UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

IN RE JOSEPH NEAL, JR.	)	MC 112-008

JOSEPH NEAL, JR.'S RESPONSE TO NOTICE AND SPECIFICATIONS

COMES NOW Joseph Neal, Jr., ("Neal") and responds to the Notice and Specifications ("Notice") filed by Assistant U.S. Attorney Frederick W. Kramer, III ("government counsel"). At the hearing held in this matter of August 22, 2012, this Court relieved Neal from filing a reply. [8/22/12 Tr. at 35] However, a Response is appropriate in this case. Neal and his counsel are deeply concerned and troubled by the many misstatements of fact and law set out in the Notice. To set the record straight, Neal supports his factual recitations with citation to relevant transcripts, or documents produced in discovery in the state court proceedings, and his legal conclusions with citation to authority.

As set forth in detail below, government counsel, as the appointed investigator for the Court and the Bar, has a solemn duty to investigate and report to this tribunal the facts.[1] In that he has failed. He has ignored evidence that directly contradicts the claims of Ms. Sprankle. He

[1] While Neal has not yet determined whether Government counsel's misrepresentations warrant sanction, they warrant careful scrutiny. Amlong & Amlong, P.A., v. Dennys, Inc., 500 F.3d 1230, 1238 (11th Cir. 2006)(sanctions are "especially appropriate where counsel takes frivolous legal positions supported by scandalous accusations . . ."), and, importantly, the pursuit of a claim without reasonable inquiry into the underlying facts can be the basis for a finding of bad faith. Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir.1998); see also Jones v. Int'l Riding Helmets, Ltd., 49 F.3d 692, 695–96 (11th Cir.1995) (finding that a court must determine whether a reasonable inquiry was conducted prior to the filing of a pleading); In the Matter of Med. One, Inc., 68 B.R. 150, 152 (Bankr.M.D.Fla.1986) (finding that failure to make a reasonable inquiry into whether a filing alleged valid claims was sanctionable).

has ignored the statements of both the prosecutor and the trial judge indicating that there was no evidence to support the rape charge preferred against Mr. Neal; rather, he has launched into a diatribe against Mr. Neal, reaching conclusions belied by the facts and the law.

1. Procedural History

By order entered June 22, 2012, this Court immediately suspended Neal after considering the indictment in 12 RCCR-373, "further information related to the charges stated therein," and the criminal judgment resulting from pleas to misdemeanors in 12 RCCR00941. [6/22/12 Order] In the hearing held on Neal's motion to vacate, two months after Neal's immediate suspension, the Court referred to this order "as a provisional matter suspending indefinitely Joseph R. Neal, Jr. from practicing or making any pretense of practice before this Court for good reason." [8/22/12 Tr. at 29] While it was the Court's "most profound wish at this juncture to withdraw from any aspect of this case that may be grounded in the *sua sponte* nature of the Order which was entered on June 22nd," it nonetheless continued Neal's suspension "until a date later to be determined." [8/22/12 Tr. at 33, 35]

2. The Rules That Govern This Proceeding

While Government counsel's Notice is silent in citation to any authority, Neal notes the following:[2] the local rules allow immediate suspension **only** under these circumstances:

> If any attorney appearing in a case or proceeding, or representing a party in interest in a case or proceeding, has been *disbarred or suspended from the practice of law* by the State Bar of Georgia or the courts of the State of Georgia or any other state, or has been *convicted of a felony or any crime involving moral*

[2] Government counsel submitted to the Court at the hearing on this matter something of a legal brief of sorts. It has not been made a part of this record. By this filing Neal requests that Government counsel's submission (a copy of which he received on Friday, September 7, 2012 (check this date??) be made a copy of the record.

> *turpitude*, such attorneys [sic] may be provisionally suspended forthwith from practice before this Court; and, unless good cause to the contrary is shown within thirty (30) days from the date of such suspension or conviction, an order of disbarment shall be entered.

S.D. Ga. L.R. 83.5(b) (emphasis added); see also Ga. R. Prof. Conduct 8.4(a)(2), (3) (providing for disciplinary action where attorney convicted of felony or misdemeanor involving moral turpitude where conduct relates to fitness to practice law). There is no other local rule providing for, or addressing immediate suspensions, therefore, this must be the rule that applies. But the Court did not cite or rely on *any* of these reasons in its suspension of Neal. His immediate suspension was improper.

Immediately after Neal's discussion of Rule 83.5(b) at the hearing and noting that the Court's order mentioned none of these things, Government counsel took the position that the Georgia Bar rules "do not bind this Court." [8/22/12 Tr. at 13] Indeed, Government counsel later cast this case as arising under "local rule *83.5(a)* [which] establishes no connection to the Georgia Bar rule; rather, for good cause shown." [8/22/12 Tr. at 23][emphasis added] Government counsel went on to argue:

> . . . The local rules and the Court's order refer not to Georgia Bar rules and American Bar Model rules as the touchstone for suspension or termination of membership, but to good cause shown. Again, in local rule 83.5(a).
>
> The Georgia and American Bar rules are mentioned only in connection with the provisional suspension pending a hearing. That is local rule 83.5(b). And representation of a client in connection with an appearance in a case or proceeding, 83.5(d), which does not apply here.

[8/22/12 Tr. at 23]

Rule 83.5(a) allows the Court "for good cause shown, and after notice and hearing," to

disbar, suspend, reprimand, or discipline an attorney. S.D. Ga. L.R. 83.5(a). In other words, Rule 83.5(a) contemplates that a practicing attorney gets notice and a hearing, and upon "good cause shown", then gets suspended. But this case involves a provisional suspension: The Court even characterized it that way. [8/22/12 Tr. at 29] The Court immediately suspended Neal in its June 22, 2012, order, so Rule 83.5(b) applies. Government counsel has no dispute that the Georgia Rules of Professional Conduct – or the "Georgia Bar rules," as he calls them – apply in an 83.5(b) suspension. [Id. at 23] If the Court had followed its own rules, Neal should not have been suspended on June 22, 2012, yet two months later, he remains suspended.

And at the time that the Court entered its suspension order, Neal was an "attorney appearing in a case or proceeding, or representing a party in interest in a case or proceeding" in at least one case pending in the Southern District of Georgia: Richardson v. Cunningham, No. CV111-118 (S.D. Ga.); Sanders v. United States, No. CV-109-164 (S.D. Ga)(J.Hall)(a wrongful death case in which Court granted summary judgment six days after the instant suspension Order was entered, leaving Sanders, an elderly widow, with no attorney). Under Local Rule 83.5(d), Neal had to govern himself under the Georgia Rules of Professional Conduct and the ABA Model Rules of Professional Conduct, with the Georgia rules providing the trump card. S.D. Ga. L.R. 83.5(d). While the alleged conduct did not occur "in connection with any matter pending before this Court," the local rules still provide that Neal had to govern himself under the Georgia and ABA professional conduct rules. See Gray v. Memorial Medical Center, Inc., 855 F.Supp. 377, 379 (S.D.Ga. 1994) (Order and Memorandum) ("The Southern District of Georgia employs the American Bar Association Model Rules of Professional Conduct (Model Rules) to govern attorneys practicing before its courts") (citing S.D.Ga. § 4 R. 5(d); Waters v. Kemp, 845

F.2d 260, 263 (11th Cir. 1988)).

In addition to the explicit application of the Georgia Rules of Professional Conduct via the local rules, Supreme Court and Eleventh Circuit precedent use them as benchmarks of appropriate attorney conduct. For a court to discipline an attorney, the "conduct prohibited must be ascertainable," which in lawyer terms, means "provided by case law, applicable court rules, and the 'lore of the profession' as embodied in the codes of professional conduct." In re Finkelstein, 901 F.2d 1560, 1564-65 (11th Cir. 1990); accord In re Snyder, 472 U.S. 634, 645 (1985). Government counsel propounds that he determines what "good cause shown" means, that he is unencumbered by the Rules of Evidence, and that he gets to inflate Neal's plea to the misdemeanor of opprobrious words disorderly conduct into a felony of sexual battery. He is in error.

3. Factual Misstatements

As set forth below, government counsel's factual misstatements are many. Using a sheriff's report [Notice at 1-2] and an explanation from the State of Georgia prosecutor, Assistant District Attorney Fogus ("ADA Fogus") justifying why the dismissal of a charge of rape carrying a mandatory minimum term of imprisonment of 25 years, in return for a probated plea to misdemeanor charges was appropriate, [Notice at 7-8], Government counsel magically turns three misdemeanor convictions – which he admits are not crimes of moral turpitude [Notice at 7] – into a completely different set of offenses, all the while contending that he "**will not be retrying the rape case**." [8/22/12 Tr. at 6] (emphasis added) Regrettably, this proceeding is based upon the same false allegations that were rejected by the Superior Court Judge and by the

prosecutor who voluntarily dismissed the rape charge after Neal's accuser giggled through portions of her direct examination.

A. The Sexual Contact Between Neal and Sprankle was Consensual

First, the sexual contact between Neal and Melina Sprankle was consensual. Although government counsel selectively quotes from police reports, he completely ignores the statement of Sprankle to investigators that was transcribed by Neal and provided to the State. In that statement, the lead investigator asked Sprankle, "Do you think that like sometime during the night, you know, after you started drinking, everything like that, that you may have said yes?," and Sprankle answered, "I didn't - - I did not say yes and I did not say no." Government counsel calls Neal a predator, a sexual predator, when in his file is a document produced by the defense that explicitly says - "**I did not say yes and I did not say no"**!! (emphasis added) Importantly, Neal passed a polygraph examination by a former FBI polygrapher prior to trial and asked the District Attorney's Office to stipulate to its results. The examiner asked Neal this question: "Did you force Melina to have sex with you against her will?" [Exhibit ? at 2] Neal responded "no," and the polygrapher determined that his answer was "not indicative of deception" – i.e., truthful. [Exhibit ? at 1-4] Well in advance of trial, Neal provided this polygraph to the district attorney's office, and sought its admission into evidence, but the district attorney refused.

Second, **this case started with Sprankle's father seeking out three different "civil" attorney's to sue Neal for money and continued through the course of negotiations with the state, when ADA Fogus unbelievably tried to extort Neal, on behalf of his false accuser, to pay Sprankle a lump sum of $15,000**! See Affidavit of Ms. Maureen Floyd attached hereto as

Exhibit. Neal rejected that financial shakedown and insisted on taking the case to verdict. Only after that did the efforts to obtain money damages out of a criminal prosecution stop.

Third, Neal passed a hair follicle test after this incident, which proved that he did not smoke any marijuana. See Def.'s Mot. in Limine and Request for Stipulation at 4-5, attached hereto as Exhibit.

Fourth, in the recitation on which Government counsel relies, the state prosecutor stated *seven times* that this case involved a credibility determination and that Sprankle had issues with credibility. In an astonishing omission, Government counsel neglects to so inform this tribunal. [Super. Ct. Sent'g Tr. at 4-8, 10, 14, 21-22]

Fifth, Government counsel never acknowledges the **series of sexually explicit text messages that Sprankle sent Neal the day after the incident** demonstrating that the encounter was consensual. Importantly, ***Ms. Sprankle inititiated the texting to Neal at 10:40 a.m., the following morning and continued to text and sext Neal a total of 44 times over the next 6 hours***, and these sext messages demonstrably proved the threesome the previous night was consensual.

Sixth, while citing certain portions of the state court sentencing transcript, Government counsel **never** cites these observations from Judge Blanchard about this case:

> Mr. Neal, there may be a perception in the community that you were given a pass in this case. And I assure you and the public that you're not being given a pass. **There's just no evidence**, according to the way the Court looks at this, because

> [the prosecutor] alludes to the fact that I look very strongly upon sexual allegations, sex charges, but **I do not feel the evidence is there**, or otherwise I wouldn't accept this plea.
>
> After reviewing all of the these texts and listening to all of the evidence and – **I don't think the evidence is there for the greater charge, the rape**. However, I do feel that it is appropriate for you to plead to the charges that you have pled to and I will sentence you accordingly.

[Super. Ct. Sent'g Tr. at 29] (emphasis added)

Neal now expands on these points.

1. <u>The Court should look to the evidence, the state's assessment of its case, the trial judge's findings and not government counsel's rewriting of it.</u>

As the Court is well aware, Neal originally faced felony charges in the Superior Court of Richmond County, Georgia, before he pleaded guilty (or nolo, on one count) to three misdemeanors: disorderly conduct by use of opprobrious and offensive language, furnishing alcoholic beverages to a person under 21 years of age, and **simple** possession of marijuana. Government counsel **admits** that these offenses "by their elements alone are not categorized by the State of Georgia as offenses involving moral turpitude." [Notice at 7] Despite this admission – that these offense do not involve moral turpitude – government counsel then implores the Court to look behind these offenses to certain "facts" contained in a report of the Sheriff of Richmond County, Georgia, and the explanation by the state court prosecutor at the conclusion of Neal's trial to explain, not Neal's conduct, but the conduct of the Richmond County District Attorney's Office in flat out dismissing the capital felony charge of rape - one of the most serious charges in our society. [Notice at 1-2, 7-8]

As an initial matter, Government counsel misplaces reliance on police reports to determine the scope of Neal's behavior. See United States v. Palomino-Garcia, 606 F.3d 1317, 1328 (11th Cir. 2010)(concluding that it "would be improper . . .to rely on police reports. . . because a defendant generally does not admit the conduct described in those documents" in determining the nature of a prior conviction); see also Shepard v. United States, 544 U.S. 13, 22-23 (2005)(plurality). Government counsel attempts to bolster his reliance on the sheriff's report with what was (allegedly) "similarly summarized publicly in open court on the record during [Neal's] plea and sentencing hearing before a judge of the Superior Court of Richmond County." [Notice at 7] After making that creation of fact, Government counsel asserts that "[a]t the conclusion of this summary by the prosecutor, [Neal's] defense counsel told the Court that it was a 'fair recitation.'" [Notice at 8] Let there be no mistake here: government counsel is wrong.

First, it was clear at the outset that the factual basis for his plea agreement came only from the accusation. ADA Fogus expressly stated:

> And, Judge, the first thing I want to do is say that **we are stipulating to the factual basis of the four corners of the accusation**; that's the factual basis that we're stipulating to. Is that correct?

To which Mr. Neal's counsel replied: "That's correct, Your Honor. That will be the factual basis for the plea." [Super. Ct. Sent'g Tr. at 3] (emphasis added). The trial judge accepted that factual basis. [Id.]

Government counsel misstates what happened next. ADA Fogus informed Judge Blanchard the reason for the trial was being brought to an unlikely conclusion: He said, "I need to explain why we're today," and later continued,"I'd like for the opportunity to explain why we're here, Your Honor" because

> ”Everybody in the entire community, especially the bar, knows how you feel about victims and knows how you feel about rape cases. And, I know I’ve got to explain this in detail and I just ask for the ability to do that, if I may.”

[Id. at 3-4] Judge Blanchard, importantly, told ADA Fogus,“I’ll give you that time.” Fogus’ statements therefore, did **not** provide a factual basis for a guilty plea, as Government counsel falsely states, rather, they provided a forum for the ADA trying the case to explain to the public and the Court why the prosecution was walking away from a charge as serious as the capital felony charge of rape, during the trial, in return for a probated plea to 3 misdemeanors.

In the course of explaining to the Superior Court why the State was offering Neal pleas to three misdemeanors, the prosecutor acknowledged that Neal “**would have demolished [Sprankle] on cross-examination**.” [Id. at 10] (emphasis supplied) Sprankle had serious credibility problems. Indeed, the state’s investigator “**doesn’t believe her in the beginning.**” [Id. at 7] (emphasis supplied) And ADA Fogus mentioned credibility seven times during the course of his explanation:

- “the case, it was said in opening, came down to credibility. It came down to consent. The jury could find against us, disbelieve her, disbelieve the evidence, and find in favor of an acquittal. I have said all along in this case this is a very hard case. It’s a very close matter.” [Id. at 4-5]

- “The problem is the jury could misconstrue those texts and not believe her. The jury could say that she wrote those texts[3] and thought that she was not trying to find out what happened but was trying to just get – continue on from the previous night.” [Id. at 6]

- “And he [investigator Owen] doesn’t believe her in the beginning. . .he goes on to ask, basically, could it have been consensual or did you agree to it. She says, as

[3] This statement refers to texts sent by Sprankle to Neal the day after. Those texts will be summarized in detail below.

the defense pointed out in the opening, the defense said she didn't say yes and she didn't say no. And that's true. . . ." [Id. at 6-7]

- "The problem in the case is every time you're there, we say this, they say that. It comes down to just the credibility. . . There was not – there was no DNA, there was no medical examinations [sic]. A lot of things were not done in this case." [Id. at 7-8]

- "They would have demolished her on cross-examination. . .The problem with these texts is it gets down to credibility and argument." [Id. at 10]

- "And this is why Melina's story is sketchy." [Id. at 14]

- "But if they did not believe her and had doubt about her credibility, which they could from the evidence, he would walk away with nothing." [Id. at 21-22]

Again, these statements by ADA Fogus were for the purpose of explaining why the Superior Court should **dismiss the capital felony of rape** and accept **Neal's pleas to three misdemeanors**. Fogus then asked the Court to accept the plea offered in this case, explaining "I'm just asking you to do that for the best interest of the case." Id., at 22. ADA Fogus then turned to the relevant portions of the plea agreement:

> We're asking you to sentence him, follow the recommendation to three years probation, 36 months, twelve months on Count One; twelve months on Count Two; twelve months on Count Three to run consecutive. For him to have to report and be on supervised probation, not unsupervised. That he'll have to pay a $1,000 fine on each charge for $3,000. That he's to have no contact whatsoever with Melinda Sprankle, the victim, and her family or anybody in the family. He's not to come near her property or any place that she goes to school, hangs out or in a restaurant. That whatever community service you want him to do, anything else that you order. . . . have I left anything from our agreement?

[Id. at 22-23] In response to ADA Fogus' question if anything had been left out of the plea agreement, undersigned counsel for Mr. Neal stated, "I think that's a fair recitation, Your

Honor." [Id. at 23] This response clearly refers to a "fair recitation" of the plea agreement, not to any factual statement given by the ADA.

But to Government counsel, the prosecutor's words and actions have a meaning that he gives them unrelated to the facts evinced by the transcript. His legal sleight of hand, in a Bar proceeding, no less, is deeply concerning to Neal and his counsel. The lengthy explanation by the prosecutor was **not**, as government counsel invents, a stipulated set of facts, but rather, was recounted for the Court and the public to explain why the District Attorney's Office was taking the drastic step of an outright dismissal of the rape charge that it had indicted a mere 3 months earlier.

Curiously, in painting with his brush as to what the evidence is, Government counsel *never once* cites any of the trial testimony of Melina Sprankle! Sprankle testified that on December 16, 2011, she left work to meet Caroline Neal for a glass of wine at Caroline's home. [Testimony of Sprankle at 10] She and Caroline had two glasses of red wine **before** Neal joined them. [Id. at 12] (emphasis added) When the women were alone, they were discussing sex, and when Neal walked in, "he joined the conversation." [Id. at 13] Later, when asked if Neal "start[ed] talking about anything sexual," Sprankle replied, "Nothing really other than the jokes that he made." [Id. at 18] Neal also "refill[ed] glasses." [Id. at 15] All total, Sprankle had about five glasses of wine in a two and one-half hour period. [Id. at 14, 18] She, Caroline, and Neal later shared a marijuana cigarette, with Sprankle taking "maybe like two hits, not a lot."[4] [Id. at 19] Sprankle never told Neal or Caroline to stop pouring wine, and she never told them that she did not want to smoke

[4] This is Sprankle's testimony. A hair follicle test of Neal after this incident came back negative for marijuana. See Exhibit

marijuana. [Id. at 25]

While the three were downstairs, Neal never asked her to participate in a threesome; he only made jokes, and Sprankle "just laughed and made it clear that that's nothing that I've ever done or would be interested in doing." [Id. at 21] Upstairs, after alleging she felt sick, she went to the bathroom, and walked into the master bedroom to find Neal and his wife undressed and lying in bed. [Id. at 20-21, 23-24] Neal and Caroline "weren't saying anything" about a threesome. [Id. at 24] But Caroline grabbed Sprankle and kissed her, and Sprankle "kissed Caroline back." [Id. at 23] **Sprankle testified that Neal never asked to have sex with her, never indicated that he wanted to have sex with her, and said nothing while she and Caroline were kissing in the bedroom.** [Id. at 27] When asked if Neal was involved in anything that she and Caroline were doing, Sprankle replied, "Just like watching and kissing on like neck and stuff is what I remember." [Id.] According to Sprankle, "my shirt was pushed up and my pants were pulled down and he was behind me and I think I was telling Caroline to like, you know, stop it or just telling her I wasn't in to whatever was going on, I didn't like it." [Id. at 28] Sprankle had no difficulty leaving the house, and her boyfriend Brett picked her up. [Id.]

Even more curiously, Government counsel mentions *nothing* about the text messages from Sprankle to Neal the next day, some of which came out in the state's direct examination of Sprankle at trial. At 10:42 the next morning, Sprankle texted Neal, "**Hey we're good; right**. Sorry I wasn't into it." [Id. at 30-31] (emphasis supplied) Neal replied that they were and that he thought Sprankle was nervous. [Id. at 31] At 10:46 a.m., Sprankle replied, "**I didn't want to do**

anything to make Brett [her boyfriend] mad with me. I love you and Caroline though and I didn't want to do anything – **I didn't want you to think anything was wrong.**" [Id.] (emphasis added) Neal assured Sprankle that he "loved her, too," that last night was "awesome," and that she was "so beautiful." [Id.] Sprankle persisted: "You're sweet, but I'm crazy about my boyfriend and I know he would be furious if that situation progressed. **You are kind of a sexy daddy though.**" [Id.] (emphasis added) Sprankle and Neal exchanged more texts. [Id. at 31-33] In explaining her love of Brett, **Sprankle writes, "My man lays the pipe big time**." [Id. at 33] Sprankle continued to sext, chastising Neal at one point that he "can't speak to [her] like that, Mr. Neal, you're married." [Id.] Sprankle, with Neal apparently have assuaged her concern that Caroline was jealous, wrote, "That's a good thing. **I was nervous about making Caroline mad.** I know that if I was with Brett and another girl I would be irritated and not in a good way." [Id. at 34] (emphasis added) This was around 11:40 a.m., approximately one hour after Sprankle began texting Neal. [Id.]

The sexting continued, with **Sprankle assuring Neal that she was** "**always wet and ready**," that **Neal's "girl is a good kisser," that she is "young and wild**," and that this threesome was her "**first time.**" [Id. at 35-37] (emphasis added)

Neal allowed that they "did [it] from behind for about a minute," and Sprankle replied, "I don't remember that but **from behind is my favorite**. I can't believe that. Now I feel a little bad." [Id. at 36] (emphasis supplied) Around 12:14 p.m., **Sprankle wrote to Neal, "<u>I did want you</u>, but what I have right now is so good I can't think of doing anything to mess that up." [**Id. at 37] She later typed, "**I told Brett that just me and Caroline kissed and he was so jealous. We got into a little argument but <u>he fucked me really hard</u> and made me promise I**

wouldn't have sex with another guy or a *threesome* without him." [Id. at 38] (emphasis supplied) After telling Neal more about the fight with Brett, including her hitting Brett, Sprankle texted that "[l]ast night was an isolated event. . .[and] I'm not tempting or teasing you with any ideas." [Id. at 40] Neal responded "[o]kay then" – and *Sprankle kept teasing and texting him*. [Id. at 40-41]

This is what the state presented at trial through Melina Sprankle, during portions of which she giggled at the content of the sexts messages. She **never** testified that any intercourse was against her will or that she did not consent. Indeed, her testimony indicated that she contacted Neal the next morning to initiate a series of sexually explicit texts to him about the previous night, her boyfriend, and her sexual preferences. Sprankle initiated and engaged in three way sexting with Neal and her boyfriend, exhibiting her arousal while doing so following her consensual three way sex with Mr. and Mrs. Neal. This is the point at which the state offered the misdemeanor pleas because a rape conviction was a "longshot." [Super. Ct. Tr. at 22] The state knew that Neal "**would have demolished [Sprankle] on cross-examination.**" [Id. at 10] (emphasis added) It knew that Sprankle had credibility issues, that its investigator did not believe her at first, and that her story was "sketchy." And Judge Blanchard opined, "**There's just no evidence**, according to the way the Court looks at this. . . **I do not feel the evidence is there, or otherwise I wouldn't accept this plea.**" [Id. at 29] (emphasis supplied)

With the plea arriving when it did during the state's case, Neal did not put up a case. The

defense case would have shown that Caroline Neal told the state prosecutor that Sprankle was the first one up the stairs of the Neal house and the first one in bed, that no crime occurred and that any sex was consensual. Neal, too, told the police that there was no force used, and as demonstrated previously, Neal passed a polygraph examination on the issue of whether the encounter was consensual. Although not elicited in the state's case, there were other text messages from Melina Sprankle that morning, sent while she was sending sexually explicit texts to Neal.

Throughout December 17, 2011, and somewhat bizarrely, Sprankle is also exchanging texts with Caroline Neal, saying "we all had a little too much" to drink (9:14:53), and texting about jeans (10:22:47), Chanel makeup (10:22:47-10:35:39), what to wear to a party (12:17:34-15:47:25), and Brett. (16:03:56, 20:52:42) **And while Sprankle has been sexting Neal, she also has been texting her boyfriend, Brett Folger. In those texts, Sprankle repeatedly propositions Brett, calling herself "hot and bothered" and "hot right now," and wanting him to "rock [her] so hard." (12:54:55, 13:38:11, 13:58:57) Sprankle also texts Brett that "All night [i.e., the night she claimed Neal raped her] trying to keep my hands off you so you could sleep was driving me insane." (13:38:11) While texting Brett, Sprankle keeps texting Neal, including this:**

> **I told Brett that just me and Caroline kissed and he was so jealous We got into a little argument but <u>he fucked me real hard</u> <u>and made me promise I wouldn't have sex with another guy or a threesome without him</u>.**

(12:59:01, 12:59:02)

> **<u>In addition to these texts, *Sprankle's cell phone was loaded with pornography –*</u>**

graphic pornography, pornography that depicts oral sex, pornography that depicts threesomes **– and photographs that showed what was clearly *a marijuana grow house* that was never investigated or prosecuted by state or federal authorities**. If Mr. Government counsel wants to talk about federal felony offenses he'd best review the evidence before casting slanderous accusations.

The defense case would have shown that Sprankle did not notify authorities about any allegations against Neal until *5 days* after the consensual sexual conduct. Further, the defense case would have shown that Sprankle and her father repeatedly sought legal counsel for the purpose of seeking monetary damages against Neal, and even during the plea negotiations, Sprankle was seeking money from Mr. Neal – not related to the payment of restitution, not for the reimbursement of expenses for treatment, *but to simply pay her money*. The prosecution of Neal began with the alleged victim seeking money from him. It ended with the request for the payment of money from him. Neal refused.

Government counsel refers to Sprankle as a "young girl" [Notice at 2, 7-8] and a teenaged babysitter [Notice at 1-3], all while calling Neal a predator. [Notice at 2]["Your actions were of a predatory nature."] Government counsel ignores the trial testimony of Sprankle, including the sexually explicit text messages that she sent Neal. Government counsel ignores the real doubts that the State had about Sprankle's credibility and its ability to get a favorable jury verdict. Government counsel ignores the Judge Blanchard's statement that there was simply "no evidence." And while this would have come out in the defense case, the Notice never mentions Sprankle's continuing attempts to extract money from Neal, *even through the state prosecutor at the time of plea negotiations.*

This whole sorry scenario of the Court's being used to beat money out of a prominent attorney was ended in the state court system on the heels of the absurd testimony of the alleged victim, where she was laughing at the content of her sexually explicit text messages. This case began for improper purposes with a flimsy investigation that no one would wish on their loved one. It has been continued in the overblown polemic of Government counsel that ignores the evidence that speaks to the core of this case.

2. The notice's recharacterization of Neal's convictions does not comport with the evidence before the Superior Court or this Court.

Without consulting Melina Sprankle's trial testimony and relying instead on a sheriff's report and the prosecutor's explanation about why he offered a misdemeanor plea to Neal, Government counsel posits that Neal's actions actually constituted various federal and state misdemeanors and felonies that rise to crimes of moral turpitude. [Notice at 4-11] Government counsel must resort to this twisted logic because he concedes that Neal's actual convictions are *not* crimes of moral turpitude: "Standing in isolation from each other, and without reference to their factual bases, such offenses are by their elements alone not categorized by the State of Georgia as offenses involving moral turpitude." [Notice at 7] Nonetheless, invoking "federal law" and "sensible judgment," Government counsel argues that these acts together, when "properly" construed, rise to crimes of moral turpitude. [Id.]

Government counsel recasts Neal's misdemeanor convictions as possession with intent to distribute marijuana and to distribute marijuana (federal misdemeanor, state felony); the purchase,

manufacture, or distribution of marijuana (federal misdemeanor, state felony); as sexual battery (state misdemeanor). Turning to the drug conviction first, recall that Neal pleaded *nolo contendre* to misdemeanor possession of marijuana. Sprankle testified that Neal got a single marijuana cigarette for the three of them to smoke - "I think there was just one." [Testimony of Sprankle at 18-19] The evidence of the marijuana charge to which Neal entered a plea dealt not with his personal possession and had nothing to do with his acquiring the marijuana. In truth, as the Assistant District Attorney (who actually investigated the case) knew, the marijuana was Caroline Neal's. Neal was only able to enter a plea to that count based upon his constructive possession, but Government counsel launches down a fanciful path that ends up with him fashioning out of thin air that Neal could have been prosecuted in federal court for a single marijuana cigaratte [Notice at 4-5] – an absolute fabrication. Cf. United States v. Leonard, 138 F.3d 906, 909 (11th Cir. 1998)(noting that element of intent to distribute met where compartment contained approximately nine kilograms of cocaine, "far more than that involved in personal use"). Again, misdemeanor marijuana possession is not a crime of moral turpitude. Ely v. State, 272 Ga. 418, 420, 529 S.E.2d 886, 889 (2000).

Government counsel also attempts is to transfigure a failed rape prosecution – where "[t]here's just no evidence" according to the Superior Court Judge [Super. Ct. Sent'g Tr. at 29] – into a sexual battery case. [Notice at 5] Under Georgia law, sexual battery occurs when one "intentionally makes physical contact with the intimate parts of the body of another person *without the consent of that person.*" O.C.G.A. §16-6-22.1(b) (emphasis added). As discussed earlier (and extensively), the state's main problem with its case with Sprankle's credibility, especially on the issue of consent. Recall that Sprankle initiated a series of sexually explicit text

messages with Neal the morning after the incident. Recall that Sprankle simultaneously texted her boyfriend sexually explicit messages, including one to the effect that she was disappointed that they had not had sex the night before. Recall that Sprankle tried to extract money from Neal and delayed going to the police for five days. And recall that Neal passed a polygraph examination indicating that he was truthful when he replied that the incident with Sprankle and his wife was consensual.

Government counsel has no desire to retry the rape case. [8/22/12 Tr. at 6] Neither does Neal, whether under the rubric of a rape case or a sexual battery case. Judge Blanchard concluded that there was no evidence to support a rape charge and that finding is conclusive. See Priest v. State, 265 Ga. 399, 456 S.E.2d 503 (1995). The Superior Court transcript points to the inescapable conclusion that the State prosecutor and the Superior Court Judge held this belief due to the evidence from the state's case and the evidence to be introduced in the defense case that *Melina Sprankle consented.* With consent, there is no sexual battery. See O.C.G.A. §16-6-22.1(b).

Government counsel also makes this argument:

> Nowhere in the Accusation, or any summary in court or within the pleadings, is there a factual basis for the charge of using opprobrious and offensive language. It is not offensive words that are constantly made reference to in these premises. The opprobrious and offensive behavior that was put before the Court was [Neal's] unwanted touching of the intimate body parts of another for [his] sexual gratification. . . .

[Notice at 8][emphasis in original] Apparently, to Government counsel, words spoken in a Superior Court proceeding only have the meaning he ascribes to them. But Government counsel

cannot re-write the transcript from the Superior Court, nor can he collaterally attack Neal's state court conviction in federal court by suggesting that it lacked a factual basis. Cf. Custis v. United States, 511 U.S. 485, 487 (1994)(holding that one cannot collaterally attack state convictions at federal sentencings with the exception of convictions obtained without the right to counsel). Legal niceties aside, Judge Blanchard expressly stated that "it was appropriate for [Neal] to plead to the charges [he had] pled to. . . ." [Super. Ct. Sent'g Tr. at 29] "The states exercise supervision of the trial of state created crimes, and federal courts are compelled to defer to a state court's interpretation of its own criminal laws, rules of evidence and rules of criminal procedure." Panzavecchia v. Wainwright, 658 F.2d 337, 340 (11th Cir. 1981) (citing Spencer v. Texas, 385 U.S. 554 (1967); Bronstein v. Wainwright, 646 F.2d 1048 (5th Cir. 1981)).

Georgia's disorderly conduct statute refers to words, not behavior. O.C.G.A. §16-11-39(a)(3). Neal, before a Superior Court Judge intimately familiar with the case, pleaded guilty to disorderly conduct. The judge approved that plea, finding it appropriate. Disorderly conduct is not a crime of moral turpitude. United States v. Cox, 536 F.2d 65, 70-71 (5th Cir. 1976).

3. Neal cannot be suspended or disbarred based upon an unwritten code of civility.

The oath taken by a member of the bar of the Southern District of Georgia requires him to swear or affirm that he "will demean [himself] uprightly and according to the law and the recognized standards of ethics of the legal profession." LR 83.3(c). Government counsel asserts that Neal did not demean himself uprightly. [Notice at 9-13] This is a subjective concept. Some may believe that an attorney is not upright if he does not go to church every Sunday. Others may

believe that an attorney does not demean himself uprightly if he moves a golf ball to get a better lie. Still more may believe that an attorney does not conduct himself uprightly if he cheats on his wife.

Given the broad range and amorphous nature of "upright" conduct, courts have placed limits on this term by reference to professional rules. The First Circuit, considering similar language in Fed. R. App. P. 46, acknowledged that one "may have a colorable claim that the terminology of [the rule] is so indefinite as not to afford sufficient warning of the behavior which is proscribed." In re Bithoney, 486 F.2d 319, 324 (1st Cir. 1973). But for attorney, "as part of a rule directed to a discrete professional group, the terms take on definiteness and clarity" because the legal profession has developed a "complex code of behavior," including codes of professional responsibility. Id. Interpreting this same rule, the Supreme Court defined "conduct unbecoming a member of the bar" as

> conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

In re Snyder, 472 U.S. 634, 645 (1985)(finding attorney's ill-mannered letter to court expressing exasperation with CJA system was *not* conduct unbecoming a lawyer).

"In examining the district court's order of suspension, the relevant inquiry is whether the attorney can be deemed to have been on notice that the courts would condemn the conduct for which he was sanctioned." In re Finkelstein, 901 F.2d 1560, 1564, citing In re Ruffalo, 390 U.S. 544, 554 (1968)(White, J., concurring). "This would necessarily include behavior which

responsible attorneys would recognize as improper for a member of the profession." Finkelstein, 901 F.2d at 1564. Again, the "conduct prohibited must be ascertainable," which in lawyer terms, means "provided by case law, applicable court rules, and the 'lore of the profession' as embodied in the codes of professional conduct." Id. at 1564-65. It cannot be "'a code by which an attorney practices which transcends any written code of professional conduct'": "The fatal flaw with this transcendental code of conduct is that it existed only in the subjective opinion of the court, of which appellant had no notice, and was the sole basis of the sanction administered *after* the conduct had occurred." Id. at 1565.

This "transcendental code of conduct that exist[s] only in the subjective opinion of the court" is what Government counsel proposes to apply here. [Mot. at 7][invoking "sensible judgment"] Indeed, this proposal seems guided by the Court itself:

> . . . [W]e are dealing with character, a general concept, whether an attorney has demeaned himself uprightly, whether an attorney is one of whom the Court and his colleagues *can be proud in stating that this individual, this person, is an officer of this Court* and is entitled to the respect and the deference that such a status would ordinarily command.
>
> In this case, the Court has clearly telegraphed the message that it is not the labels, not the guilty plea, not the nolo or any other nomenclature that is important, but the conduct which underlies. The question ultimately before this Court will be *whether this individual has committed some conduct or actions of which we cannot be proud of or which we simply cannot tolerate from a member of the bar.*
>
> Surely, there will be other messages telegraphed by this proceeding depending on the outcome. We may determine that certain conduct is acceptable, within the norms, and is tolerable. We may determine that certain conduct is intolerable, not within the norms, and not to be excused.
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> * * * * *
>
> In this matter, the conduct is the question. The character of the respondent is the

> question. And these are not necessarily arbitrary or capricious concepts, but they are *necessarily subjective, often incapable of an entirely objective description or definition.* Necessarily subjective.

[8/22/12 Tr. at 32-33][emphasis added]

But this is what Finkestein, interpreting Snyder, says to avoid. To satisfy due process concerns, the prohibited conduct must be ascertainable, and to have specific guidance for that ascertainable conduct, courts should look to case law, applicable court rules, and the lore of the profession. Finkelstein, 901 F.2d at 1565; see, e.g., Thomas v. Tenneco Pkg. Co., Inc., 293 F.3d 1306, 1324 n. 27 (11th Cir. 2002)(distinguishing Finkelstein because attorney's conduct, the "systematic *harassment* of another attorney," "violated several written ethics provisions contained in the Middle District Standards of Conduct and the Georgia Code").

If the Court looks to ascertainable standards like the Georgia Rules of Professional Conduct, those rules allow punishment for a felony conviction, a misdemeanor conviction involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law, or a criminal act that relates to the lawyer's fitness to practice law or reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, where the lawyer has admitted in judicio the commission of such act. Ga. R. Prof. Conduct 8.4(a)(2), (3), (8). The applicable comment makes this observation:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, 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. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Ga. R. Prof. Conduct 8.4, comment. 3. Neal's conduct does not trigger this rule. Indeed, this rule specifically acknowledges that an attorney can engage in "matters of personal morality, such as adultery and comparable offenses," that have no bearing on his fitness to practice law. Government counsel's invocation of Judge Blanchard's personal disgust at Neal's behavior does not advance his cause. Judge Blanchard could well be morally outraged at Neal sexting with an 18 year old with whom he engaged in consensual sexual conduct; however, that is a matter of personal morality not reached by the Rules of Professional Conduct. In fact, one's *personal dislike* for the constitutionally protected private, consensual three-way sexual conduct that Neal admitted to engaging in within the private confines of his own home is conduct that he has an express constitutional right to engage in per the Georgia Supreme Court. See Powell v. State, 270 Ga. 327 (1998).

Tying disbarment and suspension to ascertainable conduct (and concomitantly case law, rules of professional conduct, and the lore of the profession) satisfies due process. It is also the prevailing norm, as demonstrated by the conduct described in the attorney disbarment cases from federal court cited in Government counsel's 39 page outline. See Theard v. United States, 354 U.S. 278 (1957)(refusing to disbar attorney 18 years after he uttered a forgery when "concededly

he was suffering under an exceedingly abnormal mental condition"); In re Echeles, 430 F.2d 347 (7th Cir. 1970)(noting attorney's prior felony and discussing disciplinary proceedings in terms of convictions reversed on appeal for subornation of perjury of a witness at trial and obstructing justice by promoting false testimony); Ex Parte Wall, 107 U.S. 265 (1883)(attorney's disbarment due to participation in lynch mob); In re Claiborne, 119 F.2d 647 (1st Cir. 1941) (suspending due to unprofessional conduct, including offer to kickback portion of fee to union); United States v. Parks, 93 F. 414 (C.C. Colo. 1899)(disciplinary proceedings involving false claim for compensation for legal services); In re Stamps, 173 Fed. Appx. 316 (5th Cir. 2006)(disciplinary proceedings involving attorneys' lying on their bar examination to hide their prior unauthorized practice of law); Sealed Appellant 1 v. Sealed Appellee 1, 211 F.3d 252 (5th Cir. 2000) (disciplinary proceedings involving violation of state bar rules by offering inducement to witness, engaging in professional misconduct, and not acting with candor toward court); Matter v. Calvo, 88 F.3d 962 (11th Cir. 1996)(disciplinary proceedings involving attorney disbarred by state bar for violation of federal securities law); Standing Committee on Discipline of U.S. Dist. Court for S. Dist. of Ca. v. Ross, 735 F.2d 1168 (9th Cir. 1984)(disciplinary proceedings involving violations of a "number of rules of professional conduct");In re MacNeil, 266 F.2d 167 (9th Cir. 1959) (disciplinary proceedings involving prior disbarment by state court); Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112 (9th Cir. 2000)(affirming sanctions order against attorney who recklessly advised client that TRO not immediately effective); In re Hoare, 155 F.3d 937 (8th Cir. 1998) (suspending attorney for felony conviction of aggravated reckless homicide); Randall v. Brigham, 74 U.S. 523 (1868) (disciplinary proceedings involving sharp financial

dealing with client); In re Finkelstein, 901 F.2d 1560 (11th Cir. 1990) (reversing sanctions order because judge sanctioned lawyer based on some unwritten code); In re Tinkoff, 101 F.2d 341 (7th Cir. 1938)(disciplinary proceedings involving felony tax evasion); In re Sanchez-Ferreri, 620 F. Supp. 951 (D.P.R. 1985)(disciplinary proceedings involving attorney's disbarment based upon Puerto Rico canon of ethics and financial dealing with client); Selling v. Radford, 243 U.S. 46 (1917)(disciplinary proceedings in Supreme Court involving prior disbarment in Michigan for "professional misconduct amounting to a moral wrong"); In re Snyder, 472 U.S. 634 (1985) (reinstating suspended attorney who wrote harsh letter to court criticizing CJA program); In re Stoner, 507 F. Supp. 490 (N.D. Ga. 1981)(disciplinary proceedings involving attorney's felony conviction for setting off dynamite).

These cases – the very cases cited by Government counsel in his notes – demonstrate that federal courts may suspend, disbar, or sanction attorneys not on unwritten or amorphous conduct (see Theard, Finkelstein, Snyder), but on violations of duties to clients or unethical behavior (see Claiborne, Parks, Stamps, Pacific Harbor, Randall), violations of state ethical rules or suspension by a state body (see Sealed, Calvo, MacNeil, Ross, Sanchez-Ferreri, Selling), felonies (Wall,

Hoare, Snyder), or behavior involving obstruction of justice following a prior felony conviction (Echeles). Significantly, none of these cases involves conduct like Neal's.[5]

CONCLUSION

Looking at the evidence – not sheriff's report from the victim, not the state prosecutor's explanation of why the rape indictment was dismissed – Neal engaged in consensual conduct with his wife and another adult. Although Neal may have engaged in conduct that this Court "cannot be proud of," it has to ground its disciplinary decisions on benchmarks to satisfy due process concerns. The benchmarks here – the state bar rules, other cases – show that Neal's conduct does not warrant suspension.

Respectfully submitted this 4th day of October, 2012.

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[5] Government counsel cites Matter of Brooks, 263 Ga. 530, 436 S.E.2d 493 (1993), for the proposition that "[m]embers of the bar are in no need of any advance notice by this Court to alert them to the consequences, either private or professional, of engaging in conduct that involves the deliberate, nonconsensual contact with another's intimate body parts." [Outline at 11] Brooks involved a superior court judge who groped "several women, including county employees," and pleaded nolo to six counts of sexual battery and four counts of simple battery "based on incidents that occurred while he served as judge." Matter of Brooks, 264 Ga. 583 (1994). That conduct is far removed from the conduct presented here.

Contrary to Brooks, Neal did not plead to a sexual battery count, and Sprankle's consent (as demonstrated through her statement to investigators and text messages to Neal, among other things) led to the dismissal of the rape charge against Neal.

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