IN THE SUPREME COURT OF FLORIDA

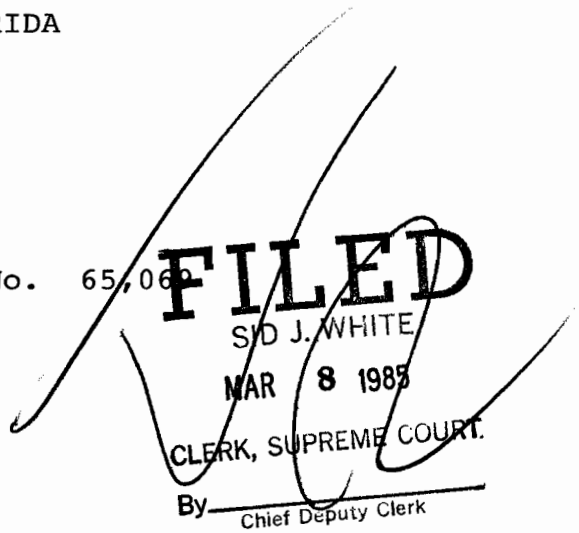
THE FLORIDA BAR, :

Complainant, :

vs. : Case No. 65,069

WILLIAM HUGH PRICE, :

Respondent. :




BRIEF IN SUPPORT OF PETITION FOR REVIEW

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OTHER AUTHORITY

## ISSUE ON APPEAL

IF A REFEREE READS THE TRANSCRIPT OF A TRIAL, THREE YEARS AFTER IT TOOK PLACE, TAKES NO LIVE TESTIMONY EXCEPT THAT OF RESPONDENT, THEN REJECTS THE FINDINGS OF A TRIAL COURT JURY, SHOULD THE REFEREE'S RECOMMENDATION TO DISBAR RESPONDENT BE REJECTED?

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement set out by the Referee on Page 1 of his Report.

## ISSUE I

## ARGUMENT

IF A REFEREE READS THE TRANSCRIPT OF A TRIAL, THREE YEARS AFTER IT TOOK PLACE, TAKES NO LINE TESTIMONY EXCEPT THAT OF RESPONDENT, THEN REJECTS THE FINDINGS OF A TRIAL COURT JURY, SHOULD THE REFEREE'S RECOMMENDATION TO DISBAR RESPONDENT BE REJECTED?

Yes. "Disbarment is the most severe disciplinary prescription that can be imposed on an attorney, and a judgment of disbarment is reserved for the most infamous type of misprison; State ex rel. Fla. Bar v. Ruskin, 126 So. 2d 142 (Fla. 1961); Disbarment is an extreme remedy, and should be exercised only as a last resort, Sheiner v. State, 82 So. 2d 657 (Fla. 1955); Removal from the bar should never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine would accomplish the end desired, Fla. Bar v. Moore, 194 So. 2d 264 (Fla. 1966)", 4 Fla. Jur 2d 6, Attorney at law Sec. 96, n 85.

In the same section, Fla. Jur 2d cites the cases of State ex rel. Fla. Bar v. Bass, 106 So. 2d 77 (Fla. 1958), and The Fla. Bar v. Wendel, 254 So. 2d 199 (Fla. 1971), for the proposition that disbarment should not be imposed lightly, "but only in a clear case for weighty reasons and on clear proof",

4 Fla. Jur 2d Attorneys at law Section 96.

In both of those cases, Bass, supra and Wendel, supra there was conflicting evidence as to what the Respondent had done. Wendel quotes from State ex rel. Fla. Bar v. Murrell, 74 So. 2d 221, 223 (Fla. 1954);

> Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferably. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him."

That is the same situation with which we are confronted in the case at bar. There is conflicting evidence about Respondent's involvement in a marijuana smuggling episode. He was tried three times by three

times by three different juries, and was never found guilty. Obviously, at the last trial, all six jurors believed his testimony and evidence, and at least some of the jurors at the two previous trials believed in him.

It has been held that a Referee's findings of fact should be accorded substantial weight, The Fla. Bar v. Carter, 410 So. 2d 920 (Fla. 1982). However, in the instant case, the Referee's findings are really his opinions, not facts. He bases his whole report and recommendation on his opinion that Respondent, and the witnesses on Respondent's behalf, were not telling the truth.

Also, this is an unusual case in that the Referee was effectively functioning as an appellate court reviewing the findings of the jury. Therefore, the finding of the jury should not be disturbed absent clear and convincing evidence. In our system of jurisprudence, the judgment of a jury if favored, and an appellate court may not lightly disturb a jury's verdict, U. S. v. Klein, 560 F. 2d 1236 (5th Cir. 1977), cert dnd 434 U. S. 1073 (1978).

In Hitchcock v. State, 413 So. 2d 741 (Fla. 1982), this court held that when a jury was shown to have faithfully and honestly performed their duty, and to have reached a reasonable conclusion, it requires more than a mere difference of opinion as to what the evidence indicated for an appellate court to reverse. Yet a difference of opinion is all that the Referee can point to. He says he elects to disbelieve Respondent and his witnesses, yet cannot demonstrate by any evidence whatsoever, let alone clear and convincing, that his opinion is correct and all of the jurors who believed Respondent are wrong. The instant case is analagous to Knight v. State, 392 So. 2d 337 (Fla. 3d. DCA 1981), where the court held that when a jury has weighed conflicting evidence, an appellate court will not overrule a verdict if there is competent, substantial evidence to support it. The Referee in the case at bar does not dispute that there was competent, substantial evidence to sustain, the jury's verdict. He merely chooses not to believe the eivdence.

But the Referee was not present at any of the trials, nor did he observe any of the witnesses at trial. The trials were all in 1981, the Referee held his hearing in 1984. He has read the record, retried the case, and reweighed the evidence submitted to the jury. When there is substantial, competent evidence to support the verdict, an appellate court should not undertake to retry the case, Tibbs v. State, 397 So. 2d 1120 (Fla. 1981).

## CONCLUSION

Based upon the foregoing argument and law cited, the Recommendation of the Referee should be rejected. His judgment should not be substituted for that of the jurors, because he was not able to cite any clear and convincing evidence that their verdict was one which no reasonable man could reach. The Referee could only state that he did not believe Respondent's defense. To disbar an attorney on one man's opinion as to the veracity of witnesses, when competent jurors have already judged the witnesses to be credible, would be an unconscionalbe result.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to David G. Mcgunegle, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801, by U. S. Mail, this 4th day of March, A. D., 1985.

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