own were not a daily occurrence and did not involve a license, title, or business name, it is conceivable a person would not conceive of them as a “business” to list on a form, any more than an EBay seller might automatically think of periodic sales, even in large amounts, as a “business” or “employment.” Joe filed a Supplement to address this issue and regrets not having done so initially (May 5 Supplement).

The Report also criticized Joe’s not having listed his income on monthly forms sent to his probation officer, even though bank balances showing the profits were provided (Tr. 92). Both Joe and the Panel agreed he should have explicitly listed the sums as income (Tr. 463). In mitigation it should be noted that Joe did discuss involvement with Spice openly both with the local admissions committee and the Panel (CMBA Exs. 46, 49, Tr. 586-87, 603). While Joe may have been incorrect in believing that income titled to a trustee should not appear on an income report for him alone, it has never been his claim that funds received as a beneficiary are not income, as CMBA Opposition to Motion to Strike claims (Opp. Mot. Strike 3). Incredibly, this assertion is made by *actually changing the transcript testimony* and deleting what Joe actually said, “my income,” and replacing “my” with a *completely different word* not contained in the

original, “a beneficiary’s” (Opp. Mot. Strike 3, Tr. 360). To the contrary, Joe explicitly recognized his obligation to file an amended return once seized records have been returned (Tr. 372). Oddly, this claim also completely contradicts the Report, which accurately rendered Joe’s testimony that he understood the income received was income to the trust and not just his alone.

Finally, the monthly reports at issue were filed four-five years ago, and a character and fitness inquiry should concern present character and fitness, not that of 2009-2010.

c. Alleged Lack of Candor for Not Listing Request for Immunity as Grant of Immunity

Question 20B of the Application to Register As A Candidate for Admission inquires, “Have you ever been granted immunity from prosecution?” Joe disclosed a grant of immunity received in 1985 but did not include an ungranted request for immunity made in 2011 because the question did not call for it. Despite the plain language of the question, the Panel states its belief that Joe’s request for immunity in 2011 should have been disclosed in response to 20B (Rpt. 12). Yet an “approval” to grant immunity is not a grant of immunity. Even if Joe did err in not specifically mentioning an ungranted request for immunity in response to a question about a grant of immunity, the record contains no indication that his straightforward response indicated intent to deceive rather than an intent to be accurate.

The Panel’s evidence of its allegation that Joe received immunity in 2011 and lied about it is a DEA report dated April 6, 2011 that documents Joe’s attorney showing a DEA agent the location of the JWH-018 that Joe turned in, which states that an Assistant United States Attorney had received “approval” to grant Joe immunity (CMBA Ex. 65). It does not claim immunity was actually granted to Joe, only that “approval” to do so had been given. Proof of “approval” to grant immunity is not proof of an actual grant of immunity. Incredibly, as recently as the CMBA’s Opposition to Motion to Strike, it is still alleged that Joe “received immunity” (CMBA Opp. Mot. Strike 8) and reference made to a “grant of immunity” contained in CMBA Ex. 65

(CMBA Opp. Mot. Strike 10), although the document filed as CMBA Ex. 65 says no such thing.

Speculation, without more, cannot be the basis of a Board finding entitled to deference and Joe requests that none be given. The only evidence available is Joe's testimony, a document that does not purport to grant immunity, and Joe's FOIA request indicating no grants of immunity could be located. Had the panel contacted the U.S. Attorney's office to clarify whether Joe had been granted immunity that might have been evidence confirming the panel's alternative version of events, but that did not happen. The record thus weighs heavily against the Board's finding and no deference should be given to it. If the Court does find Joe's failure to list a request for immunity was lack of candor, he respectfully requests permission to reapply after a delay.

d. Alleged Lack of Remorse and "Amoral Viewpoint"

One of the most puzzling aspects of the Report is the assertion that Joe did not express remorse for or have an appreciation for the harm he caused. Setting aside for the moment whether remorse specifically for the "victims of the drug trade" is a requirement that can be imposed on a candidate, the Report adopts as its own a single comment by Admissions Committee member James Kline from the interview sheet that, "[A]t no point did he ever express the view as to the harm that his conduct had on others" (CMBA Ex. 46, Tr. 613). Significantly, the quote selected omits a statement by James Kline made minutes earlier at the hearing that, "[A]t the same time he did note that he had a—I think it was a girlfriend or fiancée who had some sort of substance problem—I don't remember if it was alcohol or drugs—and that he recognized that issue" (Tr. 611-12). It also omits Kline's ultimate decision that "He does, however, have a passion for the law and a desire that indicates he would not want to jeopardize being an attorney, and recognizes the duty to comply with his legal and ethical obligations" (CMBA Ex. 46 p. 4). In addition, Joe testified at the Panel hearing:

A. I have a friend that I've had since college and she and her boyfriend were involved in cocaine dealing before me, but I eventually became her supplier, and she developed a really bad cocaine habit and it pretty much destroyed ten years of

her life.

After I was incarcerated, for about—she—she continued to use cocaine, and she eventually went through rehab and she's been off of it and she's been clean for a long time. She has a good job, she's married. And I felt—and I still feel a lot of guilt about that. And we've talked about it and she says, you know, it wasn't your fault and I was doing it before you were, and—but that's not the point. I mean—

Q. And what about all the people that you didn't see that ultimately got the product?

A. Yeah, exactly. Obviously she wasn't the only one. And I don't want to have to do something that I'm going to feel bad about later. And I would feel bad, so I—it's just not something that I want to have any involvement with (Tr. 114-15).

Despite this, on the second day of the Panel hearing the following colloquy occurred:

Q. I haven't heard one word, not a single word, about the victims of the drug trade. Why is that?

A. I think I mentioned a friend of mine named Emily at the last hearing and how she and her boyfriend, who was my best friend, were selling cocaine before I was, and he ended up becoming addicted to cocaine and had to drop out of school, and I eventually became her supplier, and I did sell to her. And years later, after I was arrested, she developed a very serious cocaine habit and had to check into rehab, and it was only after she came to see me that I really—and told me everything that had happened to her since I had gone, that I really gained an appreciation for the harm I caused.

Q. And when was this? When did she come see you?

A. Oh, this would have been while I was in federal prison.

Q. Okay. And—after all this, you characterize your activity as stupid and foolish?

A. I do.

Q. That's all you can say about it was that it was stupid and foolish?

A. No. I realize now that I did cause a great deal of harm (Tr. 456).

Joe expressed regret for his conduct elsewhere during the hearing:

I honestly regret it every minute of every day (Tr. 39).

[D]o I have a lot of regrets? Yeah. Do I wish I had never done most of the things I did? Yeah, every day (Tr. 441).

Joe's recognition of the harm he caused also lies behind his desire to practice law and his

desire to help people—to make amends—by working in a public service position:

What I'm trying to do, if I'm allowed to practice, I just want to help as many people as I can. And that's what I do at the public defender's office. People come in, they need help, and I help them. I don't ever intend to sell drugs again. I recognize it was a big mistake, I'm ashamed of it, and it's humiliating. That's something I have to live with. Everyone at school knows my background. And if I can make amends in any way, I would (Tr. 447-48).

The Report's assertion that Joe lacks remorse, does not appreciate the harm his conduct caused others, and has an "amoral view of what he had done" is belied by the actual record and the colloquy the Panel had with him.

e. Litigation

The Report concluded that Joe lacks respect for the law, and "views the law as a weapon to harass," based on his litigation history (Rpt. 14-15). It is important to note that any of the forfeiture proceedings, which are *in rem* proceedings instituted by a governmental authority, Joe would not have been the plaintiff. Contesting a forfeiture or filing a third party claim brought by another is not vexatious. Furthermore, Joe was represented by counsel in some of the appeals relating to the conviction, the forfeiture issue was heard in the United States Supreme Court, and Justice Stevens opined that the criminal forfeiture penalty should be vacated, all indicia that the appeals were not vexatious. *See Libretti v. United States*, 516 U.S. at 58, 116 S.Ct. at 372, 133 L.Ed.2d 271 (1995) (Stevens, J., dissenting).

At Joe's 1992 sentencing he was informed that only assets obtained with the proceeds of drug trafficking would be forfeited, but everything he owned was ultimately taken, including retirement savings from legitimate employment and a childhood bank account that showed no deposits since he was 12 (Tr. 443). *See also Libretti v. United States*, 516 U.S. 29, 57, 116 S.Ct. 356, 371, 133 L.Ed.2d 271, 294 (1995) (Stevens, J., dissenting), one of the most frequently cited cases in the forfeiture area (CCH Federal Banking Law Reporter, 2014 WL 989668 (C.C.H.)). It is neither incomprehensible vexatious litigation to contest such a result. Joe was eventually

appointed counsel for his direct appeal, but only after initially being denied counsel and left with no choice but to file *pro se* briefs (Tr. 62). Those challenged the forfeiture of untainted assets with his guilty plea; his appointed attorney also chose to challenge the forfeiture, the fine, and the hours of community service. Joe had no legal training and no basis to second-guess his attorney on what issues to raise on appeal. Still, had Joe prevailed in reversing the forfeiture the underlying civil actions would have succeeded, and therefore they were also not frivolous.

For example, *Libretti v. Dwyer* was dismissed only because the forfeiture order had been upheld in the Tenth Circuit. Had it been reversed, however, upon reaching the Supreme Court—as Justice Stevens thought it should have been—the dismissal of *Dwyer* also would have been reversed. The Report is correct that *Dwyer* and other similar suits were dismissed on *res judicata* grounds. In *Dwyer*, for example, a BATF agent had seized valuable firearms based on a warrant not based on probable cause that a crime had been committed. Even if everything alleged in the warrant had been true, the facts did not constitute a crime, and no charges were ever brought arising out of the seizure. Joe's Fourth Amendment claims were dismissed, not because they were frivolous, but because the firearms were later forfeited. Despite the fact that an agreement to forfeit property in exchange for a lesser sentence does not establish the property was initially seized legally, several courts held the initial property seizure could not be litigated due to the later forfeiture. *See, e.g., Libretti v. Dwyer*, 1994 U.S. App. LEXIS 29228 (10th Cir. Colo. Oct. 19, 1994). However, if the Supreme Court had reversed the underlying forfeiture order, Joe would have been entitled to relief from the dismissals based on it under Fed. R. Civ. P. 60(b)(5), which permits relief from judgment when an earlier judgment “has been reversed or vacated.”

The Report provides a list of other cases Joe filed, the most recent of which occurred almost 15 years ago (Rpt. 14-15). As Joe testified during the hearing, in the early 1990s he was not aware of joinder and erroneously filed multiple suits because he thought he had to (Tr. 385). Other cases reflect the reality that the prison system provides no other recourse besides litigation

to redress a wrong—prisoners do not generally have the option of calling someone’s supervisor or customer service to complain about an injustice. For Joe to enroll in a counseling program in Minnesota, he actually had to file a lawsuit, *Libretti v. Banks*, to gain permission (Tr. 68, Ex. B 9). Another suit, *Libretti v. U.S.* (Ex. B 8), arose when prison guards destroyed property during a search after a riot all concerned were advised to file a federal tort claim (Ex. B 8).

Finally, it bears mentioning that the Report omits the actions Joe prevailed in. For example, he litigated for eight years to regain \$33,160 of his savings that had no connection to drug proceeds but had been forfeited in violation of the Constitution. In another case the Federal Bureau of Prisons (BOP) was returning books being sent to the prison, in violation of the First Amendment. As a result of the lawsuit, the BOP agreed to change the policy.

- C. The Application should not be denied based on legal conduct the Board disapproves of that has no reasonable relationship to the practice of law under the applicable decisions of the Supreme Court of the United States and the Ohio Rules for the Governance of the Bar.**

In analyzing Joe’s application under the character and fitness factors set forth in Gov. Bar R. I(12)(D)(3), a Panel must distinguish between legal activities it deems morally questionable and conduct that has an actual nexus with an applicant’s fitness or capacity to practice law, as both federal and Ohio law require. While state bars can require bar applicants to meet high standards of moral conduct, the United States Supreme Court has held that “any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.” *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957). Ohio also distinguishes between evidence that “reflects upon an applicant’s ability to function honestly and effectively in the practice of law” and personal matters or associations that do not “bear substantially upon applicant’s ability to execute the professional responsibilities with which he will be charged.” See *In re Davis*, 61 Ohio St.2d at 374, 403 N.E.2d at 190. Furthermore, an Admissions Committee must not consider factors bearing no “reasonable

relationship to the practice of law.” Gov.Bar. R. 1 (12)(D)(6).

Here, the sale of a *legal product*, and the cessation of that activity upon its becoming illegal, does not bear a reasonable relationship with Joe’s fitness to practice law under the standards articulated in *Davis, Schware*, the Ohio Rules of Professional Conduct, and Rules for the Government of the Bar. On the contrary, it shows respect for the law. Joe’s attempts to extricate Breeden from the illegal drug business also have no “reasonable relationship” nor “bear substantially upon” his ability to execute his professional responsibilities *Id.* The U.S. Probation Office had required Joe to live in Wyoming at the halfway house, where Breeden also lived and attended the same treatment program (Tr. 469, 508) and it cannot seriously be argued that it had no knowledge of Joe’s association with Breeden as the terms of his supervised release required.

Finally, even assuming arguendo that Spice and contact with Breeden did have a rational connection with Joe’s fitness to practice law or bore substantially upon his ability to execute professional responsibilities, the essential inquiry is Joe’s *present* moral character, more than five years after the beginning and nearly four years after the cessation of any involvement with Spice. Even assuming that the sale of legal Spice evidenced a lack of good moral character, “the absence of good moral character in the past is secondary to the existence of good moral character in the present—the transitional character development in between comprising the process of rehabilitation, or lack thereof.” *Davis*, 61 Ohio St.2d at 374, 403 N.E.2d at 190. Whether Joe is viewed as having not yet adapted in 2009 to the unwritten rules of socially acceptable businesses in the legal community, or as having exercised flawed moral judgment which he later corrected, the appropriate outcome is not a permanent ban on ever applying to take the bar exam.

D. Applicant’s actions in March, 2011 demonstrate that he is fully and completely rehabilitated.

As previously discussed, despite efforts to divest himself of the JWH-018 he had purchased legally, on March 1, 2011, the DEA announced that JWH-018 had been temporarily

scheduled as a controlled substance. At that point Joe's options were limited: if he destroyed the chemical he was arguably obstructing justice or committing an ethical violation by destroying evidence of a crime. Neither could he sell it and violate controlled substance laws. By boxing it up and later turning it in voluntarily, Joe demonstrated his respect for the law. The Report suggests that Joe's retention of the JWH-018 for twenty-nine days after it was scheduled is evidence of a lack of rehabilitation. Joe contends on the contrary that it shows he is rehabilitated.

It should be noted that, although Joe asked his attorney to request immunity, he turned over the item without waiting for an actual grant of immunity, "because it was the right thing to do" (Tr. 341) and he was "willing to face the consequences" (Tr. 493).⁵ Joe was candid with the Panel about what happened and did not attempt to invoke either the attorney-client privilege or his right against self-incrimination, preferring to candidly provide the above details and exposing himself to possible prosecution. This was in accordance with his duty under *Davis*, 38 Ohio St. 2d at 274, 313 N.E.2d at 365, which criticized an applicant's invocation of the attorney-client privilege in the admissions process to conceal damaging yet salient character information.

If anything, this incident shows that when he must choose between obeying and violating the law, Joe will choose to obey the law. Ironically, had he chosen to do the wrong thing and either destroyed or resold the JWH-018 the day it was scheduled, he would not need to explain himself to the Court today. By choosing to do the right thing Joe has found himself accused of lacking the very character and fitness that caused him to refrain from actions that, while illegal and unethical, would arguably have been much more in his self-interest.

The Report seems to imply that, once rehabilitated, an individual must lead a perfect, blameless, and flawless life from that point on. Full and complete rehabilitation does not and cannot mean a person can never make a mistake ever again, if for no other reason than such a

⁵ Although 21 U.S.C. §844 (simple possession) is not a strict liability crime and, in light of Joe's efforts to dispose of the substance, he likely lacked the *mens rea* for the commission of a crime. See, e.g., *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608.

standard would be utterly unattainable. Such a standard could not and should not be upheld by this Court. It is simply not reasonable to expect an individual to adapt to spending 16 years under one set of social rules and then immediately to re-adapt upon release. That Joe has done well enough during the three years in law school to garner glowing recommendations is a testimony to his resilience, desire to succeed, and intentions to give back to the community.

Joe knows what he did was wrong. He admitted that candidly to the Board (Tr. 454). This is not the same person who, as he told the Admissions Committee, in the 1980s viewed the activities that led to his imprisonment as a victimless crime between consenting adults (Tr. 579). Joe learned respect for the law while in prison (CMBA Ex. 56), but in 2011 he learned that literal compliance with the law is necessary but not sufficient for someone with his aspirations (Tr. 564). Fortunately he was able to step back from the edge and reengage with the life he had been moving toward, rather than the life he had left behind.

It would be unconscionable for this Court to say now that, not only is there a roadblock in your path, but it reaches to the sky and to the horizon on either side. It would be unconscionable say that roadblock will never, ever come down, no matter how well you live your life, or how many people you could have helped, or how intelligent and hardworking you are, or how desperately you want to make a contribution to the world you know you harmed. Is that the kind of profession that we are? Do we really believe that it is too late for people to learn from their mistakes? Do we really believe that the ability to serve our sometimes very imperfect clients requires that we be perfect ourselves? On the contrary, the practice of law has to imply a belief in the possibility of redemption. We have to believe that our engagement with the law makes things better for our clients, and ideally for us too. We have to believe that a person can fall, and then get up and go on for miles before stumbling again just yards before the destination. Otherwise there is no purpose to the law, no purpose for attorneys, and no purpose for courts such as this who set standards of expected behavior. Full and complete rehabilitation does not and cannot

mean a person can never make a mistake again. The law is ever evolving, and so are we.

- E. Presently, Applicant meets the character and fitness standards articulated in Gov. Bar Rule I and should be permitted to take the bar exam either in July, 2015 or February, 2016.**

An Admissions Committee is required to consider a list of factors in determining an applicant's character and fitness, including those listed in Gov. Bar Rule I(11)(D)(3). The Board must also consider the (D)(3) factors when conducting a mandatory review of a candidate with a past felony conviction—though it may consider others—as well as the factors listed in (D)(5)(a). Gov. Bar Rule I(12). The Report certified to this Court does neither of these.

Joe therefore requests the Court adopt the Admissions Committee's findings of approval as to the (D)(3) factors indicated on CMBA Ex. 45 and 46. The Board was also required to but did not consider the factors in Gov. Bar Rule I(12)(D)(5)(a). In the absence of any findings of record as to these factors, Joe requests the Court enter the following findings:

- (i) The amount of time that has passed since the applicant was convicted of the felony.

Twenty-two years have passed since Joe was convicted of a felony in 1992.

- (ii) [I]f the applicant was convicted under the laws of the United States...whether the applicant would be eligible to have his rights and privileges restored under the laws of Ohio if convicted in this state for the same offense;

If Joe had been convicted in Ohio, his rights and privileges would have been restored by operation of law. See R.C. 2967.16(C)(1).

- (iii) Whether the applicant is disqualified by law from holding an office of public trust;

Joe is not disqualified from holding an office of public trust. See R.C. 2967.16(C)(2)(c).

- (iv) How an approval of the applicant would impact the public's perception of, or confidence in, the legal profession.

Joe submits that approving his Application would promote public confidence in the rehabilitation process of the penal system. He also submits that he is in a better position to counsel clients away from continuing in illegal activity based on his personal experience.

Disapproving a talented, qualified candidate like Joe is what would negatively impact the public's perception of the legal profession, as it implies a person can serve the time meted out to them by the law but will continue to pay indefinitely for a crime. It would also be anomalous and reflect poorly on the public's perception that a candidate who is demonstrating competent, ethical representation of members of that public under a Legal Intern Certificate can then be permanently deprived of the opportunity to continue serving that public due to conduct that ceased years before the Certificate was granted.

This Court is not bound by the Board's findings though it usually gives them deference unless the record weighs heavily against them. Because the record of Joe's conduct justifies the trust of clients, adversaries, courts and others with respect to professional duties owed to them and demonstrates that he satisfies the essential eligibility requirements, the Admissions Committee approved him as to the (D)(3) factors, and no finding was made as to the (D)(5)(a) factors, the record weighs heavily against the Panel's findings. Joe respectfully requests this Court give those findings no deference and that it approve his Application. In the alternative, he requests that it permit him to re-apply after a delay to be determined by the Court.

IV. THE HEARING PROCESS AND REPORT OF THE BOARD OF COMMISSIONERS DID NOT COMPLY WITH GOV. BAR RULE I(11).

A. The Report did not evaluate Applicant's *present* character and fitness.

The Report narrowly focused on Joe's legal conduct between late 2009 and early 2011, of which the Panel disapproved, and relied on his testimony as to his state of mind concerning it in 2009 and 2010. In so doing it failed to consider the entirety of his conduct and ignored its obligation to determine his *present* conduct, qualifications, and fitness. Joe respectfully requests the Court find that any character concerns it has regarding his conduct between late 2009-early 2011 reflect "transitional character development" it noted in *Davis* (*See Davis*, 38 Ohio St. 2d at 276, 313 N.E.2d at 365), rather than, as the Report urges, the impossibility of his rehabilitation.

B. The Report did not examine the Applicant's entire conduct but only his perceived negative conduct during a narrow time period.

The Report did not examine Joe's conduct in the entirety—positive and negative—but limited its review to conduct it deemed problematic and that occurred within narrowly specified time periods. The Report chose to focus on five concerns outside the (D)(3) factors that occurred between late 2009-early 2011, but it could just as well have identified five examples of conduct that reflect positively on Joe's character and that are more recent than those it cites from four-five years ago. There are at least that many anecdotes contained in Section III(A) above alone.

Applying the D(4) factors to assess the weight and significance of Joe's conduct as attested to by employers, co-workers, and instructors could just as well result in the following with regard to his reliability, integrity, and professionalism: Age at the time of the conduct: 51; Recency of the conduct: more recent than the conduct of concern cited in the Report and continuing through the present day; Reliability of information regarding the conduct: multiple reliable and consistent sources who have first-hand multiple experiences with the applicant in a professional environment; Seriousness of the conduct: very serious, meriting the trust given by current and former employers and by clients, professionals, and courts; Factors underlying the conduct: applicant's desire to apply his talents to give back to the community and make amends for the past; Cumulative effect of the conduct: very positive; Evidence of rehabilitation: the specific instances related provide ample evidence of rehabilitation. Positive social contributions: applicant continues to engage in the positive conduct and to demonstrate his rehabilitation. Materiality of any omissions or misrepresentations: omission of much of this information from consideration and from the Report has had drastic consequences for the candidate in the form of a potential death sentence for his legal career.

C. The Report should not be given deference as the record weighs heavily against its findings and the hearing process resulted in an aberrant portrait of the candidate compared to the overall record.

This Court is not bound by the findings of fact made by a disciplinary Panel but gives their findings “some” deference because the Panel observed the witnesses firsthand. *Cleveland Bar Assn. v. Cleary*, 93 Ohio St.3d 191, 198, 754 N.E.2d 235 (2001), cited in *Cincinnati Bar Association v. Mezher and Espohl*, 134 Ohio St.3d 319, 2012-Ohio-5527. Credibility findings of a character and fitness Panel receive the same deference. See *In re McKinney*, 134 Ohio St.3d 260, 2012-Ohio-5635. However, if the Panel’s findings weigh heavily against the record, the Court will disregard those findings. In *McKinney*, the Court found the Panel’s findings as to credibility were entitled to deference on the issue of the reason McKinney was fired. Notably, the Panel subpoenaed a human resources official from the previous employer and found her testimony more credible than McKinney’s. *Id.* at 263, 2012-Ohio-5635. In *Aboyade*, a co-worker provided information regarding Aboyade’s deceptions. In *Wiseman* the Panel contacted the Florida Board of Bar Examiners for a version of events differing from the applicant’s. In none of these cases did the Panel hypothesize an alternate version to the information before it and enter it a finding without further support. A Panel is not free simply to speculate as to an alternate version of events without evidentiary support and deem it a finding of fact. If it were, an applicant could be faced with having to disprove an infinite number of alternate theories.

The record also weighs heavily against the Panel’s findings for the following reasons:

- 1. The Board’s failure to adhere to established, articulated standards in evaluating Applicant’s candidacy constituted a denial of due process.**

An applicant has the burden under Gov.Bar R. I(11)(D)(1), “to prove by clear and convincing evidence that the applicant possesses the requisite character, fitness, and moral qualifications for admission to the practice of law.” However, this must still be determined in accordance with the standards articulated in Gov.Bar Rule I, applicable decisions of the Ohio Supreme Court and the United States Supreme Court, and approved standards of conduct (the “Essential Eligibility Requirements”). Gov.Bar Rule I(11)(D)(2). Once standards have been

established and articulated, failure to adhere to them violates due process. *See, e.g., State ex rel. Keith v. Ohio Adult Parole Auth.*, 2014-Ohio-4270. This is all the more true in the bar admissions area where an applicant has a property interest protected by due process in a professional license (*Schware, supra*), whereas the relator in *Keith* had no constitutional right to parole, only to the expectation that eligibility standards would be followed.

The Board is charged with reviewing the (D)(3) factors and the D(5)(a) factors in a case where an applicant must be reviewed due to a previous felony conviction. Gov.Bar Rule I(12). It did not consider either set. Instead, it issued findings as to the (D)(4) factors, which are used to determine the weight and significance of an applicant's conduct (not negative conduct only). Significantly, nowhere in Gov.Bar Rule I is the Board charged with considering the (D)(4) factors, let alone with substituting them wholesale for the required (D)(3) and (D)(5)(a) factors. By ignoring the tremendously positive aspects of Joe's candidacy, narrowly focusing on a decision to engage in legal conduct for approximately 16 months during an otherwise unmarred 23 year record of rehabilitation, and substituting (D)(4) factors for the factors the Board was required to consider, the Report creates an extremely distorted picture of the candidate and provides poor guidance as to his abilities to ethically practice as an attorney.

2. The improper use of innuendo to influence witness's statements, unwarranted adversarial nature of the hearing, and inaccurate renderings of the record, irreparably tainted the resulting Report.

a. The improper use of innuendo to influence witnesses' statements.

During the hearing a number of improper questions implying facts not in evidence were used. The classic version of this type of question is "When did you stop beating your wife?" when there is no evidence that any beating has occurred whatsoever. When used with a non-party witness who has been segregated from the remainder of the proceedings, it is very easy to manipulate the witness into expressing reservations regarding previous statements based on an impression that events have occurred that have not and that facts have been proven that have not.

For example, CMBA Admissions Committee member James Kline was asked:

Q. Did he tell you that the seized firearms included registered and unregistered firearms?
(Tr. 584)

As had been discussed earlier in the hearing, this unregistered firearm charge from 1991, which was dismissed, had been based on Joe possessing a box of parts that it was alleged could be assembled into a Sten machine gun, of which Joe already owned two that were legally registered (the reason he had the parts) (Tr. 54). These details were not shared with the witness.

And again:

Q. Did he tell you that the seized firearms included semiautomatic and automatic machine guns?

The witness was not informed that Joe had a Class 3 firearms license and was authorized to possess these types of weapons (Tr. 584).

Q. Did he tell you that the seized firearms included silencers and/or parts to make silencers?

For the same reason, Joe was also permitted to possess these items but the witness would have had no way of knowing that (Tr. 584). It was not mentioned that the original allegation was that each of the different mounts that came with a registered silencer Joe had purchased constituted a different silencer. That charge was also dropped.

Q. Did he tell you there was evidence at his 1992 trial that he used the firearms business to launder drug proceeds?

A. No (Tr. 584).

The witness was not informed that no such evidence was presented but that bar counsel was reciting the Prosecutor's statement (Tr. 158), or that the Wyoming District Court specifically found during Joe's 1992 sentencing that the offense had not involved a firearm, and no enhancement of Joe's sentence for use of a firearm was applied (Tr. 56).

Q. Are you concerned that the use of the BATF license to obtain firearms and use them, as Joe did, constituted an abuse of that license?

A. If those are the circumstances, yes (Tr. 585).

The witness was not informed that there was no evidence presented that Joe had used his firearms business to launder drug proceeds and that there had been a finding in his 1992 conviction that no firearm was involved in the offense.

Q. And given those circumstances and his arguable abuse of a BATF license, does that given you concern as to whether or not he should be allowed to get a law license?

A. It—it further adds to my concern with respect to the extent of the disclosures (Tr. 584).

This answer, which appears to back away from the Admissions Committee's previous approval of the candidate, was predicated on the misleading nature of the preceding questions.

Admissions Committee member Warren Rosman was asked:

Q. Did he tell you that he had—that they had set up a trust by which all this money would be funneled so as to avoid paying income tax?

A. Again we – we didn't go into anything like that at all (Tr. 656).

The witness was not informed that there was absolutely no evidence on the record regarding the use of a trust to avoid income tax. This question was also posed with the full knowledge that Joe had provided his income tax returns to the Panel and reported income from "Sales: Herbal" on his Schedule C. He also explained that he had been unable to obtain the return of seized records for the year 2010 and had been advised by a tax attorney to file an amended return when they were recovered rather than to guess (Tr. 372). Finally, Joe asks the Court take judicial notice of the fact that income taxes cannot in fact be avoided by being "funneled" through a trust (Internal Revenue Code §§671-678 (26 U.S.C. Part I, Subpart E)).

The follow-up question was designed to indicate that Joe had not only engaged in tax evasion in a manner not legally feasible but had concealed this non-existent activity:

Q. It wasn't disclosed in his application or any supplement to his application as of the June 6, 2013 interview, was it?

A. I don't believe so, no (Tr. 657).

There was no mention of the fact that it wasn't disclosed in the Application or Supplement for the simple reason that it didn't happen.

Another question to Rosman with no support in the record was:

Q. Now, with respect to the financing that Mr. Libretti provided to his roommate, did he tell you that all of the money was run through his—Mr. Libretti's account because Mr. Hohlios was trying to avoid garnishment orders for child support?

A. No, we didn't go into any of that detail (Tr. 656).

The witness was not informed that no evidence on the record indicated this to be true. He was not informed that the only testimony had been that Joe did not want Joe's money seized for Hohlios' child support if their joint profits were received first into Hohlios' account. He was not informed that, as Commissioner Richards correctly stated (Tr. 422), since the profits were in a revocable trust in Hohlios' name, the handling "would not have protected" them from support claims in any event. *See, e.g.* R.C. §5805.06(A)(1) and Wyo. Stat. §4-10-5069(a)(1)(2013).

An even more blatant example of presenting facts in contradiction to the actual evidence occurred when Admissions Committee member James Kline was asked:

Q. Did he tell you that the Colorado firearms case was dismissed because it was an informal part of his 1992 plea bargain in Wyoming? (Tr. 585).

There was no mention that the 1992 plea agreement provided "no additional promises, agreements, and conditions have been entered into other than those set forth in this document," (CMBA Ex. 38) and that part of the Change of Plea proceeding had been read into the record:

There is now pending against Joe in the District of Colorado a silencer count... I've been informed...that they will be dismissing that count...**It's not part of the plea agreement**, but I think in terms of completeness, this Court should know that this is also in these circumstances (Tr. 477, emphasis added).

Significantly, even after the improper suggestions implicit in these lines of questioning, neither member of the Admissions Committee withdrew his recommendation (Tr. 607, 661-62).

b. The unwarranted adversarial nature of the hearing.

The character and fitness process is not meant to be an adversarial inquiry:

We view such proceedings as being different from the adversary contest associated with, for example, disciplinary cases. A hearing to determine character and fitness should be more of a mutual inquiry for the purpose of acquainting those aspects of morality, attention to duty, forthrightness and self-restraint which

are usually associated with the accepted definition of 'good moral character.' Such a view commands the utmost in cooperation between applicant and the Board (*Davis*, 274).

It was apparent early on from the transcript that the hearing was going to take an adversarial approach rather than one of "mutual inquiry," which appears to have resulted in some hesitancy and defensiveness on Joe's part. It is clear the Panel was angered by the measured and careful responses it received from Joe, and viewed his reaction to the questioning style and improper use of innuendo as indicating a lack of candor. However the record weights heavily against this finding, as the phrases "candid" "open" "forthcoming" and the like populate the testimony and references provided on Joe's behalf, and it should therefore be given no deference.

From Professor Stephen R. Lazarus:

He's always been very open with me, and as far as I can tell, he's been very open with everyone else, other faculty to whom I've spoken. he hasn't—he hasn't attempted to hide anything at all (Tr. 214).

From Admissions Committee Member Warren Rosman:

[H]e explained things in great detail, and there was no hesitancy on his part to explain either. That's why the interview lasted two hours and 45 minutes. I mean, we asked a lot of questions and he did a lot of explaining (Tr. 600).

Very forthcoming at interview (CMBA Ex. 45).

From Admissions Committee Member James Kline:

[W]e were essentially invited to review matters by Mr. Libretti following—he sent us follow-up materials and correspondence, and because of that issue, I chose to contact and follow up on it (Tr. 597).

From Assistant Public Defender Linda Hricko:

Mr. Libretti disclosed his history to me from the beginning. My initial reservations were very soon overcome by the integrity Mr. Libretti displayed (Ex. 18).

From Professor Kevin O'Neill:

What impresses me, even beyond his exceptional intelligence, is the honesty, the humility, and the integrity he has shown in all of his dealings with me over a three-year period (Ex. 11).

From Law Student Elizabeth Bonham:

Honesty. The first time Joe bought me an after-class coffee, straight out of the gate he told me the history of his felony conviction.

Openness. During that first discussion, he welcomed my questions. In fact, his willingness to share his story with me was my first exposure to the importance of criminal justice in the context of my legal education.

Integrity. Joe's straightforwardness inspires trust immediately. I would challenge anyone to have one conversation with him and doubt his virtue by the end of it (Ex. 10).

From Law Student Robert Knecht Schmidt:

He's never been anything but honest and forthcoming with me (Tr. 267)

From former employer Joe J. Vegh:

Joe let me know immediately that he was a convicted felon and gave me his background. I appreciated his candor (Ex. 15).

From Public Defender Cullen Sweeney:

Joe has spoken very candidly with me about his 1992 criminal conviction.

From Retired Manager of Academic Excellence Program Daniel Dropko:

He was also open and candid with me about his own history, which he offered freely, and not as a result of any probing or questioning on my part (Ex. 7).

In contrast to the multiple reliable and consistent sources who have first-hand in-depth experiences with the applicant in a professional environment, it is the Report's assertion that Joe exhibits a lack of candor and is "evasive" that stands out as aberrant. Faced with a lengthy, hostile cross-examination, one might have expected any witness might shut down, which is the reason this style is not utilized for information-gathering purposes such as at a deposition. Despite the information provided to it as Ex. 2 to the Hearing Brief, the Report also failed to take into consideration other explanations for a candidate with Joe's background possessing a less than effusive demeanor, such as the effects of mild post-traumatic stress or re-adapting from an environment for 16 years where considering every word carefully was a survival skill. It is worth noting that the approach taken by the Admissions Committee, which found Joe to be "forthcoming" was the exact opposite of that taken by the Panel, which might be expected to affect the results (Tr. 659). The Committee did not subscribe to the belief that it was an applicant's job to divine how much and what sort of information not explicitly requested out of the universe of information each individual contains within should be articulated to it.

Q. And this is—this is, again, an interview. It's up to you guys to ask the questions and it's Mr. Libretti's job to answer the questions; is that right?

A. Very much so. And Jim may have gone into this, but the typical interview is about a half hour...So when we went almost three hours with Mr. Libretti, we were—both of us were trying to be very thorough (Tr. 659).

By way of contrast, there were a number of times during the Panel hearing where Joe attempted to provide more information than was being requested and was cut off by an instruction to answer yes or no, a scenario not likely to promote an atmosphere of open sharing:

(Tr. 142):

Q. Would you like me to explain?

A. I'll let your lawyer ask you that.

(Tr. 422):

Q. You're telling me that when you contribute, rather than putting in cash, when you contribute capital, when you contribute capital to an LLC and agree that you will receive back 42 percent of the profits, it is your statement here under oath that you don't consider yourself a member?

A. No, I did not.

Q. And you don't consider that you have to respond in any way to 23C?

A. I didn't think—

Q. Yes or no.

Q. And did—did you ever get any—any answer in the affirmative from a court or from a prosecutor that, yes, you can have immunity?

A. No. And I think I know why.

Q. But I'm just asking for a yes or no.

A. No, no, I did not.

(Tr. 357):

Q. You did allege in your complaints that herbs that were seized from your Cleveland apartment on March 30, 2011, were legal, didn't you?

A. That, I did.

Q. But you didn't tell them about stuff that was seized from the storage locker, did you?

A. Well, that wasn't an issue in the lawsuit. It wasn't—

Q. Can you just answer yes or no, sir?

A. No.

Nevertheless, Joe did share an extensive amount of information with the Panel over two days. After the hearing he also submitted the results of an FOIA request and a letter from JPL's

sole member verifying that Joe has no ownership interest in it (May 6 Supplement). Because every witness who testified mentioned Joe's ready provision of information regarding his past and his conduct, the record weighs heavily against the findings by the Board and Joe respectfully requests this Court give those findings no deference. Should the Court find he failed to exhibit sufficient candor, Joe respectfully requests the Court permit him to re-apply after a delay.

c. The inaccurate renderings of the record

The Report contains inaccurate restatements of testimony from the hearing, an inaccurate summary of expenditures, and an unsourced assertion not based on any evidence presented at the hearing. Joe submits the following in response to the Report's assertion he made "knowingly false" statements in an FOIA request (Rpt. 11 fn 8), expended more than \$360,000 to purchase materials *for resale* (Rpt. 8, CMBA Ex. 9), and to the information on Spice inserted into the Report without being presented at the Panel hearing (Rpt. 3 fn 3).

Joe's FOIA request indicated it was made "for the purposes of scholarly research and for educational purposes" and "not for a commercial purpose." The request was made after the hearing so no inquiry could have been conducted of Joe regarding his use of the information for a purpose independent of also providing it to the Board. The Panel therefore had **no** evidence before it to conclude Joe's use of the material was commercial or non-educational or whether he might also, for example, been preparing an article on aspects of the admissions process and public records. It had **no** evidence before it to conclude Joe's statements in his FOIA request were untrue, and the assertion should therefore be accorded no deference. It is not sufficient to employ the saw, "If it walks like a duck, talks like a duck, and looks like a duck, it is a duck" (CMBA Opp. Mot. Strike 9). Folk sayings are not evidence. Folk sayings do not justify permanently barring an applicant from registering as a candidate for the practice of law.

The Report also asserted Joe expended more than \$360,000 to purchase materials "for later resale" (Rpt. 8, CMBA Ex. 89) and that "disclosure was required given the size of the

enterprise” (Rpt. 10). However, Ex. 89 is not a valid indicator of the size of the enterprise, first because it double-counts invoiced amounts and amounts transferred as payment on that same invoice. Second, it cannot be simultaneously argued that Exhibit 89 does not “purport to reflect his profit” (Opp. Mot. Strike 4) but that it does reflect the “size of the enterprise” (Rpt. 10). Between late 2010 and March, 2011, some of the materials Joe purchased were shipped to an Arizona LLC which reimbursed him for the cost along with 42% of any profit made based on those materials (Tr. 418-23). Any expenditures listed on this summary exhibit that were subsequently reimbursed would therefore not be true “expenditures” or “for resale,” nor would they reflect Joe’s profit. The net profit from the transactions on Ex. 89 is unknown, and its size cannot be determined by simply adding the cost of goods purchased, as the Report relied upon in Ex. 89 did. It should also be noted that Joe’s prior counsel’s consent to Exhibit 89’s admission was made subject to objections in a brief (not solely the “closing brief to the Panel” as claimed in Opp. Mot. Strike 4) and a Motion to Strike if inaccuracies were found (Tr. 669).

Lastly, Joe submits the following in response to the Report’s unsourced explanation of a legal product’s nature, effect, and potential for harm when none was presented at the hearing (Rpt. 3). The explanation in the footnote appears to come from a web page published by the National Institute on Drug Abuse (NIDA) and reads,

Spice is a mix of herbs (shredded plant material) and man-made chemicals with mind-altering effects. It is often called “synthetic marijuana” because some of the chemicals in it are similar to ones in marijuana; but its effects are sometimes different from marijuana and can be much stronger (Rpt. 3 fn 3, quoting without attribution <http://teens.drugabuse.gov/drug-facts/Spice>).

Further down the same page from the quote selected for inclusion in the Report one finds the following qualifying statement:

Spice is a new drug so there is not much research on how it affects the brain. We do know that the chemicals found in Spice attach to the same nerve cell receptors as THC, the main mind-altering ingredient in marijuana. Some of the chemicals in Spice, however, attach to those receptors more strongly, which could lead to a much stronger and more unpredictable effect. We still don’t know what many of

the products sold as Spice are actually made of, and therefore we can't be sure how the chemicals in Spice will harm the user.

An assertion that compounds “bind more strongly to those receptors, which could lead to a much more powerful and unpredictable effect” but admits there is not much research on how the brain is affected is a significantly different statement than the version chosen for inclusion in the Report which categorically concludes that its effects “can be much stronger.” This may be related to the site’s target audience (teenagers), but, as an authoritative source inserted to justify the imposition of a legal death sentence on a bar applicant, much more should be required.

This NIDA-authored site leads to another site, which goes on to elaborate that,

Manufacturers of Spice products attempt to evade these legal restrictions by substituting different chemicals in their mixtures, while the DEA continues to monitor the situation and evaluate the need for updating the list of banned cannabinoids (<http://www.drugabuse.gov/publications/drugfacts/Spice-synthetic-marijuana>).

This would seem to undercut the Report’s speculation that, were it not for JWH-018 being scheduled as a controlled substance, Joe would not have ceased his involvement with Spice (Rpt. 4). Spice is still being made with many different chemicals, and its ever-changing composition presents significant legal challenges. Joe could have switched, but did not, to purchase and resale of JWH-250, AM-2201, or XLR-11, which remained legal for more than a year after JWH-018 was scheduled 1, 2011, or to another compound that is, for the time being, still a legal product. *See United States v. \$18,198.00 in United States Currency*, 2014 U.S. Dist. LEXIS 57390, 2014 WL 1451594 (E.D. Tenn. Apr. 14, 2014) and *State ex rel. DeWine v. Fred’s Party Ctr., Inc.*, 2014-Ohio-2358. *See also Sathappan, Hari. Slaying the Synthetic Hydra: Drafting a Controlled Substances Act that Effectively Captures Synthetic Drugs*, 11 Ohio St. J. Crim. L. 827 (2014).

What unites these seemingly divergent allegations is the use of speculation without evidence to buttress an assertion that Joe must then defend against. Joe is alleged to have made “knowingly false” statements in an FOIA request despite no evidence to support the assertion. The Opposition to Motion to Strike introduces still more new and unsupported allegations: that

Joe “aided and abetted” Hohlios’ evasion of child support (Opp. Mot. Strike 1) and his FOIA request was “undoubtedly a gambit to see if the left-hand of the government knew or could find out what the right-hand had done” (to what end is unstated). Joe is alleged to have expended more than \$360,000 to manufacture Spice and to have a 42% interest in JPL Marketing (Opp. Mot. Strike 4-5), in clear contradiction to the transcript testimony regarding the mixed nature of the purchases listed on CMBA Ex. 89 and confirmation from JPL Marketing that Joe has no ownership interest in it (May 6 Supplement). Joe submits that the use of an unending series of speculations in the absence of or in actual contradiction to evidence on the record is an abuse of the fact-finding process. Judicially or quasi-judicially issued findings that will have a binding and preclusive effect must be based on competent and credible evidence, as the Panel did in *McKinney*, *Aboyade*, *Wiseman*, and elsewhere, and not on speculation.

3. Applicant should have been permitted to withdraw his Application.

Joe initiated these proceedings when he filed his Application and should have been permitted to withdraw it when he filed a Motion so requesting. Though Gov.Bar Rule I does not identify a specific right to withdraw an application, this Court has recognized withdrawal as a “procedurally wise” option for applicants that has been available for over twenty-five years. *Application of Corrigan*, 47 Ohio St.3d 32, 546 N.E.2d 1315 (1989). This Court’s Rules of Practice, Ohio’s Civil Rules, and the Rules of Appellate Procedure all allow the party instituting an action to dismiss it. *See* S.Ct.Prac.R. 4.05, Civ.R. 41, and App.R. 28. Conservation of judicial resources also supports this approach.

V. EVEN ASSUMING ARGUENDO THAT APPLICANT DOES NOT PRESENTLY POSSESSES THE REQUISITE CHARACTER AND FITNESS, A PERMANENT BAN ON REAPPLICATION IS UNWARRANTED, ARBITRARY AND CAPRICIOUS, AND A DENIAL OF SUBSTANTIVE DUE PROCESS.

A. The Report’s recommendation is unwarranted, arbitrary, and capricious considering the other cases in which a permanent ban has been imposed.

The Report refers to *Application of Poignon*, 132 Ohio St.3d 395, a permanent

disapproval case (Rpt. 5). No candidacy could be more distinguishable from Joe's than that of Poignon's. Poignon had been a pharmacist but lost his license due to a felony conviction for drug theft. Ten years later he still blamed his supervisor for the missing drugs, the pharmaceutical profession for tolerating drug theft, and his attorney for the loss of his license. He pled guilty but denied doing the acts he pled guilty to. At the hearing he claimed ignorance of foreclosure proceedings against his home and had been unemployed for three years. A key factor in the decision to permanently bar Poignon from reapplying was his loss of an earlier professional license due to 15 years of unethical conduct. This Court found that Poignon's irresponsible and dishonest behavior spanned "at least 20 years" in total *Id.* at 9, 2012-Ohio-2915.

By way of contrast, Joe was employed full-time in a paraprofessional position from 1989 to 2010, and currently attends law school full-time while working for the public defender, and has volunteered speaking to groups about recreational and prescription medications based on his experience (Ex. 21). Joe's acceptance of responsibility is also clear: "[T]he issue in any direct appeal wasn't whether I sold drugs. I did that. I own that. I don't deny that. I never have." (Tr. 74). The Admissions Committee noted he said, "I deserved to be caught and punished" (CMBA Ex. 56). Joe received acceptance of responsibility points at his sentencing in 1992 (Tr. 56).

Perhaps most importantly, Joe has had a limited license to practice law since June, 2013, and has received nothing but praise for his conduct. He is a known quantity, unlike the vast majority of candidates who come before the Board and this Court and ask it to surmise, based on past behavior, how they would function as a licensed attorney. Joe's conduct under his limited license is the best possible evidence of his conduct as a future attorney. It is at least worth giving him the chance to come back in a year or two to demonstrate what those who work with him already know and what failed to come across to the Board on a particular day in a particular set of circumstances: that he has the character, fitness, and moral qualifications to be an attorney.

In re Davis provides much more guidance and is much more applicable to the current set

of facts than *Poignon*. Davis had a felony conviction for larceny and the Panel hearing focused on his past. *Davis*, 38 Ohio St.2d at 273, 313 N.E.2d at 363. The Board recommended his Application be disapproved, due in part to “testimonial inconsistencies and misleading explanations” and efforts to “keep the board from acquiring a ‘true, though damaging, picture’ regarding his past. *Id.* at 274-76, 313 N.E.2d 363. Despite “significant doubts” due to Davis’ evasiveness, the Court remanded the Application to the Board with instructions to hold another hearing in 6 months to consider “current evidence.” It noted Davis’ accomplishments, including academic achievements and a prior position of considerable responsibility. *Id.* at 276, 313 N.E.2d 363. The Board again disapproved Davis, but the Court held, though some evidence supported the Board, it was impressed with his academic and professional accomplishments and approved his application. *In re Davis*, 61 Ohio St. 2d at 373-374, 405 N.E.2 at 189.

Permanent disapproval is a remedy this Court has reserved for particularly egregious conduct involving dishonesty in multiple contexts (often falsification on a bar application or perjury before the Panel), exacerbated by a refusal to accept responsibility for wrongful conduct. One permanently banned applicant committed additional illegal acts following the denial of his first application for admission (*In re Kapel*, 87 Ohio St. 3d 122, 717 N.E.2d 704); another failed to take responsibility for admitted violent conduct (*In re Keita*, 74 Ohio St. 3d 46, 656 N.E.2d 620); another altered transcripts, failed to disclose disbarment in another state, and lied under oath (*In re Aboyade*, 103 Ohio St. 3d 318, 2004-Ohio-4773, 815 N.E.2d 383); another was indefinitely disbarred in another state and recently convicted of welfare fraud (*In re Nerren*, 79 Ohio St. 3d 322, 681 N.E.2d 906). Moreover, the holdings in *Nerren*, *In re Cvammen*, 102 Ohio St. 3d 13, 2004-Ohio-1584, 806 N.E.2d 498, and *In re Wiseman*, 135 Ohio St. 3d 267, 2013-Ohio-763, all involved candidates who refused to accept responsibility for their actions, indicating that this Court judges most severely not the person who engages in conduct she or he acknowledges was unwise but the person unable to admit to error, and hence to correct it.

Joe has presented a great deal of evidence of his redeeming qualities, and has accepted responsibility on the record for his pre-1990 conduct and for going against his conscience in 2009. It would be perverse to hold that acknowledgement against him. Additionally, he investigated to the best of his ability whether he had been granted immunity and provided the results to the Panel. He regrets not listing his Spice activity on the Application but in mitigation respectfully submits that he did discuss the activity openly with the Admissions Committee and the Panel, provided tax returns and bank statements upon request, and filed a supplement.

Board recommendations that an applicant never be permitted to re-apply have been rejected by this Court in favor of a delay where there is evidence of an applicant's redeeming qualities. In *Application of McKinney*, the applicant had provided what the Panel, Board, and Court found to be a false reason for her employment termination, did so repeatedly, and gave multiple explanations under oath for not telling the truth initially. *See McKinney*, 134 Ohio St.3d 260, 2012-Ohio-5635, 981 N.E.2d 847, ¶ 23. The Court did not find it determinative that she made a false statement on her Application, but stated "once the committee members began to ask questions" she was obligated to "fully disclose" the circumstances. *Id.* at ¶ 22. In contrast, even if Joe should have disclosed the Spice activity and request for immunity on his Application, he did discuss it openly with the Admissions Committee and Panel, indicating no deliberate intent to deceive, and displaying more candor than McKinney, who nevertheless was given a chance to reapply and submit to a new investigation. In *Application of Holzhauser* (66 Ohio St. 3d 43) the Board's recommendation of a permanent ban was set aside in favor of a two-year delay because the Court found she did not "completely lack rehabilitation potential." This is all the more true as concerns Joe, who has displayed rehabilitation and redeeming qualities, and who would only ask at a minimum that this Court provide him with additional time to demonstrate those qualities.

- B. The cumulative effect of the procedural violations in IV(C)(1)-(4) arbitrarily and capriciously deprived Applicant of his liberty and property interests, therefore violating due process and equal protection principles.**

The Due Process Clause provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, Sec. 1. Substantive due process protects those rights that are “fundamental,” that is, rights that are “implicit in the concept of ordered liberty.” *See Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). It protects these rights “from deprivation at the hands of arbitrary and capricious government action.” *Young v. Township of Green Oak*, 471 F.3d 674 (6th Cir. 2006).

While there is no protected liberty interest in a particular position of employment, the Due Process Clause encompasses a liberty interest in pursuing a trade, profession, or calling. *See Parate v. Isibor* (6th Cir.1989), 868 F.2d 821, 831; *see also Draghi v. County of Cook* (7th Cir. 1999), 184 F.3d 689, 693; and *Milhoan v. Eastern School District Board of Education*, 2004-Ohio-3243 at 16. While *Parate* was denied relief because he could have taught anywhere position else in the state, accepting this Report will result in Joe’s complete exclusion from the practice of law in Ohio. Such a decision cannot be made on an arbitrary and capricious basis or based on a failure to follow previously articulated standards for decision-making, as occurred with the hearing and Report. More even than a license to practice law, the adoption of the Board’s recommendation is likely to be the end of any professional employment for Joe. Every licensing application inquires about other license denials, and the Court’s opinion will likely be the first result in a Google search of Joe’s name for any non-licensed job he applies for. Unless this Court would also be willing to permanently disapprove an applicant who sold alcohol or cigarettes, Joe’s conduct does not merit this kind of death sentence, not just to legal employment, but to any sort of remunerative employment where his considerable talents could be applied.

C. Cigarettes, alcohol, and industrial chemicals are toxic to human health, but no Ohio attorney has ever been refused admission to the bar or disciplined for involvement in legal yet toxic products.

The Report and Opposition to Motion to Strike make much of documentation stating that

some of the chemicals used to make Spice have been found to be toxic (Rpt. 3, Opp. Mot. Strike 10). Regardless, Joe was entitled to see a document the Report relied on, and to ask questions at the hearing through counsel, and that was used as a basis for permanently denying him a law license. Moreover, substances toxic to human health that no Ohio attorney has been refused admission to practice or disciplined for investing in include tobacco, alcohol, and industrial chemicals such as PCBs, “toxic environmental pollutants” *State v Wangler*, 2012-Ohio-4878, that are “known carcinogens.” *Brown v. Whirlpool Corp.*, 996 F. Supp. 2d 623. *See also Estate of Sheely v. Sheely*, 2012-Ohio-32 (death by acute alcohol toxicity). Numerous Ohio attorneys make a living as corporate counsel for companies that disseminate these toxic products.

One such toxic product is legal tobacco. On August 17, 2006, Judge Gladys Kessler issued a 1,683 page opinion holding tobacco companies liable for violating the Racketeer Influenced and Corrupt Organizations Act by fraudulently covering up the health risks of smoking and for marketing their products to children. *See U.S. v. Philip Morris*, 449 F. Supp. 2d. 1 (D.D.C. 2006). The Court found that tobacco “causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system.” It ordered the companies to publicize the following statements, among others, regarding its toxic products: “More people die every year from smoking than from murder, AIDS, suicide, drugs, car crashes, and alcohol, combined.” “Smoking causes heart disease, emphysema, acute myeloid leukemia, and cancer of the mouth, esophagus, larynx, lung, stomach, kidney, bladder, and pancreas.” “When you smoke, the nicotine actually changes the brain – that’s why quitting is so hard.” *U.S. v. Philip Morris USA, Inc.*, 907 F. Supp. 2d 1, 8 (D.D.C. 2012).

The harm caused by the legal Spice industry for the short time it has been in existence does not begin to rival this level of damage.

The Court particularly addressed itself to attorneys representing tobacco companies:

Finally, a word must be said about the role of lawyers in this fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine. At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes. They devised and coordinated both national and international strategy; they directed scientists as to what research they should and should not undertake; they vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected; they identified “friendly” scientific witnesses, subsidized them with grants from the Center for Tobacco Research and the Center for Indoor Air Research, paid them enormous fees, and often hid the relationship between those witnesses and the industry; and they devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege.

What a sad and disquieting chapter in the history of an honorable and often courageous profession.

No attorneys have been disciplined for profiting from the billions of dollars generated by this multi-state fraudulent and unethical enterprise, and Ohio has never denied a law license to an applicant due to involvement with the production and sale of tobacco, alcohol, or other toxic chemicals harmful to human health, nor does the business enterprise question on the Application screen for ownership, financing of, or investments in businesses that produce toxic substances. Unless this Court would be prepared also to discipline and bar from admission attorneys and others who profit from the sales of toxic substances, whether from employment or investments, it should not disapprove an applicant for short-term involvement with a legal yet possibly harmful product. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), recognizing a “class of one” claim where an individual has been intentionally treated differently from others similarly situated without a rational basis as a result of discretionary governmental action. Imposing a permanent disapproval on Joe for his short-term involvement with a substance whose effects are infinitesimal in comparison, beyond being a demonstration of hypocrisy, would constitute an impermissible arbitrary classification without a rational basis.

VI. FOREVER PRECLUDING APPLICANT FROM REAPPLYING SERVES NO POSITIVE SOCIAL PURPOSE AND NO HARM WILL RESULT FROM APPROVING HIS APPLICATION OR PERMITTING HIM TO REAPPLY.

A. Forever precluding Applicant from reapplying prevents him from completing the last stage of his rehabilitation by giving back to society and deprives society at large of using his skills for its benefit.

Joe has indicated his desire to continue working in the public service sector as a public defender. He desires to assist others and in some way to make amends for his past (Tr. 112, 447-48). Permanently preventing him from accomplishing his objective serves no positive purpose and deprives future low-income clients of high quality legal assistance. Joe's candidacy presents an unparalleled opportunity to give back to the community through application of the principles of restorative justice. *See* Sweig, Michael, In Felony's Mirror, Reflections on Pain and Promise, Institute for People With Criminal Records (2014), 30. This is precisely the opportunity Joe seeks and should be afforded, not just in his own interest but in society's.

B. The Panel misapprehended Applicant's intentions and misinterpreted his demeanor, resulting in a flawed impression of his candidacy.

Perhaps the most plausible explanation for the disconnect between the weight of the evidence and the Panel's findings is non-legal: that Joe, an older candidate described by a co-worker as "pretty reserved and quiet" (Ex. 5) and who had learned from painful experience to be very careful of what he does and says, angered the Panel with his careful and considered answers, though without intent to do so. This reticence appears to have caused the Board to suspect Joe of duplicity and of not truly having turned a corner, which in turn increased their intensity of suspicion and questioning, creating an unfortunate loop that ultimately did not result in an accurate assessment of Joe's ability to practice law in a competent and ethical manner.

This anger can be seen in, for example, the amount of vitriol contained in the CMBA Post-Hearing Brief, which dramatically accuses Joe of "Rambo litigation," sarcastically refers to his guilt over harm he caused as "Emily's Story," and repeatedly twists and misstates the hearing testimony as if seeking to replace actual sworn evidence with argument. Joe is accused of having "aided and abetted" Hohlios' evasion of child support as if an admissions proceeding were a

criminal trial (Opp. Mot. Strike 1). The CMBA Opposition to Motion to Strike actually quotes bar counsel's cross-examination at one point when it claims to be quoting Joe ("You sold for human consumption something too toxic to be placed in a garbage dump?") (Opp. Mot. Strike 10, Tr. 344). Elsewhere it goes so far as to *change sworn transcript testimony* to insert a word that was *not there* in support of Joe's alleged belief that income to a beneficiary is not taxable (Opposition 3, Objections and Brief 18). These instances, among others, suggest that an utter departure from the sound reasoned judgment that should be the hallmark of the character and fitness process has taken place. Another statement, that "Libretti did not declare any of the proceeds on his federal income tax returns based on Hohlios' legal advice that trust beneficiaries do not need to declare or pay taxes" (CMBA Post-Hearing Brief 3) is a patent falsehood without citation that appears nowhere in the record, though it makes evocative reading. Such a departure from measured judgment could only result in a Report that does not take an objective measure of the candidacy at hand. On the other side of the scale, the plethora of actual credible evidence from multiple sources who have in-depth, repeated experience with Joe indicates that the Panel, perhaps despite its own best intentions, simply got Joe wrong on a particular day.

C. No harm will result from approving the Applicant, with or without delays, permitting him to withdraw his application, or permitting him to reapply.

If this Court does approve Joe's Application or permit him to re-apply after a delay, he will still be subject to further review. Joe would still have to file either a new Application to Register As A Candidate, or an Application to Take the Bar Examination and obtain an updated character and fitness certification. He is also subject to a future Panel review under Gov.Bar Rule I(12) due to his conviction, ensuring he will need to remain on his current path.

CONCLUSION

Joe has proven that he is worthy of a client's trust, which is the touchstone of character and fitness review. His former employers and the members of the legal community he has

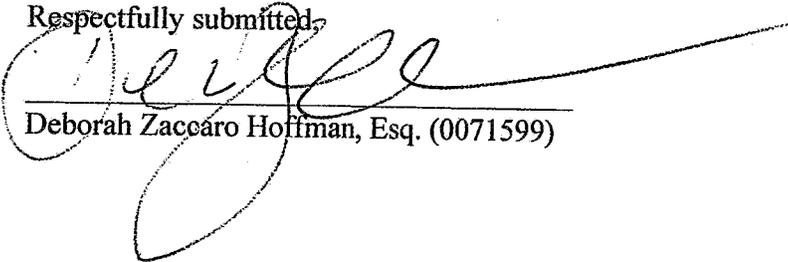
worked with and appeared before praise his ability and integrity, and he has been successfully fulfilling his duties to his clients as a certified intern for more than a year now. Practicing law is Joe's way of making amends for his transgressions.

It has been said that a person's repentance is only complete when he encounters the same situation that led to his downfall and makes a different choice.⁶ Joe paid a high price for his transgressions in the 1980s. He then encountered the same opportunity again in a slightly disguised form: a product that was legal though arguably unhealthful that subsequently became illegal. This time Joe had no qualms about turning the product and, by extension, himself in. He had no qualms about refusing continued involvement with the remaining legal forms of a substance he had decided was immoral, regardless of whether it was legal. He made a different choice, the right choice, and that choice made all the difference. This Court should do the same.

WHEREFORE, Applicant Joseph Victor Libretti, Jr., respectfully requests:

- A. that this Court sustain his Objections to the Report and Recommendations, approve his Application, and permit him to apply to take the July, 2015 bar exam.
- B. Alternately, he requests permission to (1) Withdraw his Application to Register As A Candidate or (2) Re-apply to Register As A Candidate and apply to take the February, 2016 bar examination, a full five years after the pivotal events of early 2011, in order to address any remaining character and fitness concerns.

Respectfully submitted,


Deborah Zaccaro Hoffman, Esq. (0071599)

⁶ Babylonian Talmud, Yoma 86b, as interpreted by Maimonides in Hilkhot Teshuvah 2:1-2.

FILED

SEP 10 2014

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

In re: Application of
Joseph Victor Libretti, Jr.

Case No. 2014-1555

ORDER

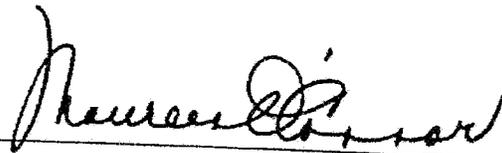
This cause came before the court upon the filing of a report by the Board of Commissioners on Character and Fitness. In this report, the board recommends that the applicant, Joseph Victor Libretti, Jr., be disapproved and that he not be permitted to reapply for admission to the practice of law in Ohio.

On consideration thereof, it is ordered by the court that the applicant and the Admissions Committee of the Cleveland Metropolitan Bar Association may file objections to the findings and recommendations of the board within 30 days after issuance of this order. It is further ordered that any objections be accompanied by the original and 18 copies of a brief in support of the objections. It is further ordered that the original and 18 copies of an answer brief may be filed within 15 days after any objections have been filed.

After a hearing on the objections or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper.

It is further ordered that, in accordance with Gov.Bar R. I(13)(C), the record filed with this court by the board shall remain under seal until November 4, 2014, after which date the record shall become public unless this court, on motion by the applicant or sua sponte, orders that the record or portions of it remain confidential.

It is further ordered that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings, and further that, unless clearly inapplicable, the Rules of Practice shall apply to these proceedings. All case documents are subject to Sup.R. 44 through 47 which govern access to court records. It is further ordered that service of briefs and other documents shall be made upon the applicant, the admissions committee, and all counsel of record.



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS

ON CHARACTER AND FITNESS OF

THE SUPREME COURT OF OHIO

UNDER SEAL

In re: Application of
Joseph Victor Libretti, Jr.

Case No. 563

14-1555

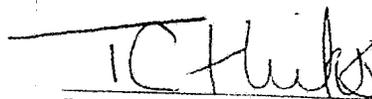
FINDINGS OF FACT AND
RECOMMENDATION OF THE BOARD OF
COMMISSIONERS ON CHARACTER AND
FITNESS OF THE SUPREME COURT OF
OHIO

This matter is before the board pursuant to its review authority as mandated by Gov. Bar R. I, Sec. 11, Div. (D)(5)(a) of the Supreme Court Rules for the Government of the Bar of Ohio.

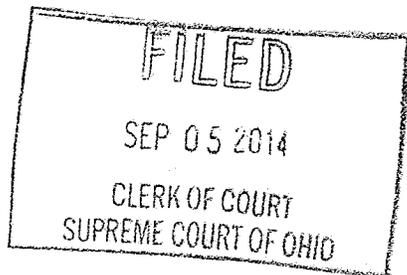
A duly appointed panel of three Commissioners on Character and Fitness was impaneled for the purpose of hearing testimony and receiving evidence in this matter. The panel filed its report with the board on July 7, 2014.

Pursuant to Gov. Bar R. I, Sec. 12(D), the board considered this matter on July 11, 2014. The board adopts the panel report, including its findings of fact and recommendation of disapproval with no provision for reapplication. The panel report is attached hereto and made a part of the board's report.

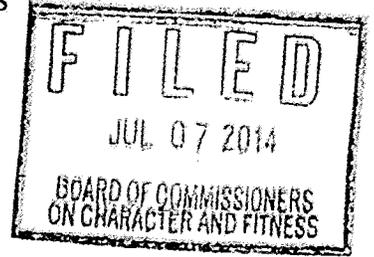
Therefore, the Board of Commissioners on Character and Fitness recommends that the applicant, Joseph Victor Libretti, Jr., be disapproved, and that he not be permitted to reapply for admission to the practice of law in Ohio.



TODD HICKS, Chair, Board of Commissioners
on Character and Fitness for the Supreme Court
of Ohio



BEFORE THE BOARD OF COMMISSIONERS
ON CHARACTER AND FITNESS OF
THE SUPREME COURT OF OHIO



IN RE:)

APPLICATION OF)
JOSEPH VICTOR LIBRETTI JR.)

CASE NO. 563

PANEL REPORT AND RECOMMENDATION

STATEMENT OF THE CASE

Applicant, Joseph V. Libretti, Jr. applied to register as a candidate for admission to the practice of law on November 14, 2012. He was interviewed by two members of the Admissions Committee for the Cleveland Metropolitan Bar Association ("CMBA") on June 6, 2013. Both members of the Admissions Committee voted to recommend approval of the application.

Libretti was arrested in 1991 and charged with numerous counts of drug, firearms, and money laundering violations, including a continuing criminal enterprise, 21 U.S.C. § 848. In 1992, after a week of compelling trial testimony, Libretti pled guilty to engaging in a continuing enterprise and was sentenced to twenty years imprisonment, to be followed by five years of supervised release. Libretti served sixteen years of the twenty year sentence. He was released from prison in May 2008. His supervised release was completed in May 2013.

Pursuant to its review authority, as mandated by Gov. Bar Rule I, Section 11(D)(5)(a) of the Ohio Supreme Court Rules for the Government of the Bar (the "Felony Rule"), a three member panel was appointed to hold a hearing on the issue of whether Applicant currently possesses the requisite character and fitness to become a member of the Bar of Ohio.

Following a two-day panel hearing conducted on November 5, 2013 and January 7, 2014, Libretti filed a motion to withdraw his application to register as a candidate for admission to the practice of law. That motion, for the reasons set forth in the Panel's Report of Recommendation, was denied by a vote of the Board on March 25, 2014.

This report now focuses on the merits of Libretti's application to register as a candidate for admission to the practice of law.

FACTUAL BACKGROUND

Libretti is 51 years old. He is second in his class at Cleveland-Marshall College of Law and is well liked by his fellow students and professors. He is scheduled to graduate in December 2014. There is no doubt that he is talented, intelligent, and hard-working.¹ The question to be answered by the Board is whether Libretti currently has the requisite character, fitness, and moral qualifications to become a member of the bar.

Applicant's criminal activity began when he was in college at the University of Denver and spanned the years of 1983 through 1990. Libretti was a drug dealer – initially selling marijuana and then moving on to dealing in cocaine. His activities were not that of some misdirected hippie. When he was indicted in January 1992, one of the charges was brought under the "Kingpin" statute – meaning he was an organizer, manager, or supervisor of a criminal enterprise. Conviction under the Kingpin Statute carried a minimum sentence of twenty years with a maximum sentence of life imprisonment.²

¹ Over two dozen character letters from law professors, attorneys, students, and past employers were submitted in support of Applicant.

² Libretti's drug activities did cease for a short time in the mid-1980s. In 1985, he was served with a subpoena to testify before a federal grand jury and was granted immunity by the District Court, thereby relieving him of his Fifth Amendment protection against self-incrimination. That experience seemed to "scare him straight" for approximately eighteen months. But the allure of easy money was too strong and he resumed his cocaine dealing for the next three years. Then in December 1990, after the authorities searched his homes in Colorado and Wyoming, Libretti stopped selling drugs because he knew he was under investigation.

APPLICANT'S RELEASE FROM PRISON AND SALE OF SPICE

Libretti served the next sixteen years in various Federal prison facilities and was ultimately released to a halfway house in late 2007. After six months, he was released from all incarceration and, in May 2008, began a five year term of supervised release. In 2009, Libretti was living in Casper, Wyoming with Brian Hohlios. The roommates met each other during their stay in the halfway house. (Hohlios was a convicted drug dealer. According to Libretti, his probation officer was aware of and approved the living arrangements.) At some point in 2009, Libretti became involved in the sale of spice.³ The business was primarily directed at selling spice to wholesalers. Initially, Libretti was funding the purchase of chemicals to manufacture spice with his personal credit card. The profits from the sale of spice were run through Libretti's bank account so as to help Hohlios avoid child support garnishments. In March 2010, Libretti took over the entire spice operation in Casper due to the fact that Hohlios was sent back to prison for 90-days due to a violation of the terms of his probation. Shortly after Hohlios's release from prison, the Casper home was searched by authorities in June 2010. Among the items seized were quantities of spice, chemicals to manufacture spice, and \$7,200.00 in cash. (The cash was hidden in a heating vent.) In July 2010, Hohlios committed suicide by hanging himself in the basement of the Casper, Wyoming home.

In August 2010, Libretti started classes at Cleveland-Marshall School of Law as a first year law student. Even though he no longer lived in Wyoming, Libretti continued his spice

³ Spice is a mix of herbs (shredded plant material) and man-made chemicals with mind-altering effects. It is often called "synthetic marijuana" because some of the chemicals in it are similar to ones in marijuana; but its effects are sometimes different from marijuana and can be much stronger.

operations of selling the product and selling chemicals to manufacture spice (again primarily to wholesalers located in Colorado and Wyoming) from both Casper and Cleveland.⁴

In November 2010 (the day before Thanksgiving), the United States Drug Enforcement Administration issued a public notice that it would be scheduling as controlled substances five chemicals used to make spice. Throughout the period of his spice operations, Libretti sold one of the chemicals that were to be scheduled, known as "JWH-018." Thereafter, according to Libretti, he set about trying to sell off or get rid of his supply of spice chemicals.

The DEA actually scheduled as controlled substances the five chemicals, including JWH-018, on March 1, 2011. The chemicals were designated as Schedule 1 substances (the most restrictive category under the Controlled Substances Act). One day before the DEA scheduled the five chemicals, and contrary to Libretti's assertion that he was desperately taking steps to rid himself of the spice chemicals, Libretti placed a \$17,500 purchase order for JWH-018 at the request of one of his spice customers. The chemical was to be sent to Libretti, who, in turn, would then ship the chemical to his customer. Later that same day, upon learning that the scheduling was imminent, Libretti cancelled the order for JWH-018.

The DEA's March 1, 2011 action made *possessing* or selling the scheduled chemicals (or products containing them) illegal in the United States. Libretti then took the chemicals that were in his possession in Cleveland (including the JWH-018) and packaged them in a U.S. Mail priority mailing box and addressed the box to his lawyer in Casper, Wyoming. He then placed the box in the storage compartment at his Cleveland apartment building. He never sent the box to his lawyer.

⁴ Libretti also supplied chemicals to manufacture spice to an Arizona entity called JPL Marketing LLC. His supply of the chemicals was his "investment" in the spice manufacturer. In return, he received 42% of the profits from the sale of spice.

Unbeknownst to Libretti, in March 2011, he was indicted in Wyoming on a single count of conspiracy to distribute 50 grams of methamphetamine. He was arrested in Cleveland in late March and was extradited to Wyoming where he was incarcerated until his trial. After a seven-day trial, he was acquitted of the charges in January 2012.

At that point, Libretti returned to his studies at Cleveland-Marshall. Once in Cleveland, he began seeing a psychologist on a regular basis until later in 2012. He was diagnosed with a mild case of post-traumatic stress disorder.

As noted earlier, his supervised release concluded in May 2013 – just weeks before he was interviewed by the CMBA in June 2013.

DISCUSSION

As stated above, Mr. Libretti is a convicted felon. That status, *per se*, does not demonstrate that he lacks the moral character to be a member of the Bar. “But when an applicant’s background includes such a conviction, the applicant bears the burden of proving that he or she is morally fit to practice law and that he or she is *fully and completely rehabilitated*.” *In re: Application of Poignon* (2012), 132 Ohio St.3d 395, 399 (emphasis added).⁵

The evidence presented at the Panel hearing compels the conclusion that Libretti has not met his burden of proving by clear and convincing evidence, that he possesses the requisite character and moral qualifications to be a member of the Ohio Bar.

As an initial matter, the Panel is deeply troubled by the fact that within approximately one year after being released from the halfway house, Libretti, along with Mr. Hohlios, engaged in the business of selling spice. Applicant defends his activities on the sole basis that selling spice, at that point in time, was legal. Even in his own mind, however, the issue was not, and is

⁵ Gov. Bar Rule I Section 12(C)(6) requires that the applicant meet his or her [footnote continued on next page]

not, that simple. While he was engaged in selling spice, he was troubled about the morality of the activity – but again, gave in to the allure of easy money.

Q. Why did you do that? [selling spice with Hohlios]

A. Well, the short answer is because he asked me to. I looked into it, it wasn't illegal. I know he needed to make some money. When I look back on it, should I have done it? No.

Q. At the point in time that you did it, you knew that you didn't feel very good about it, did you?

A. No, you're right, I didn't.

Q. And you knew – you said yourself, I don't know whether or not – and I thought you used the word moral. You had serious questions at the point in time you were doing this that this may not be very moral; is that right?

A. I don't know if I said that, but that's true.

* * *

Q. Okay. So here's – here's what I'm struggling with: You go to prison for 16 years under the kingpin statute, you've got a lot of time to think about what's moral and what's right and what's wrong, right?

A. Correct.

* * *

Q. All right. So you come out, and rather than run as far away as you can from the very line that's [illegal], you get your toes right to the edge. Right to the edge with a meth dealer. You're living with a guy who's a convicted felon, who's a meth dealer, and he wants to finance a business. In fact, a business that got you real close to what you went away to prison for. And as you say, it was legal, but it was close. It was so close that it gave you moral issues about whether you should be doing it.

Why did you get that close? What were you thinking? Why didn't you run 180 degrees the other direction? And this isn't while you're in prison saying, gee, I wish I hadn't done something in '89, '90, and '92, this is after you spent 16 years in prison.

What's the answer?

[footnote continued from previous page] burden by clear and convincing evidence.

A. The only answer I have is I did it because he asked me to and he said it would help him out because he needed some money.

Q. Okay. So then he hangs himself, and rather than saying, done, done, I'm changing my life. I've already gone to prison, gotten out, went right up to the line, and the guy that I financed hung himself. What I'm now going to do is I'm going to take it over, and you run the business in two completely separate locations; one out west and one in Cleveland, after you've applied to law school.

What were you thinking then?

A. I was thinking –

Q. I'll make some money?

A. Yeah, that's what I was thinking.

Q. So – so – so, notwithstanding this moral tug of war that's going on inside of you, you say it put some serious cash in my pocket, I'm going to continue doing this, right?

A. Yes.

Q. When you knew it was wrong, right?

A. I didn't feel good about it.

Q. I'm going to leave it there. But I'm going to ask you one more time, did you think it was wrong? I didn't say legal, I said did you think it was wrong?

A. Yeah. I did. I think I did.

Q. And notwithstanding that, you continued to do it, right?

A. I did.

* * *

Q. And so when you get out of prison, you go right up to the line. Why? For money?

A. Yeah. That's why I did that.

(Hearing Transcript at 449:18-450:10; 452:5-10; 452:16-454:17; 457:6-8.)

Other aspects of Libretti's spice business were equally disconcerting to the Panel. To enhance his distribution and sale of spice, Applicant recruited a known methamphetamine dealer, William Breeden, to sell his product. Not only was Libretti's association with Breeden a violation of the terms of his probation (Libretti admitted that he failed to disclose it to his probation officer even though he was required to do so), but such a relationship with a known meth dealer at this juncture in Libretti's life reflects a blind spot in Applicant's moral filter.⁶

For all the protestations that his spice business was legal, Libretti was not very forthcoming (both historically or during the bar application process) about its operations or the money he made from the enterprise. Libretti testified that his probation officer learned of the spice operation only after the Wyoming residence had been searched in June 2010. (By that time Libretti and Hohlios had been operating the spice business for months but Libretti did not disclose the business to his probation officer.) The spice operation dealt with large sums of money. In 2010, Libretti expended an excess of \$360,000 to purchase chemicals to be used in the production of spice. He resold the chemicals to his customers at a profit and ran the revenues from the business through a trust that he and Hohlios had established. (Both of them were trustees as well as beneficiaries of the trust.) Notwithstanding the requirement that he report all his income to his probation officer, Libretti did not report the large sums of money he was making from the sale of spice chemicals. When asked why he failed to make the disclosure, he informed the panel that the funds technically belonged to the trust. Upon further examination, Libretti admitted it was wrong not to disclose the income to his probation officer.

Q. Okay. Did you report these revenues to your PO?

A. No.

⁶ Libretti told the CMBA interviewers that he fully complied with the terms of his supervised release.

Q. I thought you were supposed to advise your probation officer of the – of your income.

A. You are correct.

Q. Did you advise him of the income?

A. No.

Q. Why?

A. Because originally Brian set this up as a trust so he said legally it wasn't my income.

* * *

Q. And did you tell her, by the way, I've been making a boatload of money on this stuff and putting it into a trust and here's how much I made?

A. No.

Q. Why?

A. Because Brian said technically that wasn't my income.

Q. You're taking your obligations [sic] to meet your obligations – reporting obligations to the PO, you're taking your advice on that from Brian?

A. Yeah, I –

Q. You don't think that was a little convenient?

A. It was.

Q. And you're telling us under oath that you did it not so that the PO wouldn't learn about it, you did it because that's what Brian told you to do?

A. No, I'm not telling you that at all.

Q. Okay. So you knew it is wrong? You knew you needed to tell the PO, am I correct?

A. I knew that we should have, yes.

(Hearing Transcript at 460:13-23; 462:22-463:21.)

Moreover, nowhere on his Bar application does Libretti disclose his spice business. Question 23C of the application calls for that disclosure. ("Have you ever been engaged in your own business...a partner or a joint venture in any business enterprise?") The Panel finds that given the extent of the enterprise, a complete disclosure of the spice business was required.

While Libretti did discuss his selling of spice with CMBA interviewers, albeit in more guarded terms – calling it "herbal incense," he did not disclose that he had recruited a known methamphetamine dealer (Breedon) to distribute his product. He did not disclose that he singlehandedly ran the business in Wyoming after his partner committed suicide in July 2010 and in Cleveland when he moved to Ohio to attend law school. He did not disclose the running of the revenue through a trust. Most importantly, he did not disclose that his Cleveland apartment had been searched by federal authorities in Spring 2011. He did not disclose that as of March 1, 2011, he had in his possession -- in direct contravention of the Controlled Substances Act -- the controlled substance known as JWH-018.⁷

Finally, he did not inform the interviewers that he had sought immunity in the Northern District of Ohio in connection with the search of his Cleveland apartment in March 2011 and his turning over to the authorities the spice chemicals that were stored in or around his apartment. Possibly the reason why Libretti did not make the "immunity" disclosure was because it would have led to questions about his having the controlled substances in his possession.

Libretti rejects the notion that, in response to Question 20B of the Application, he should have disclosed the 2011 request for immunity. He is correct that the questions asks: "Have you ever been granted immunity from prosecution." According to Libretti, since he never received written confirmation from the District Court in Cleveland of the grant of immunity, he was not

⁷ Nor did Libretti disclose to the interviewers that he had been warned by the DEA months earlier that such chemicals were going to be designated as Schedule 1 controlled substances.

compelled to answer the question affirmatively. Libretti testified that on the day he was arrested, March 30, 2011, he discussed with his counsel the possibility of obtaining immunity. (This was before he directed the authorities to the JWB-018 that was in his possession in his apartment's storage locker.) He expressly asked his attorney to request immunity and further testified that his counsel spoke to the United States Attorney about extending immunity to Libretti. Exhibit 65, the DEA's Report of Investigation (Attachment C, dated April 6, 2011, at Page 30 [hand-written]), states: "OHN AUSA Matthew Shepard received approval from OHN U.S. Attorney's Office supervision to provide Libretti immunity from prosecution in the OHN for the below listed drug evidence received in the OHN." Libretti testified that he was never informed, verbally or in writing, by his lawyer or the U.S. Attorney's Office of the approval of the immunity request. Given Applicant's history and experience in dealing with prosecutors and law enforcement, and his highly tuned distrust for such individuals and governmental agencies, it is simply not credible that Libretti did not inquire and learn of the Government's approval of the request for immunity. His testimony at the hearing on this point was evasive and not believable.⁸ Moreover, if Gov. Bar Rule I tells applicants anything, it insists on complete candor from those seeking to take the bar examination. The panel believes that by making the request to be granted

⁸ On May 6, 2014, Libretti supplemented his answer to Question 20B. Frankly, that submission is less informative than the testimony he provided at the hearing. The supplement concedes that he "discussed" the granting of immunity with his lawyer. But, nowhere in the supplement does he admit to directing his lawyer to ask the authorities for immunity or acknowledge that the request was made by his lawyer to the government on his behalf. Libretti, in his supplement to Question 20B, also informed the court (and this panel) that he made a FOIA request to receive "[a] copy of any agreement between the United States and myself for a grant of immunity in 2011." The response from the United States Department of Justice, dated April 9, 2014 indicates that "[a] search for records located in the United States' Attorney's Office for the Northern District of Ohio has revealed no responsive records regarding the above subject. However, we will initiate a search in the District of Wyoming." One matter is troubling with regard to Libretti's FOIA request. In the January 9, 2014 letter containing that request, he states: "The records are requested for the purposes of scholarly research and for educational purposes. I am a law student. The records are not being requested for a commercial purpose." Later in the letter, he states: "Because these records are being requested for an educational purpose and not for a commercial purpose, I am requesting a fee waiver." The panel is disturbed by the knowingly false nature of the two statements contained in his FOIA request.

immunity with regard to the 2011 arrest and search of his Cleveland apartment, Libretti should have disclosed that information in response to Question 20B. Frankly, this was just one example of multiple instances that the panel felt Libretti was walking a fine line with regard to his disclosures.

On this point, the panel draws attention to Libretti's testimony on redirect.

Q. Okay. With respect to the spice business, you agree – you've acknowledged that there isn't anywhere in the application that discloses the spice business; is that right?

A. Correct.

Q. Okay. And you can appreciate the panel's concerns about your – your participation in this – in the spice business, right, even though you – you believe it was legal?

A. Yes, I do.

Q. So I mean, it's kind of convenient that it never appears in these pages.

A. Well, it's certainly not something I'm proud of.

Q. And so would you have –

A. I mean, if I had to fill out the application again today, would I do things a little differently? Yes. I think I most certainly would.

Q. And if you were given the opportunity to supplement that application, would you disclose that information?

A. Yes.

Q. Okay. And did the spice business come up during your – your character interview with Mr. Kline and Mr. Rosman?

A. It did. It did. Yeah. I told them what we were doing.

Q. And did you tell them your involvement with it?

A. I did, *but I didn't go into the extent of it. Had they asked, I would have.*

(Hearing Transcript at 491:1-24; 492:1-9.) (Emphasis added.)⁹

Finally, the panel notes Libretti's characterization of his criminal activity as being "stupid" or "foolish." The panel was struck by Libretti's amoral viewpoint as it pertained to his criminal activities and spice operation. Possibly, James Kline, one of the interviewers for the CMBA who was called to testify at the hearing, described it best as he shared with the panel his reaction to his interview with Libretti.

It was – I'll say he expressed regret that it was foolish conduct and that there was regret over being caught and the harm it had caused him and the impact it had on him. He did acknowledge at some point that his conduct had resulted in humiliation and pain for his family. And, again, I ascribed that, though, to the impact it had, in a sense on him. But at no point did he ever express the view as to the harm that his conduct had on others.

(Hearing Transcript at 613:17-614:2) That is precisely the reaction the panel had after listening to Libretti testify for several hours during the two-day hearing. But the panel was uncomfortable, not only with Libretti's amoral view of what he had done, but also with his demeanor and reluctant – sometimes combative – responses. Stated bluntly, after observing Libretti for a number of hours on the witness stand, the panel did not trust Applicant to be truthful or forthcoming.

One final aspect of Libretti's conduct causes the panel concern. As noted, he pled guilty under the Kingpin statute. He entered into a plea agreement providing that the government would recommend that he receive the statutory minimum sentence. In return for that recommendation and an agreement by the government not to pursue other criminal charges

⁹ Libretti does mention (in a single sentence) his spice business in the May 6, 2014 supplement. However, this is not a situation where an applicant overlooks an event or a circumstance and later files a supplement in due course so that the record is complete. Here, Applicant was fully cognizant of the spice business activity and purposely failed to disclose it in his initial application. Even the disclosure itself ("At various times between October of 2009 and March of 2011 I provided capital, manufactured and sold legal versions of Spice, or sold legal ingredients that could be used to make Spice") gives little indication that this was a continuing business involving significant monetary transactions.

against him, Libretti agreed to a forfeiture that would transfer all bank accounts, investment accounts, retirement accounts and all cash. In addition to sentencing him to the statutory minimum and ordering forfeiture pursuant to plea agreement, the court required him to pay \$5,050, consisting of a \$5,000 fine and a \$50 assessment; finally, he was also required to perform 500 hours of community service. Despite receiving what the Court of Appeals described as a "favorable plea agreement" after the government had presented "overwhelming evidence of his guilt," Libretti appealed each provision of his sentence (including the \$50 assessment) except for the statutory minimum prison term. As the Court of Appeals for the Tenth Circuit aptly summarized:

Libretti has been persistent in challenging the validity of his guilty plea, and in particular, the forfeiture aspect of his sentence. *See United States v. Libretti*, 2000 U.S. App. LEXIS 2499, No. 99-8047, 2000 WL 192944 (10th Cir. Feb. 17, 2000) (concerning motion for return of \$33,160 in currency taken in defective administrative forfeiture); *United States v. Libretti*, 1998 LEXIS 22011, Nos. 97-8039, 97-8044, 97-8089, 1998 WL 644265 (10th Cir. Sept. 9, 1988) (concerning appeal of final order of forfeiture and challenge to administrative forfeiture of \$33,160 in currency);...

The Court went on also to detail the numerous civil actions commenced by Libretti:

Libretti v. Mecham, 1996 U.S. App. LEXIS 13353, No. 95-8073, 1996 WL 293822 (10th Cir. June 4, 1996) (holding that Libretti's guilty plea precluded civil rights complaint investigation of drug trafficking); *Libretti v. Meyer*, 1995 U.S. App. LEXIS 20, No. 94-1413, 1995 WL 3956 (10th Cir. Jan. 4, 1995) (affirming dismissal of civil rights claim of improper search of Libretti's property in Lakewood, Colorado); *Libretti v. Bray*, 1994 U.S. App. LEXIS 29323, Nos. 93-8096, 93-8097, 1994 WL 57319 (10th Cir. Oct. 19, 1994) (affirming entry of summary judgment on civil rights claim arising from execution of searches of Libretti's property in Green River, Wyoming); *Libretti v. Dwyer*, 1994 U.S. App. LEXIS 29228, No. 93-1373, 1994 WL 573929 (10th Cir. Oct. 19, 1994) (rejecting Libretti's requests for return of forfeited firearms and firearms accessories); *In re Search of 2440 Willow Lane*, 1994 U.S. App. LEXIS 29227, No. 93-1134, 1994 WL 573930 (10th Cir.

Oct. 19, 1994) (dismissing appeal of order denying a return of forfeited property); *Libretti v. Miller*, 1994 U.S. App. LEXIS 29324, No. 1068, 1994 WL 573936 (10th Cir. Oct. 19, 1994) (dismissing appeal concerning search of rental storage unit). See also *United States v. Libretti*, 1998 U.S. App. LEXIS 17651, No. 97-8040, 1998 WL 458557 (10th Cir. July 31, 1998) (rejecting third-party claim to certain forfeited property).

The Court then concluded its recitation of Libretti's cases with the understated observation that "In the instant cases, Libretti continues this practice." *United States v. Libretti*, 201 U.S. App. LEXIS 21412 (Oct. 3, 2001).

While the panel understands that an individual is entitled to pursue a vindication of his rights in a court of law, at some point the pursuit becomes vexatious litigation. The panel believes the Libretti may have crossed the line into litigiousness, especially since many of the claims were duplicative and were dismissed on *res judicata* or collateral estoppel grounds. For example, he sued each of BATF Special Agent Ken Bray, Wyoming DCI Agent Tony Young, Green River Police Department Lieutenant Monty Mecham multiple times and sued other DEA and Colorado law enforcement agents. Indeed, Libretti's continual filing of claims caused one federal district judge to issue an order stating that it would no longer consider any pleadings filed by Libretti *pro se*. Even this directive did not stop him. Ex. 60, Dkt. No. 148; 157. This pattern of repetitive litigation does not indicate an individual who has respect for the law, but rather someone who views the law as a weapon to be used to harass.

GOV. BAR RULE I, SECTION 11(D)(4) FACTORS

In making its decision, the panel – and ultimately the Board – are to consider the following factors as they pertain to an applicant's prior conduct.

(a) *Age of the applicant at the time of the conduct*: Libretti was a drug dealer from the time he was approximately 20 years old until he was sentenced when he was 28 years old.

Applicant sold spice from 2009 until 2011 – when he was 48 years old. This factor does not weigh in favor of Libretti.

(b) *Recency of conduct:* The panel appreciates the fact that his cocaine drug dealing occurred many years ago. However, the panel, as noted above, is concerned with Applicant's behavior since his release in 2008. Had the DEA not scheduled the chemicals used to make spice – there is no indication that Libretti would have stopped selling the product. This factor does not weigh in favor of Libretti. Moreover, his failures to make the appropriate disclosures about his spice business and the 2011 immunity are recent in time.

(c) *Reliability of the information concerning the conduct:* The panel is still not convinced that it has received a complete, candid, and full accounting of all pertinent information relating to the activities that give pause to the panel. It is noted from Libretti's own testimony, he views the onus is on the panel to ask the right questions before he will give a complete answer. His testimony at the hearing was consistent with that viewpoint and it is inconsistent with the candor called for in Gov. Bar Rule I.

(d) *Seriousness of the conduct:* The conduct in question can be only characterized as serious. This factor does not weigh in Libretti's favor.

(e) *Factors underlying the conduct:* This is one of the most troubling aspects of the evidence and testimony. Much of his conduct is a function of greed and an amoral view of the harm arising from that conduct. This factor does not weigh in favor of Libretti.

(f) *Cumulative effect of the conduct:* Neither the panel nor Libretti can measure the cumulative effect of his conduct both as a drug dealer and with respect to his activities in selling spice. One thing is clear, the effect is not positive. This factor does not weigh in favor of Libretti.

(g) *Evidence of rehabilitation:* There is no doubt that Libretti is smart, has done well in law school, and is hard working. He is to be commended for the services he has provided to those who cannot afford legal representation. But there appears to be another side to Applicant. His noted lack of candor leads the panel to doubt whether he is, or in the future will be, rehabilitated.

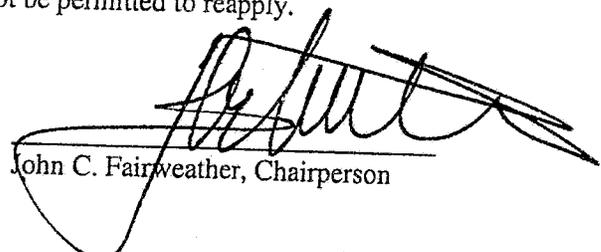
(h) *Positive social contributions of the Applicant since the conduct:* The Applicant's law school record and multiple letters of recommendation speak volumes on this factor. This factor weighs in favor of Libretti.

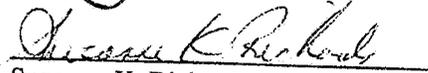
(i) *Candor of the Applicant in admissions process:* For the reasons stated above, the panel does not believe this factor weighs in Libretti's favor.

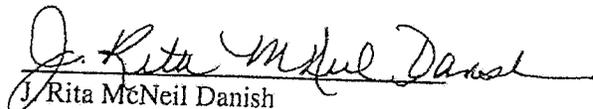
(j) *Materiality of any omissions or misrepresentations:* For the reasons noted above, this factor does not weigh in favor of Libretti.

RECOMMENDATION

The panel recommends that Libretti's application to register as a candidate for admission to the practice of law be disapproved and that he not be permitted to reapply.


John C. Fairweather, Chairperson


Suzanne K. Richards


Rita McNeil Danish

[886570]

- (a) Establish rules of procedure;
 - (b) Promulgate, subject to the approval of the Court, standards of conduct for applicants;
 - (c) Develop forms to be used by applicants and admissions committees;
 - (d) Require that standard background checks of all applicants be made;
 - (e) At any time prior to an applicant's admission to the practice of law, investigate *sua sponte* the character, fitness, and moral qualifications of the applicant;
 - (f) Appoint special investigators;
 - (g) Refer any matter to a regional or local bar association admissions committee with directions for further investigation by that committee with a report to be made to the Board.
- (3) Hear all appeals by applicants from recommendations of regional or local bar association admissions committees.
- (4) Approve applicants who possess the requisite character, fitness, and moral qualifications for admission.
- (5) Submit recommendations to the Court as to the disapproval of applicants by the Board in accordance with Section 12 of this rule, or the approval of applicants who must be reviewed by the Court under Section 11(D)(5)(c) of this rule.
- (6) Investigate any matter brought to the attention of the Board after an applicant has been admitted to the practice of law and alleging that the applicant made a materially false statement in, or deliberately failed to disclose any material fact in connection with, the applicant's application for admission to the practice of law.

Section 11. Character Investigation by Admissions Committees.

(A) The president of each local bar association shall appoint an admissions committee, provided, however, that the local bar association permits the membership of any attorney practicing within the geographic area intended to be served by that association without reference to the attorney's area of practice, special interest, or other criteria. Local bar associations may join together on a regional basis to create a regional admissions committee. Each admissions committee shall consist of three or more members, each of whom shall serve without compensation for a term of three years. One-third of the admissions committee members' terms shall expire each year. Each admissions committee shall file with the Office of Bar Admissions the following information, updated as necessary:

- (1) The names, addresses, telephone numbers, and terms of all members of the admissions committee;

(2) Designation of chair of the admissions committee;

(3) The name, address, and telephone number of the admissions committee representative who shall be responsible for receipt of material forwarded by the Office of Bar Admissions under division (C) of this section.

(B) The admissions committee shall investigate the character, fitness, and moral qualifications of applicants for admission to the practice of law in the State, report its findings and recommendations to the Board of Commissioners on Character and Fitness, and obtain and offer such information as pertains to the character, fitness, and moral qualifications of the applicants at hearings conducted by the Board's duly designated panels pursuant to this rule.

(C)(1) Upon receipt of an applicant's complete Application to Register as a Candidate for Admission to the Practice of Law filed under Section 2 of this rule or Application for Admission to the Practice of Law Without Examination filed under Section 9 of this rule, the Office of Bar Admissions shall forward one copy of the applicant's character questionnaire to the National Conference of Bar Examiners for a character investigation and report. Upon receipt of this report, the Office of Bar Admissions shall forward the report and the applicant's character questionnaire to one of the following admissions committees:

(a) An admissions committee of the county in which the applicant claims permanent residence, if the applicant is a resident of Ohio;

(b) An admissions committee in the county in which the applicant is enrolled in law school;

(c) An admissions committee in the county in which the applicant intends to practice law;

(d) Such other admissions committee as the Office of Bar Admissions deems appropriate.

(2) Within thirty-five days after the admissions committee's receipt of the applicant's character questionnaire and the report of the National Conference of Bar Examiners, the admissions committee shall review the character questionnaire and the report, schedule an interview, and notify the applicant, in writing, of the date and place of the interview. The notice shall inform the applicant that the applicant's failure to cooperate in completing the interview may be grounds for disapproval of the application.

(3) At least two members of the admissions committee shall jointly conduct a personal interview of the applicant and record the results on a form prescribed by the Board. During the interview of the applicant, the admissions committee shall inquire of the applicant whether any answer on the character questionnaire should be changed or supplemented because of events occurring after the date on which the character questionnaire was originally signed by

the applicant and notarized. A member of an admissions committee shall not interview an applicant or otherwise participate in an admissions committee's investigation or recommendation of an applicant if it is reasonable to expect that the member's judgment will be, or could be, affected by such member's own financial, business, property, or personal interest or other conflict of interest.

(4) The admissions committee shall ascertain, from the character questionnaire, the report of the National Conference of Bar Examiners, and the interview, whether the applicant possesses the requisite character, fitness, and moral qualifications for admission to the practice of law. If the admissions committee deems it necessary or appropriate under the circumstances, it shall conduct further investigation of the applicant before ascertaining the applicant's character, fitness, and moral qualifications.

(D)(1) The applicant has the burden to prove by clear and convincing evidence that the applicant possesses the requisite character, fitness, and moral qualifications for admission to the practice of law. An applicant's failure to provide requested information, including information regarding expungements and juvenile court proceedings, or otherwise to cooperate in proceedings before the admissions committee may be grounds for a recommendation of disapproval.

(2) The admissions committee shall determine an applicant's character, fitness, and moral qualifications in accordance with all of the following:

- (a) The provisions of this rule;
- (b) The applicable decisions of the Supreme Court of the United States;
- (c) The applicable decisions of the Supreme Court of Ohio;
- (d) Any standards of conduct promulgated by the Board and approved by the Court under Section 10(B)(2)(b) of this rule.

(3) An applicant may be approved for admission if the applicant's record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them and demonstrates that the applicant satisfies the essential eligibility requirements for the practice of law as defined by the Board. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant. Factors to be considered carefully by the admissions committee before making a recommendation about an applicant's character, fitness, and moral qualifications shall include, but are not limited to, all of the following:

- (a) Commission or conviction of a crime, subject to division (D)(5) of this section;
- (b) Evidence of an existing and untreated chemical (drug or alcohol) dependency;

- (c) Commission of an act constituting the unauthorized practice of law;
- (d) Violation of the honor code of the applicant's law school or any other academic misconduct;
- (e) Evidence of mental or psychological disorder that in any way affects or, if untreated, could affect the applicant's ability to practice law in a competent and professional manner;
- (f) A pattern of disregard of the laws of this state, another state, or the United States;
- (g) Failure to provide complete and accurate information concerning the applicant's past;
- (h) False statements, including omissions;
- (i) Acts involving dishonesty, fraud, deceit, or misrepresentation;
- (j) Abuse of legal process;
- (k) Neglect of financial responsibilities;
- (l) Neglect of professional obligations;
- (m) Violation of an order of a court;
- (n) Denial of admission to the bar in another jurisdiction on character and fitness grounds;
- (o) Disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.

(4) The admissions committee shall determine whether the present character, fitness, and moral qualifications of an applicant qualify the applicant for admission to the practice of law. In making this determination, the following factors shall be considered in assigning weight and significance to the applicant's prior conduct:

- (a) Age of the applicant at the time of the conduct;
- (b) Recency of the conduct;
- (c) Reliability of the information concerning the conduct;
- (d) Seriousness of the conduct;

- (e) Factors underlying the conduct;
- (f) Cumulative effect of the conduct;
- (g) Evidence of rehabilitation;
- (h) Positive social contributions of the applicant since the conduct;
- (i) Candor of the applicant in the admissions process;
- (j) Materiality of any omissions or misrepresentations.

(5)(a) If an applicant has been convicted of a felony under the laws of this state, the laws of the United States, or the laws of another state or territory of the United States, or adjudicated a delinquent child for conduct that, if committed by an adult, would be such a felony, the applicant shall undergo a review by the Board of Commissioners on Character and Fitness in accordance with Section 12 of this rule. In addition to considering the factors listed in (D)(3) of this Section, the Board shall consider the following:

(i) The amount of time that has passed since the applicant was convicted of the felony, but in no event may an applicant be approved before being released from parole, probation, community control, post-release control, or prison if no post-release control or parole was maintained;

(ii) If the applicant was convicted in this state, whether the rights and privileges of the applicant that were forfeited by conviction have been restored by operation of law, expungement, or pardon under the laws of Ohio; or, if the applicant was convicted under the laws of the United States or the laws of another state or territory, whether the applicant would be eligible to have his rights and privileges restored under the laws of Ohio if convicted in this state for the same offense;

(iii) Whether the applicant is disqualified by law from holding an office of public trust;

(iv) How an approval of the applicant would impact the public's perception of, or confidence in, the legal profession.

(b) If the applicant's conviction or delinquency adjudication was for aggravated murder, murder, or any first or second degree felony under Ohio law, and the Board votes to approve the applicant in accordance with this section and Section 12 of this rule, the Board shall make a final report, with its findings of fact and recommendation of approval, for the Supreme Court's review. The Board shall file the report and the record with the Clerk of the Supreme Court. Consistent with the procedures established in Section 12(F) and (G) of this rule, the Court will review the applicant and make the final determination on whether the applicant shall be approved for admission.

(6) In determining an applicant's character, fitness, and moral qualifications for the practice of law, the admissions committee shall not consider factors that do not directly bear a reasonable relationship to the practice of law, including but not limited to the following impermissible factors:

(a) Age, sex, race, color, national origin, or religion of the applicant;

(b) Disability of the applicant, provided that the applicant, though disabled, is able to satisfy the essential eligibility requirements for the practice of law.

(E) After reviewing the character questionnaire and the report of the National Conference of Bar Examiners, interviewing the applicant, and conducting any further investigation, the admissions committee shall file with the Office of Bar Admissions a written report with its recommendations on a form prescribed by the Board.

(F)(1) An admissions committee recommendation other than an unqualified approval shall be deemed a recommendation that the applicant not be admitted to the practice of law, in which case the written report shall enumerate the specific reasons for such recommendation with relation to the standards set forth in divisions (D)(3) and (4) of this section, and the matter shall proceed as provided in Section 12 of this rule.

(2) An admissions committee recommendation of unqualified approval shall be submitted to the Board, and the Board shall determine whether the applicant has the requisite character, fitness, and moral qualifications for admission to the practice of law. The Office of Bar Admissions shall notify the applicant in writing of the Board's determination.

(G) An admissions committee may establish bylaws or procedures, not inconsistent with this rule, for the conduct of its proceedings. The functions of an admissions committee under this rule may be delegated to a subcommittee or subcommittees thereof.

Section 12. Appeal to Board of Commissioners on Character and Fitness.

(A) If an admissions committee makes a recommendation other than an unqualified approval, or if the Board of Commissioners on Character and Fitness is required to review the applicant pursuant to Section 11(D)(5)(a) of this rule, the Office of Bar Admissions shall forward a copy of the report required under Section 11(E) of this rule by certified mail to the applicant, and the applicant may file a written notice of appeal with the secretary of the Board. The report shall be sent by certified mail to the address listed on the application or as supplemented by the applicant. If the certified mail is returned as unclaimed, refused, or otherwise undeliverable, the Office of Bar Admissions shall send the report to the applicant by regular mail.

(B) The applicant's notice of appeal shall be filed within thirty days of the applicant's receipt, by certified mail, of the admissions committee report or within thirty days of the date the Office of Bar Admissions mailed the report to the applicant by ordinary mail if the certified mail was returned as unclaimed, refused, or otherwise undeliverable. The applicant shall serve a copy

of the notice of appeal on the admissions committee. If the applicant files a timely notice of appeal, the admissions committee shall appoint counsel to represent it before the Board and notify the applicant and the secretary of the name and address of counsel. If the applicant does not file a timely notice of appeal, the application shall be considered withdrawn.

(C)(1) Upon receipt of a notice of appeal that has been timely filed, the secretary shall, by entry, appoint a panel consisting of three commissioners and designate one of them chair of the panel. No commissioner appointed to the panel shall be from the appellate district in which the admissions committee that made the recommendation is located. Except with the consent of the applicant, a commissioner shall not sit as a member of a hearing panel or otherwise participate in the Board's investigation or recommendation of an applicant if it is reasonable to expect that the commissioner's judgment will be, or could be, affected by such commissioner's financial, business, property, or personal interest. The secretary shall serve a copy of the entry appointing the panel on the applicant, the admissions committee, and all counsel of record.

(2) After reasonable written notice to the applicant, and the admissions committee, and all counsel of record, the panel shall conduct a hearing at a place designated by the panel chair and otherwise inquire into the character, fitness, and moral qualifications of the applicant. At such hearing, the admissions committee and the applicant shall offer such information as bears upon the character, fitness, and moral qualifications of the applicant. The applicant shall be entitled to be represented by counsel of the applicant's choice, at the applicant's expense.

(3) The panel may take and hear testimony in person or by deposition, administer oaths, and compel by subpoena the attendance of witnesses and the production of books, papers, documents, records, and materials. The panel shall report its findings, together with the stenographic record of the proceedings, to the Board for its consideration and decision.

(4) The chair of the Board, the chair of the panel, and the secretary of the Board shall have authority to issue subpoenas, which shall be issued in the name and under the Seal of the Supreme Court and signed by the chair of the Board, the chair of the panel, or the secretary of the Board. In order to preserve confidentiality consistent with Section 13 of this rule, subpoenas shall bear the case number but not the name of the applicant. The party calling or subpoenaing a witness shall inform the witness of the purpose of the hearing and of the confidentiality provisions of this rule. All witnesses, whether or not subpoenaed, are bound by the confidentiality provisions of this rule. The refusal or neglect of the person subpoenaed or called as a witness to obey a subpoena, attend the hearing, be sworn or affirm, answer any proper question, or abide by the confidentiality provisions of this rule shall be deemed to be contempt of the Supreme Court and may be punished accordingly.

(5) All relevant evidence as determined by the panel shall be considered by the panel. The parties and their counsel shall cooperate with the panel and shall not keep relevant information from the panel.

(6) The burden of proof in such hearings shall be on the applicant to establish by clear and convincing evidence the applicant's present character, fitness, and moral qualifications for admission to the practice of law in Ohio. An applicant's failure to provide requested

information, including information regarding expungements and juvenile court proceedings, or otherwise to cooperate in proceedings before the Board may be grounds for a recommendation of disapproval.

(7) The hearing may be waived upon agreement of the parties and the panel, and the Board or panel may proceed with its own investigation of the applicant, and base its recommendation on the results.

(8) The Board may remand any matter on appeal to a local or regional admissions committee with directions for further investigation by that committee with a report to the Board.

(D) An applicant reviewed by the Board will be approved only if the applicant receives a vote in favor of approval from not fewer than seven commissioners. If the applicant is approved by such vote, the Board shall forthwith notify the applicant, the admissions committee, and all counsel of record.

(E) If the applicant is not approved, the Board shall make a final report of the proceedings, with its findings of fact and recommendation, and shall file its report and the record with the Clerk of the Supreme Court. The Board shall recommend that the applicant not be permitted to reapply for admission to the practice of law or that the applicant be permitted to re-apply only after a specified period of time.

(F)(1) On the filing of the Board's report and record with the Clerk of the Supreme Court, the Court shall issue an order to show cause why the report should not be confirmed and why the Board's recommendation should not be adopted. The Clerk shall send a copy of the show cause order and a copy of the Board's report, by both ordinary and certified mail, to the applicant at the address listed in the application or as supplemented by the applicant, to the admissions committee, and to all counsel of record.

(2) Within thirty days after issuance of the show cause order, the applicant and the admissions committee may file objections to the findings or recommendation of the Board. The objections shall be accompanied by the original and eighteen copies of a brief in support of the objections.

(3) The original and eighteen copies of an answer brief may be filed within fifteen days after the objections have been filed with the Clerk.

(4) Unless clearly inapplicable, the Rules of Practice of the Supreme Court of Ohio shall apply to proceedings filed in the Supreme Court under this division. Service of briefs and other documents shall be made upon the applicant, the admissions committee, and all counsel of record.

(G) After a hearing on objections or if objections are not filed within the prescribed time, the Court shall enter such order as it may find proper. Upon the entry of any order pursuant to this rule, the Clerk shall send by ordinary mail certified copies of the order to the applicant at

the address listed in the application or as supplemented by the applicant, to the admissions committee, and to all counsel of record.

Section 13. Confidentiality of Character and Fitness Matters.

(A) All information, proceedings, or documents relating to the character and fitness investigation of an applicant for admission, including all character questionnaires submitted pursuant to this rule, shall be confidential, and no person shall disclose any information, proceedings and documents except for any of the following purposes:

- (1) To further any character and fitness investigation of the applicant under this rule;
- (2) In connection with investigations of the applicant under Gov. Bar R. V;
- (3) Pursuant to a written release of the applicant in connection with the applicant's application for admission to the practice of law in another jurisdiction;
- (4) To file a final report with the Court pursuant to Sections 11(D)(5)(c) or 12(E) of this rule;
- (5) Pursuant to divisions (C) and (D) of this section.

(B) This section applies to members, employees, and agents of the Supreme Court; members, employees, and agents of the Board of Commissioners on Character and Fitness; members and employees of local and regional admissions committees and the employees of the members of such committees; employees of local or regional bar associations; court reporters retained for character and fitness hearings or proceedings; witnesses; and attorneys representing applicants.

(C) A record filed with the Clerk of the Supreme Court pursuant to Section 12(E) of this rule shall be filed under seal. After sixty days, the record shall become public unless the Supreme Court, on motion by the applicant or *sua sponte*, orders that the record or portions of the record remain confidential.

(D) Information or documents otherwise confidential pursuant to division (A) of this section may be released to an appropriate governing board, law enforcement agency, or other authority having jurisdiction to investigate a violation of a rule of the Supreme Court or of a state or federal statute, if all of the following apply:

- (1) During the course of the character and fitness investigation of an applicant under this rule, an attorney who is licensed to practice law in Ohio learns of a violation of a rule of the Supreme Court or of a state or federal statute;

CERTIFICATE OF SERVICE

A true copy of the foregoing Objections to the Report and Recommendation of the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio has been served by

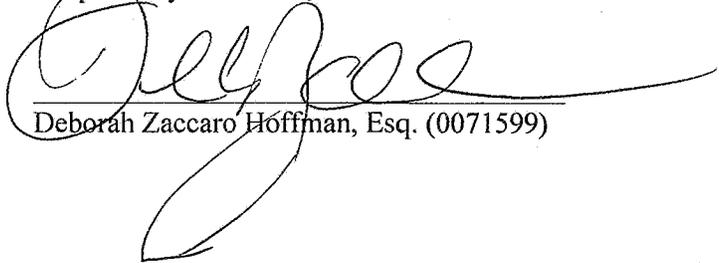
U.S. mail this 27 day of October, 2014 upon the following:

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Respectfully submitted,



Deborah Zaccaro Hoffman, Esq. (0071599)

CERTIFICATE OF SERVICE

A true copy of the Motion to Strike and Replace has been served by U.S. mail this 10

day of November, 2014 upon the following:

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