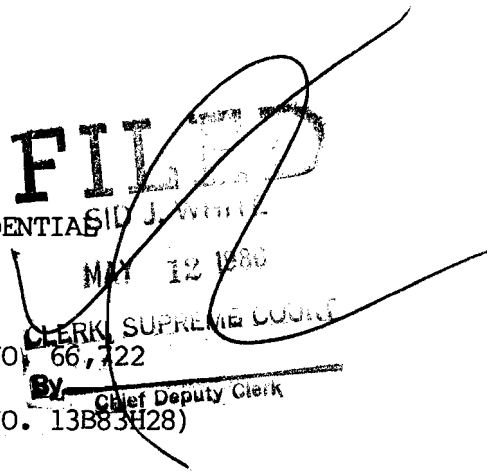
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Petitioner,

v.

PAUL T. MARKS,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 66,722

(TFB NO. 13B83H28)

PAUL T. MARKS' INITIAL BRIEF

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THE FLORIDA BAR,

Complainant,

vs.

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Respondent.
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CONFIDENTIAL

CASE NO. 66,722
(TFB #13B83H28)

SUMMARY OF ARGUMENT

Respondent and the Florida Bar agree on only one point, i.e. that in the proper case lawyers who participate in illegal activity should be dealt with severely by this Court. However, respondent submits that the case at bar is not the proper case for harsh treatment.

Respondent has practiced law in Florida since 1969 with a blemish free record, and while this fact alone should not be taken as proof of his innocence, it should be given substantial weight in determining the truth of his under oath testimony. The case at bar is a battle between the veracity of the respondent as opposed to that of two convicted drug traffickers, one of whom received a sentence of probation for his crimes in exchange for his testimony against respondent, and the other of whom was hoping that in exchange for his testimony, his sentence after conviction, would be reduced (as in fact it was).

The testimony of the "key witness", Angel Haya, was completely discredited by his inconsistencies and outright lies. His credability as a witness was further tainted by his need to shift the blame for his own wrongdoings to some innocent third person (respondent) in order to save his own skin.

The testimony of the witness, Jerry Green, should have been disregarded for the same reasons and because of his admitted complete lack of knowledge.

On the other hand, there was competent, substantial and uncontroverted evidence submitted by respondent of his innocence and of his good character, which for some unknown reason the Referee disregarded.

Moreover, the Referee gave undue weight to respondent's plea of nolo contendere to a lesser crime than that with which he was originally charged, particularly after respondent and his trial counsel gave a full explanation of his reasons therefor.

There is very little gray area in this action, i.e. either the respondent is guilty of a felony and should be suitably punished by this Court or he is not guilty and should be exonerated by this Court.

Respondent submits that there was a lack of proof to sustain the Referee's finding of guilt, that there was no clear and convincing evidence of guilt, that to the contrary, the evidence

submitted by the Florida Bar was untruthful, inconsistent and totally discredited by respondent, and that the Referee erred in construing the evidence otherwise.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Summary of Argument has been furnished by U.S. mail to David R. Ristoff, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 this 20 day of May, 1986.

Gerald W. Nelson

GERALD W. NELSON, ESQ.

TABLE OF AUTHORITIES

TABLE OF ABBREVIATIONS

Report of the Referee ..... R.

Transcript of Referee Hearing..... T.

STATEMENT OF THE CASE

Respondent is an attorney duly licensed to practice law in the State of Florida. In October, 1982 respondent was charged with a crime. He ultimately pled nolo contendere and adjudication was withheld on that plea. A grievance was filed against Respondent and that matter was heard by the Grievance Committee of the Thirteenth Judicial Circuit which found probable cause to believe that Respondent had committed a misdemeanor. The matter was referred to the Florida Bar which ultimately filed a complaint against respondent charging respondent with several violations of the disciplinary rules of the Florida Bar, one of which was that he had committed a misdemeanor.

This disciplinary proceeding is before this Court upon the Florida Bar's Petition for Review and the Respondent, Paul T. Marks' Cross-Petition for Review of the Report of the Referee finding Respondent in violation of the Florida Bar Integration Rule, Article XI, Rule 11.02 (3)(a) (engaging in conduct contrary to honesty, justice, or good morals); Rule 11.02 (3)(b) (commission of felonious misconduct); Florida Bar Code of Professional Responsibility, Disciplinary Rule 1-102 (A)(1) (violation of a disciplinary rule); DR 1-102 (A)(3) (engaging in illegal conduct involving moral turpitude); DR 1-102 (A)(6) (misconduct that adversely reflects on his fitness to practice law); DR 7-102(A)(7) (counsel or assist client in conduct the lawyer knows to be illegal); and DR 7-102 (A)(8) (engage in other illegal conduct or conduct contrary to the disciplinary rules). The referee recommmend that Respondent be suspended from the practice of law in

the State of Florida for three (3) years and until he proves rehabilitation. Costs and expenses of this proceeding were also assessed against Respondent.

Respondent challenges each and every finding of fact and conclusion of law reached by the referee.

STATEMENT OF THE FACTS

For approximately 2 1/2 years respondent was the attorney for one Angel Haya and several corporations in which Haya was the main stockholder (T.p.2, T.p.202) In early 1982, Haya became interested in forming a corporation for the purpose of doing construction work in the country of Algeria. Respondent was retained to form the corporation and to perform various other legal services to further this venture (T. ps. 202-203). In April, 1982 Haya traveled to Algeria and on his return he reported to respondent that an airplane would be useful in Algeria because of the distance between proposed job sites and their relative inaccessability by ground transportation (T.p.204).

Respondent also had another client, named Ben Stinson and it apparent that Stinson and Haya met at respondent's law office shortly after Haya returned from Algeria (T.p.205). Stinson and Haya collaborated on the purchase of a single engine Cessna 206 aircraft. Haya was to put up the money and in return, Stinson was to find a suitable plane and take flying lessons in it until Haya had it shipped to Algeria (T. ps. 206-207). Respondent took no part in the purchase of the plane (T. p. 207).

Subsequently, in August, 1982, Stinson took the airplane at night without Haya's knowledge and crashed in the Gulf of Mexico (T. p. 208). Thereafter, in September, 1982, Haya purchased a second airplane which was used by Haya, Stinson and others in an effort to transport marijuana into this country from Jamaica (T. ps.26-30). Upon the plane's arrival in Florida it was greeted by law enforcement officers and Haya, Stinson and three others (including Jerry Green) were arrested and charged with various

crimes including trafficking in marijuana and conspiracy to traffick in marijuana (T. ps.32-33). All of these co-conspirators were caught either with the marijuana in their possession or in relatively close proximity to it.

After his arrest, Haya promptly confessed and in return for his "assistance" was promised probation (T. p.33). Haya's assistance was to ensnare someone other than those with whom he was arrested. Respondent had naively allowed himself to be set up and with some prodding by the Sheriff's department, Haya ultimately, named respondent as another co-conspirator and agreed to have himself "wired" in order to make surveillance tapes of private conversations between himself and the respondent (T. p.34).

Some two weeks later, on October 11, 1982, respondent was arrested by the local sheriff's department and charged with trafficking in marijuana and conspiracy to traffick in marijuana.

Approximately one year later, after lengthy discovery and plea negotiations with the State Attorney's office of Hillsborough County, Florida, respondent pled nolo contendere to a charge of delivery of cannabis (a third degree felony), adjudication was withheld, and respondent was put on probation.

ARGUMENT

A. THE REFERE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT SHOULD NOT BE ACCEPTED BY THIS COURT DUE TO THE DELAY IN PROSECUTING THIS RESPONDENT

Respondent was arrested on October 11, 1982. While the criminal prosecution was pending, respondent requested the Florida Bar to delay bar prosecution until such time as the criminal prosecution was concluded. That prosecution was concluded in October, 1983 and the Florida Bar had knowledge of that fact almost immediately.

The Grievance Committee hearing did not take place until July, 1984. On August 2, 1984 the Florida Bar advised then counsel for respondent that further action was to be taken, but it was not until March 5, 1985 that the Florida Bar actually filed its complaint. The trial before the Referee took place in December, 1985 and the Referee's report was delivered in January, 1986, more than 2 years after the criminal case against respondent was disposed of, and almost one and one-half years after the Bar advised that it was to take further action.

The responsibility of diligently prosecuting a disciplinary case rests with the Florida Bar, The Florida Bar v. Randolph, 238 So.2d 635 (Fla.1970). When a disciplinary case is not handled with diligence this Court has recognized the principle that the delay may necessitate the mitigation of otherwise proper discipline, The Florida Bar v. Papy 358 So.2d 4 (Fla.1978). Furthermore, where the delay in prosecution has been found to be substantial and the consequences of that delay have resulted in prejudice or injury to the accused attorney, the respondent should be entitled to dismissal of the charges. The Florida Bar v. Rubin, 362 So.2d 12 (Fla.1978).

Moreover, this substantial delay is violative of the spirit and intent of the Integration Rule. This intent to ensure the prompt and diligent processing of disciplinary cases is evidenced by the statement of the then President of the Florida Bar, Burton Young, when he wrote in the Florida Bar Journal:

> "With the powers of the new Disciplinary Rule, those who would trespass upon our ethics can expect to be called on to account immediately. There will be no more two-and-one half year delays. Final disciplinary action will be completed within approximately 6 months." The Florida Bar Journal, Vol. 44, No 6, P. 323 (June, 1970).

Respondent submits that the substantial delays in this action have caused him substantial harm and prejudice. His ability to continue with his practice has been severely hampered due to his hesitation to accept new cases in view of these pending proceedings. He has in effect suffered the consequences of a suspension from his practice combined with the anxiety of not having the matter resolved years ago.

Perhaps had the case been called to trial sooner, the witnesses' memories would have been clearer.

Respondent was 37 years old at the time this ordeal began; he is now 41 and further removed from the job market outside the practice of law.

In conclusion, this Court should consider the substantial delay, the harm and punishment suffered by respondent, the harsh effects which will result from the recommended discipline, and the lack of benefit to the Bar or the public and should dismiss the charges against respondent.

B. THE REFEREE ERRED BY GIVING UNDUE WEIGHT TO RESPONDENT'S NOLO CONTENDERE PLEA

On October 11, 1982, respondent was arrested and charged with trafficking in marijuana and conspiracy to traffick in marijuana, both second degree felonies. Approximately one year later, respondent entered a plea of nolo contendere to a lesser charge of delivery of cannabis. It is undisputed that there was no factual basis for the plea but rather that the plea was entered as a compromise. The Referee found (R. p. 2) that the "evidence of these other considerations is not clear and convincing."

The Referee referred to the nolo contendere plea three (3) times in his opinion and he must, therefore have placed great weight on the inference raised by such a plea. However, it is unclear from a reading of his Report exactly how much weight was given by him to respondent's plea. Respondent suggests to this Court that if the Referee gave any weight to it, that he was in error.

This Court has held that a plea of nolo contendere is relevant in disciplinary proceedings even though the plea relates to charges unconnected with those presented at the hearing and that the important factor is not whether there has been an actual adjudication of guilt (respondent in the case at bar was not adjudicated guilty) but whether the attorney has been given chance to explain the circumstances surrounding this plea and otherwise contest the inference that he engaged in illegal conduct The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla.1984).

Respondent testified at the hearing before the Referee. In response to questions relating to the plea agreement, he testified as to at least seven reasons why the plea was made (T. ps. 230 - 232):

a. That being charged with trafficking in marijuana, respondent faced a three year minimum mandatory sentence if convicted, with no bond pending

appeal;

b. That he was a "coward" and could not face the unlikely chance that if convicted he would be sent to prison for three years;

c. That he had two families to support and could not take the risk for their sakes.

d. That at the time he was supposed to go to trial there was a political upheaval in Hillsborough County where the two members of the Board of County Commissioners as well as a local attorney had been tried and found guilty of various crimes; that Circuit Judges Arden Merkel and Richard Leon were front page news practically every day; and that as a result, respondent did not believe that he could get a truly fair trial in Hillsborough County at that time.

e. That respondent wrongfully believed that the provisions of Section 90.410, Florida Statutes prohibited the use of the nolo plea against him in this proceeding and that the case would truly be tried on its merits. Respondent did not practice in the criminal law area and in a sense was in a worse position than a layman. He mistakenly read the statute in question, took it at face value and did no further research to find exceptions.

f. That Rules 3.170 and 3.172 of the Florida Rules of Criminal Procedure permit a defendant to plead nolo contendere to charges brought against him because he believes it to be in his best interest, while at the same time maintaining his innocence. Respondent entered the plea on that basis and stated on the record at the plea hearing his reasons.

g. That there was no factual basis whatsoever for the charge that respondent pled nolo contendere.

Much of the foregoing was supported by respondent's trial counsel,

James Alfonso, who testified before the Referee (T. ps. 189 - 196).

None of the foregoing was contradicted by the Florida Bar, yet the Referee held that the testimony was not clear and convincing.

Respondent submits to this Court that it is manifestly unfair to promulgate rules of criminal procedure whereby persons in the position of respondent are encouraged to plea bargain, provide means by which they can enter pleas to doubtful claims to preserve their freedom, and then pull the rug out by using such pleas against them in subsequent procedings, despite the clear language of the Rules and of the Florida Evidence Code.

Respondent was faced with what he considered dubious criminal charges filed by the State of Florida, for various personal reasons referred to above chose the coward's way out and entered a plea of nolo contendere to greatly reduced charges, and now is faced with a Referee who regarded such a plea sufficiently onerous to base his recommendations that respondent be found guilty of such dubious charges and suspended for a period of three years.

Respondent submits the Referee's findings with regard to respondent's plea is a subversion of the letter and spirit of the Florida Evidence Code and of the Florida Rules of Criminal Procedure as set forth above and for this reason alone, the Referee's report and recommendations should be set aside.

Moreover, Respondent asserts that the uncontradicted testimony at the hearing before the Referee was truthful, clear and convincing; that the Referee erred in construing it otherwise; that the inference arising from

the plea has been controverted, that the Referee should have completely disregarded the plea and that the he erred in inferring guilt because of it.

C. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT BE FOUND GUILTY OF VIOLATING THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE FLORIDA BAR INTEGRATION RULE

The burden of proof in disciplinary proceedings as announced by this Court in The Florida Bar vs. Quick, 279 So.2d 4 (Fla. 1973) is on the Florida Bar to prove an attorney's guilt by "clear and convincing evidence." This is a quantum of proof that is something more than merely a preponderance of the evidence as in civil cases, but less than beyond a reasonable doubt as required in criminal cases.

Since the inception of the criminal action against this Respondent he has been faced with attempting to prove that the lies of Angel Haya were in fact lies. Haya has testified on various occasions but until the time of the hearing before the Referee, the case boiled down to who was telling the truth, Haya or Respondent. Who would a jury or, in the case at bar, a Referee believe? As Haya's lies had succeeded in getting Respondent arrested and charged with serious crimes, Respondent took the easy way out by pleading nolo contendere in the criminal case, trusting that the lawyers and judges who would hear the bar case would be somewhat more discerning in their view of Haya and the testimony presented by him. Alas, at lease thus far, Respondent has been sorely disappointed.

Although the Referee's report is difficult to follow and is quite inconsistent, his opinion is based upon 8 main points, all of which

are patently incorrect and not supported whatsoever by the evidence submitted, even that evidence that is most favorable to the Florida Bar.

1. On the first page of the Report the Referee makes the statement that Haya trusted this Respondent. On the fourth page he finds that respondent used his position as an attorney to "ignite and fan the fires of cupidity in Mr. Haya." He states further that if "Respondent had not been an attorney, it is highly probable that he could not have convinced Mr. Haya to engage in this scheme."

Respondent challenges the Florida Bar, the Board of Governors, this Honorable Court, the Referee or any other person to find a scintilla of evidence in the record to support these findings.

Haya did testify that he had been doing business with respondent and that he trusted him (R. p.6). Again at page 56 of the transcript, Haya reiterates that he trusted respondent. In 135 pages of testimony, these are the only two references to the trust reposed by Haya in Mr. Marks.

The record reflects that respondent had represented Haya for at least two years prior to the incident in question, had handled a substantial amount of legal work for both Haya and the corporations of which Haya was the majority stockholder. Of course, Haya trusted respondent. But there is not a bit of evidence to even remotely suggest that respondent used his position as an attorney to influence Haya to break the law. Moreover, on the record before this Court, for the Referee to state catagorically that Haya would not have broken the law except for respondent's urgings borders on ludicracy.

The conclusions reached by the Referee that he claims are "clear and convincing" are completely without factual basis, are not supported by the record, appear to have been influenced by passion or prejudice, and are arbitrary findings that should be totally disregarded by this Court.

2. The Referee found "it incredible that any attorney in West Central Florida who is approached to facilitate the purchase of a small airplane with over-water capability . . . can honestly claim that he has no strong suspicions that a drug deal is contemplated. These circumstances alone lend credence and corroborate the other evidence . . ."

This finding by the Referee once again is completely off-the-wall. One can imagine that hundreds of attorneys throughout Florida either fly themselves or assist their clients in purchasing airplanes. Should each be required to refuse to assist any client who wishes to purchase a plane merely because some airplanes are used for illegal purposes? Should lawyers refuse to go hunting with clients because some guns are used for unlawful purposes? Of course not!

Moreover, there are no less than 5 references in the record showing that Haya's planes did not have over-water capability. On page 14, Haya testified that the plane had to be plumbed; that a bladder had to be installed so that the plane could carry more gas as the trip was so long. On the top of page 15 of the transcript, Haya states that it was Ben Stinson who told him the plane had to be plumbed. Again on pages 25 and 26, Haya testified that he and Stinson plumbed the plane, i.e. put another gas tank in. On page 65, Haya states that Stinson was going to modify the plane by putting in a bladder.

On page 144 witness and Haya's co-conspirator, Jerry Green testified

once again the he and several others had to plumb the plane.

It is clear that neither of Haya's planes had over-water capability at the time they were purchased. Accordingly, even if lawyers such as respondent should be suspicious of clients purchasing over-water aircraft, such is not the case here.

It is clear therefore, that the Referee's findings of fact with reference to this issue must fall for the same reasons set forth above on the trust issues.

3. The Referee found that Haya gave respondent $25,000 in order to purchase an airplane.

On the surface the finding of this fact seems innocuous except that the Referee found further that the plane was to be used for smuggling marijuana. Or did he?

At the trial there was a substantial amount of testimony from both Haya and respondent concerning Haya's aborted business venture in Algeria. Although Haya did testify that the plane was to be used for smuggling purposes he also testified, albeit reluctantly, on cross-examination that he told other people that the Algerian venture required an airplane (T. p.44). And the Referee found that Haya would need an airplane for Algeria (R. p. 2).

So if one assumes that on at least one occasion the Referee made a correct finding of fact and that Haya on at least one occasion told the truth, the plane was purchased for Algeria. Accordingly, no crime would have been committed if respondent had in fact received the $25,000.

But respondent unequivocally denies ever having received the $25,000 from Haya or anyone else.

Haya made the bare statement that he had given respondent $25,000 for the purchase of an airplane for whatever reason. Not one shred of corroborating evidence was submitted, why? because the transaction never took place. Haya must have obtained the money from somewhere. Perhaps the Florida Bar could have produced a withdrawal slip from the bank. Perhaps it could have produced a receipt from respondent, for after all, no matter how much one person trusts another, one does not give $25,000 in cash without getting some type of receipt. Perhaps on the tapes that were taken surrepticiously of respondent's and Haya's private conversations, Haya could have inquired "Hey, Marks! Remember the 25 grand I gave to you to buy the plane?" Where is the corroboration?

Haya testified that respondent gave him back the money at one time and told him to redeposit it for interest. Yet Haya did not redeposit it and so there is no record of the transaction. How convenient for Haya and the Florida Bar.

On page 49 of the Transcript, Haya admits that he confessed to the police as follows:

> "I was approached by Mr.Stinson on a deal, which I did not know in the beginning as to what it was. If I was to put up 25 he would guarantee me back $40,000.00."

At page 57 of the Transcript:

> Q Well, did you have Mr. Stinson go buy it?
>
> A I don't know how you're going to--are you going to say if I gave him the money then I'm telling him to go buy it? I did give him the money, yes. Did Mr. Stinson go buy the airplane? Yes, he bought it.

On page 61 of the transcript if the word "Square" means "yes" Haya again admitted that he gave Stinson the $25,000.00.

Even at the hearing Haya contradicted his own testimony. Were these slips of the tongue as the Florida Bar in the good faith manner in which it has otherwise handled this matter, will allege in its reply? Or were these statements the truth? Respondent submits Haya's testimony on this issue and others was so contradictory that the Referee should have disregarded it in its entirety.

It is manifestly unjust to condemn a lawyer based upon one person's statement of fact that is uncorroborated by some other source. Although respondent has been unable to find case precedent for this statement, if such is not the law of this state, it certainly should be.

Moreover, it has been held by this Court that "no lawyer should be disbarred by discredited testimony", The Florida Bar v. Oxford, 127 So.2d 107 (Fla. 1960). In that case, as in the case at bar, the "key witness" originally gave evidence in exoneration of the accused lawyer, but later changed her testimony to incriminate him. This Court reversed the Referee on the basis of the discredited testimony.

The kindest thing that can be made about Haya's testimony was that it was inconsistent and throughly discredited.

4. The Referee found that respondent "actively participated in the negotiation for the purchase of the airplane that was an integral part of the scheme (R.p.2)."

Respondent once again must ask where in the record is there testimony to substantiate this finding? Haya himself testified that Stinson bought the first airplane and that he bought the second one after Stinson had found it.

There was no testimony whatsoever to link respondent with the first plane other than to prepare a bill of sale and a title transfer for filing with the F.A.A. and his only involvement with the second one was that he flew it at the time it was purchased some two weeks prior to the time it was used to smuggle drugs. The testimony was clear and convincing that respondent had no aviation expertise, had no knowledge of airplane mechanics but flew the plane only because he had a chance to fly for free and get "checked-out" in a high performance aircraft.

The foregoing does not constitute under any stretch of the imagination "active participation in the purchase of an airplane" and the Referee erred in so concluding.

5. In a rare moment of insight, the Referee found that there was no clear and convincing evidence as to what respondent's split was to be. Could even he have been confused by Haya's inconsistencies? At page 23 of the Transcript Haya testified that Stinson was to get 50%, he (Haya) was to get 25% and Green was to get 25%. Three pages later, realizing his mistake, he changed his story to include respondent, reducing Green's share to 15% to accomodate respondent with 10%. Wasn't this a clever feat of legerdemain by Haya?

Moreover, at page 78 of the Transcript, Haya says that the man in Jamaica was to get 50%. Green testified, however, that he was not to get a percentage but rather that he was to receive 25 pounds of marijuana for his efforts (R. p. 141).

Finally, Cass Castillo, the assistant State Attorney for Hillsborough County, testified at the Grievance Hearing, that Haya told him that

respondent was to receive no share of the smuggling operation. Unfortuantely, the Referee did not see fit to include the transcript of the Grievance Hearing in record submitted to this Court for review.

The Referee was, therefore, correct in concluding that it was not clear and convincing what respondent's share was to be. Was he incapable of considering that perhaps Haya was lying not only in his testimony on this issue but also on others as well? Was he incapable of perhaps concluding that perhaps respondent's alleged participation in the drug smuggling operation was non-existent?

Once again, the "key witness" testimony was inconsistent and contradictory and should have been disregarded by the Referee.

6. The Referee found that respondent knew that he was bringing Haya and Stinson together for illegal activity. Once again, where is the proof required to sustain this finding?

Certainly, at the hearing before the Referee, Haya testified to respondent's participation. Did the Referee think that he would do otherwise?

Haya had made a deal to testify against respondent in all proceedings brought against him. In exchange for his testimony, Haya received a probationary sentence rather than the 35 or 40 years in prison that the police told him he would get if he did not incriminate the respondent (R. p.33). Haya could not help the police with Stinson or the other co-conspirators as they had been caught red-handed with the contraband in their possession. He had to bring in someone else. Who better than an attorney?

The record clearly shows that at his first interview with the police, Haya claimed that it was Ben Stinson who had approached him and got him involved him in this illegal activity (R. ps. 127 and 129). But this was not good enough because, as stated above, Stinson was caught with the goods in his possession. Haya was in a quandry - if he told the truth, he could not get the benefit of the "substantial assistance" offered by the state and would go to jail for what he thought would be 35 or 40 years - if he lied, and incriminated someone else, he would get probation, go home and rebuild his life.

It was obvious what course of action he chose to follow. He lied. But who was he to incriminate? First he tried to incrimnate a man named Fallon; that didn't work (It is known that Haya and Jerry Green had tried to work another drug operation with this man [R. p.148 and 160]). Haya's attorney friend had flown the plane and had been at his home at an unfortunate moment, maybe that would work. Obviously, it did.

But Haya did not know what he was supposed to say to the police. His house had been under surveillance at one time when respondent was there. But he had already told the police that he didn't know whether respondent was involved (T. p.131) and that it was Stinson who had approached him on a deal to import marijuana (T. ps. 127 and 129). He did not know what was expected of him - "LEAD ME DOWN THE ROAD", Haya tells the police (T. p. 134), lead me down the road. In other words "You ask the questions, suggest the answers that you want to hear, and I'll confirm whatever you want me to confirm". That is exactly what transpired and that is exactly why respondent is now before this Court.

Now, Haya claims that he was not telling the truth at that first meeting with the police (R. p. 130).

Haya is incredible and for the Referee to have closed his mind to the proven lies and distortions admitted by Haya is absolutely incredible and to recommend conviction of a lawyer, who otherwise has a blemish free reputation and record, shocks ones conscience.

It would seem to this writer that clear and convincing proof of the extent of respondent's alleged participation should have been a prerequisite for conviction. Since proof was non-existent, the conviction should be set aside.

7. Finally, the Referee found that respondent initiated Haya's introduction to the scheme and was Haya's mentor. Other than Haya's "word" there is no factual basis for this finding. As stated above, Haya had previously testified that it was Stinson, not respondent, who had introduced him to the scheme; it was Stinson who purchased the first plane and found the second plane for Haya; it was Stinson, not respondent, who had the contact in Jamaica; it was Stinson, not respondent, who flew the plane; etc., etc., etc.

8. The Referee found that respondent had attended meetings where the marijuana importation scheme was discussed. Frankly, this finding poses a more difficult problem for respondent as at least here the Referee did not rely soley on the word of Angel Haya. One of Haya's co-conspirators, Jerry Green, appeared at the eleventh hour to bolster the Florida Bar's case.

Green was arrested along with Haya, Stinson and others on September

26, 1982, but until the date of the hearing before the Referee, more than three years later, to respondent's knowledge, Green had never testified against respondent or anyone else for that matter.

Accordingly, not only must Green's testimony be closely scrutinized, but his motives for testifying must also be studied.

Green at least does not blame respondent for getting him involved in the conspiracy. He says that Haya and Stinson got him involved (R. p. 151).

At page 139 of the Transcript, Green states that a meeting took place at respondent's office where the discussion centered around how much money it would take to buy an airplane. Green says "I don't remember exactly what was taking place. They was in the process, I think . . . of buying an airplane."

At page 140:

> Q. Was it discussed at this first meeting where the drugs were going to come from?
>
> A. I don't recall. I couldn't really say at that point in time.

He does recall that there was some discussion about respondent having a pilot's license and that he needed to get checked out in the plane in order to obtain insurance.

Green further states that a discussion took place about how much money Haya was due from Stinson as a result of Stinson crashing Haya's plane and that Stinson had "put a note on his house or something . . ."

At page 142:

> Q. During that first conversation did Paul Marks say say anything that you can recall in reference to the drug transaction? Did he make any statements?

A. Not that I can pinpoint.

Ten days or two weeks later, a second meeting took place at respondent's office. At page 143, the following dialogue took place:

> Q. Do you recall any specific statements that Mr. Marks made at the second meeting in reference to the drug transaction?
>
> A. No, sir, I don't.

The next alleged meeting took place on September 25, 1982 (R. p. 145) the day before Haya's and Green's arrest at Haya's home.

> Q. At Mr. Haya's home did Mr. Marks make any statements that you can recall?
>
> A. No, sir. Mr. Marks and Mr. Haya was over in the corner talking when I got back and I never did really talk to Mr. Marks that day.

The next alleged meeting took place at a restaurant in Tampa where Haya, respondent and one Terry Hernandez were allegedly present. At first Green cannot remember any discussions about a drug deal (R. p. 147), but then at the prodding of counsel for the Florida Bar, Green recalls that somebody said something to him about a drug deal but he does not recall exactly who that person was. He does say at page 148 that it was Haya who sent him to Jamaica.

However, this meeting at the restaurant never took place. Jan Marks, respondent's former wife, testified at page 184 that she, respondent and Haya were at lunch one day when Green came in, stopped at the table, said something and then went on to join another person at another table. At page 186 she states that she had never laid eyes on Terry Hernandez until the day of Haya's arrest when he appeared at her home, in direct conflict with Green's restaurant story.

The balance of Green's testimony relates to his involvement with Haya, and Stinson in processing the drug operation. He makes no reference to respondent as a participant in the scheme, nor could he, as respondent was not a participant.

In summation, Green did not know much of anything. In the 9 pages of transcript in which the Florida Bar attempted to elicit incriminating testimony from Green about respondent, Green answered "I don't remember", "I don't know", "I don't recall" or words of a similar nature at least 19 times. He, like Haya (when first arrested) didn't know what he was supposed to say about respondent, except that whatever he said it could not be anything good, if he wanted the Bar to help him.

Green had been convicted of trafficking and conspiracy to traffick in marijuana in December, 1985, was sentenced to 4 1/2 years in prison a little more than a week before the hearing before the Referee, was in jail at the time of the hearing, and was hoping that he would be "offered something" in the nature of a reduced sentence in exchange for his testimony (R. p. 167).

Though not a part of the record before this Court, Green's sentence was reduced by 1 1/2 years shortly after the Referee's hearing. It appears that Green's wish came true.

In conclusion, Green's testimony is tainted by his own self-interest and furthermore does not in fact corroborate Haya. It does not convict respondent for the very reason that nowhere does he say with any degree of certainty that respondent heard anything or said anything that would indicate that respondent had actual knowledge of what he, Stinson and Haya were planning.

Respondent's testimony is clear and unambiguous. It is the story of an unsuspecting attorney, not versed in the criminal practice of law, who in attempting to serve his client in civil matters, naively allowed himself to be made the scapegoat for his felonious client. It is indeed unfortunate that this respondent did not realize until too late what was being done to him.

The record is absolutely devoid of evidence tending to show that respondent commited a criminal act. Every action taken by respondent during the course of the incidents in question was open and above-board. After the first plane crashed, he prepared a note and mortgage whereby the person who suffered the loss received a modicum of protection in the event the debtor, Stinson, was unable to repay him for his carelessness. Respondent received a form bill of sale and title transfer papers to an airplane and at his client's request, filed the same with the F.A.A.

He at one point flew an airplane that ultimately was used in an attempt to smuggle marijuana into Florida, but he did so openly and without guile. For his client, he attempted to have himself made the insured pilot so that the plane could be insured. He even had it entered in his flight log book.

It wasn't until the evening of Friday, September 24, 1982 that respondent had strong suspicions that Haya and Stinson were up to no good. But it was not until the next morning that he learned for sure what was going on, i.e. that Haya, Stinson and Green were attempting to smuggle drugs into the country. Respondent had stopped at Haya's home rather than wait two hours for his son's soccer practice to conclude. Certainly, if respondent were the desperado Haya makes him out to be he could have

phoned; that certainly would have been safer. Perhaps respondent should have called the police at that point in time, but he did not, and perhaps for this he deserves a reprimand, but a lengthy suspension as recommended by the Referee or disbarment as sought by the Florida Bar seems unduly harsh under the circumstances of this case.

> "The power to disbar or suspend a member of the bar ... is not an arbitary one to be exercised lightly, or with either passion or prejudice. Such power should be exercised only in a clear case for weighty reasons and on clear proof." The Florida Bar v. Bass, 106 So.2d 77 (Fla., 1958)

What criminal or unethical acts did respondent commit? He did not advise his client of means by which he could break the law and not get caught. He did not buy or fly the planes feloniously, he did not chart their courses, he did not handle any marijuana, he did not possess, deliver or otherwise dispose of marijuana. In short, respondent committed no act of which he is ashamed, no act for which he should feel remorse (except that he did not call the police when he discovered with certainty what he client was up to), no act for which he should be suspended or disbarred by this Court.

The Florida Bar, in its initial brief, leads one to believe that it would have been merciful had respondent only freely admitted a guilt he does not possess. Does the Florida Bar really believe that it is so omnipotent that it should be begged for forgiveness even from those whose actions do not require forgiveness. Respondent stole no money from a trust account that he can replace and then say "I'm sorry." Respondent did nothing wrong and cannot and will not apolgize.

Respondent respectfully submits to this Court that the proof of respondent's alleged wrongdoings was not clear; that the Florida Bar failed miserably in carrying its burden of proof, and that the Referee's recommendations were "clearly erroneous or lacking in evidentiary support" so as to warrant reversal in accordance with this Court's ruling in The Florida Bar v. McCain, 361 So.2d 700 (Fla.1978).

CONCLUSION

Respondent agrees with the Florida Bar on one point and one point alone and that is in the proper case this Court should treat severely attorneys who abuse their office and participate in drug trafficking. But the Florida Bar would require very little proof of wrongdoing by the attorney while respondent would require very stringent proof.

In the instant case there is no proof whatsoever that respondent used his office as an attorney to further his client's criminal activities.

Accordingly, respondent prays that this Court will reverse the Referee because his recommendations are clearly erroneous and unsupported by the evidence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail on this 12th day of May, 1986 to David R. Ristoff, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607.

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