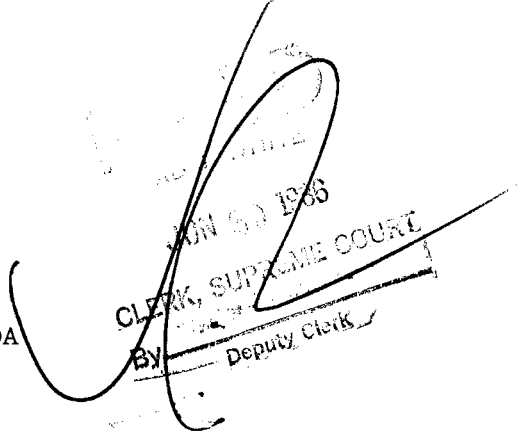

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant

vs:

JUSTIN JEROME LIPMAN

Respondent

CASE NO. 67,262
TFB CASE NO. 01-81N15

REPLY BRIEF OF RESPONDENT

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CITATIONS OF AUTHORITY

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PRELIMINARY STATEMENT

The designations used by the referee and the Florida Bar shall be used here. The headings of Complainant's brief are used but are, when appropriate, changed for purposes of this brief. Complainant's brief is referred to as CB. The Respondent is referred to as Respondent but, more often by the personal such as "I" or "My" Argument is contained in Statement of the Case and Facts as there is a difference of opinion in certain areas.

Oral argument has already been requested.

SUMMARY OF ARGUMENT

The Bar objects to my statement of the facts and the case because they place the Bar in an unfavorable light. This may be true but those facts as stated by me are correct. The statement of the case by the Bar is not complete in that it does not refer to any of the evidence introduced by myself at the hearing as to earlier intentions of the Bar.

The referee erred in failing to grant my Motion to Dismiss as the same was in violation of my constitutional rights. The McCain case clearly shows that if a statute of limitation does not exist in proceedings such as this, laches does exist. There are four elements to laches and all four fit in this particular case in that there was (1) conduct, (2) knowledge and opportunity by the complainant to bring action, (3) lack of knowledge on my part and (4) injury and prejudice.

The referee erred in failing to grant my motion for continuance and that the same constituted a violation of my constitutional rights pursuant to the 14th amendment to the United States Constitution.

The findings of fact by the referee are not supported by the evidence. This is painstakingly pointed out in the initial brief and counsel has not answered any of the arguments set forth in the initial brief. The case of Lipman vs State certainly supports my allegation that I was convicted by an overzealous prosecutor.

The referee's recommendations of guilt are not supported by clear and convincing evidence as the only real testimony is that of Massoud's, which is not corroborated.

The referee's recommendation of disbarment is not appropriate in that I have explained why I pled to a misdemeanor. In view of the fact that I have a clean record, I fail to see where I have anti-social tendencies which need to be corrected. I fail to see why refusal to admit something that is not true constitutes lack of rehabilitative qualities.

STATEMENT OF THE CASE AND FACTS

Counsel starts off by rejecting my rendition of the Facts and Statement of the Case. He further states that it (Respondent's Brief) contained "immaterial, contradictory and impertinent argument---" and that the facts presented were not "in the light most favorable to the Bar---". (P2CB)

It is to be noted that Complainant's Brief does not allege that my statement of the Facts and Case are false. I attempted to show the facts that were not controverted by either side. (See page 4 - 1st sentence of Respondent's Brief). If these facts happen not to be in a light most favorable to the Bar - so be it.

The Bar adopted the Findings of Fact by the Referee. It was certain of those findings that were objected to by the Respondent. Therefore, it was felt that those Findings were inappropriate for the Statement of the Facts.

The Bar's Statement of the Case is correct but incomplete. The Statement of the Case by the Respondent is correct. The exhibits introduced into evidence at the hearing tend to prove same. The Bar fails to mention that they did not proceed after the Grievance hearing, after indicating to Respondent and his Counsel that they were going to proceed. It is true that this Court entered an Order allowing the Bar to proceed but it should be remembered that,(1) the question of the Bar's delay was not raised in the Petition to Terminate Suspension, (2) the Bar did not act for an additional seven months after the Order terminating Suspension and (3) the question of time can certainly be raised. The fact that counsel was appointed

in May, 1985 is irrelevant. It could, however, be pointed out that his wife had been Bar counsel long before May, 1985.

The Referee did not set the final hearing "on that date" (September 6, 1985) but set the hearing in October, 1985.

ARGUMENT

THE REFEREE DID ERR IN DENYING RESPONDENT'S PRE-TRIAL MOTIONS

(a) Motion to Dismiss

A hearing was held on September 6, 1985 in Panama City. When Respondent arrived at the hearing he assumed it was being reported. For reasons unknown to the respondent, it was not reported. It is true that the referee found that "The Florida Bar has proceeded expiditiously in this matter". But, was this a correct finding? It is my position that the finding was not correct for the following reasons, (1) my position was prejudiced by the death of Massoud. Can anyone state with certainty that Massoud would have testified the same way at a Referee hearing that he did at the trial - especially since he would not have had a Jerry Allred questioning and coaching him and (2) the taking of one's livlihood (property) without due process such as (a statute of limitation) is certainly violative of the Constitution of the State of Florida and the United States. This is a fundamental right.

Counsel, in his brief, refers to the case of The Florida Bar vs McCain 361 So2d 700. I would also cite this case for the proposition that if a Statute of Limitations does not exist, laches does exist.

The McCain case involves a situation where a former justice was before the Court on a complaint filed by the Florida Bar alleging

facts which had occured many years prior to filing. But, except for that point, any similarity between that case and my case is non-existent.

In that case, the Court found that the Bar had acted expiditiously because McCain was a Supreme Court Judge at the time of the alleged improprieties. The Bar could not have acted even if it wanted to. Further, the Court found that the Bar could not have acted towards McCain until the Court told it how to proceed against a former jurist. In my case, (1) I was not a judge in 1981 and was never a judge and (2) the Bar knew how to proceed against me.

The Court in the McCain case set for the criteria for establishing laches. The Court (page 705) states as follows:

> A suit is held to be barred on the ground of laches where, and only where, the following appear: (1) conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is raised: (2) delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute the suit;(3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant. All these elements are necessary to establish laches as a bar to relief. 21 Fla Jur, Limitation of Actions, Section 94. (Emphasis Supplied)

I would examine my case in the light of the above principles, (1) as far as conduct is concerned - I was indicted in 1980 and tried in 1981. The grievance committee found probable cause in 1981. (2) The Claimant (Florida Bar) had knowledge of all of the facts in 1981. There has been no new evidence uncovered since 1981. (3) The respondent was, at first, led to believe that the

Bar would proceed against him by virtue of the letter from Laura Keene (See exhibits of Respondent). Further, these same exhibits show that Laura Keene was appointed bar counsel in March, 1982 to proceed in my matter. Still nothing happened. The undersigned asserted at the unreported hearing on September 6, 1985, that he had been led to believe that the Bar would not do anything after it had failed to act and after I voluntarily remained out of practice for one and one half years after the 1st DCA had reversed my conviction (See Lipman vs State 428 So2d 733). Even after I was re-admitted, the Bar did not proceed for seven months. I was led to believe that the Bar would settle for a period of probation and the retaking of the ethics portion of the bar examination. Even Mr. Bateman admitted (HT 264) that there had been negotiations but never alluded as to what these negotiations were (see p 267 HT). (4) Injury or prejudice is obvious - the death of Massoud previously referred to; lack of means for counsel; uncertainty resulting since the filing of the complaint four years later.

I believe the above certainly shows laches on the part of the Bar and, I further believe, that the above was compounded by the failure of the referee to grant my motion for continuance.

The Complainant's brief (P 10) states that because I was suspended until December, 1984, the "public and legal profession were protected during the interim". Is that sufficient? His own brief cites Florida Bar vs Wilson 425 So2d 2 on page 21 of same. Since I was only on suspension during this time, would this not be viewed by the public as a "slap on the wrist"? Further, how was the "public" ever harmed in the first place when no complaints had ever been filed

against me by a client. What about my rights?

(b) Motion for Continuance

The case cited above (McCain) certainly shows how I was prejudiced by denial of my motion. If I had independent counsel handling this matter so that I could take the time to earn a living, perhaps he would have found this case and perhaps I could have testified, in more detail, just how I was prejudiced by the delay.

The statement that "any man who represents himself has a fool for an attorney" is certainly applicable here.

The attorney for complainant did respond to my motion for a continuance as sated on page 11 of his brief. But he did not need to have bothered. I received the referee's denial of my motion (without hearing) on the same day I received counsel's response.

My reason for not having an attorney now is pointed out on page 14 of my initial brief. Even the time period set for in complainant's brief is not sufficient time.

There is no inconsistency in my arguments as alluded to by counsel in his footnote on page 13 of his brief. It is one thing when the Bar waits four years to prosecute and quite another when the one being prosecuted asks for a sixty day delay because he has been put into that position by the actions of the Bar.

It is my impression that the facts certainly support the proposition that in failing to grant a continuance, considering the severity of the charge, certainly amounted to a violation of my constitutional right of due process and this is error.

ISSUE II

THE REFEREE'S FINDINGS OF FACT ARE NOT SUPPORTED BY THE RECORD

I find no fault with any of the cases cited by counsel. I recognize that the findings of the referee come to this court clothed with the presumption of correctness. I have painstakingly pointed out in my initial brief just how the referee was wrong. I have met the initial burden. The referee based his entire findings on the testimony of Massoud. The referee made two "typographical errors" - that which was pointed out on page 3 of Complainant's brief and one which was pointed out by myself on page 21 of my brief ("several phone calls"). These may be classified as typographical but the other errors are more substantial. This has already been pointed out to this court.

Was I convicted by an overzealous prosecutor? When was the last time a person was charged with violation of the STATE charge for counterfeiting? When was the last time anyone was charged with violation of Florida Statues 831.18? How often would a person who was not charged on the Federal level be charged on the state level? It was apparent to the Court in Lipman vs State 428 So2d 733 - why is it not apparent now? The court in that case stated:

> We are not unmindful of the many cases which have determined that, where the record as a whole overwhelmingly supports a finding of guilt, error in the form of improper questions or comments by the State is only harmless. (Cases cited) Where, however, the evidence presents a "close case" and the jury's verdict hinges on the defendant's credibility, "we must give particular careful attention to any proper and prejudicial remarks." Richardson vs State 335 So2d (Fla 4th DCA 1976)

> In this case, which hinged to a great extent on the jury's determination of who was more credible - Massoud or Lipman - we conclude that the prosecutor's remarks could well have prejudicted the accused and we are, therefore, compelled to reverse.

Enough said.

Counsel has not taken issue with any of my arguments as to the specific findings of fact. Therefore, no further review is needed here.

ISSUE III

THE REFEREE'S RECOMMENDATION OF GUILT IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

This has been pointed out again and again in my initial brief and was certainly shared by the Court in the Lipman case (cited before) and needs no further elaboration here.

I would take issue with counsel when he states (p 21-22) that Massoud's testimony was corroborated by Clarice Wilson and documentary evidence. I would ask - what testimony - what documentary evidence? The testimony of Clarice Wilson is commented on pages 22-23 of the initial brief and the grand jury testimony is there to be read. The only documentary evidence consists of phone records, a lease and checks - none of which tend to prove any complicity with counterfeiting and which, at best, are subject to more than one interpretation.

It is interesting to note that no where in counsel's brief does he actually discuss the facts in particular except to adopt the findings of the referee as "facts" (p 2 CB) and to state that they are supported by the record (p 14 CB). He also states that the referee did not find my version credible (p 16 CB). It is felt that the referee did indeed misconstrue the evidence.

ISSUE IV

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS NOT APPROPRIATE ON THE FACTS OF THIS CASE

On page 266 HT, I explained why I pled nolo to a misdemeanor. Therefore, the statement of counsel (p21 CB) that I did not contest the inference is in error. I have never admitted guilt in this matter and I never will.

Counsel talks about disbarment as being better able to provide "an opportunity for the Respondent to attempt to rehabilitate himself and to correct any anti-social tendencies which would need to be corrected before he could again practice law." (p 21CB).

What "anti-social" tendencies? I was in practice for 25 years with only one prior minor matter (see page 4 of my initial brief which matter I brought to the Court's attention.) There are not now nor have there been any complaints filed against me by clients. I voluntarily stayed out of practice for 1½ years after my conviction was thrown out. I even introduced a check written out of sequence (p 29 of initial brief). In fact, counsel in his brief gives a left handed compliment (p 12 CB).

I submit that the referee chastised me for failing to admit something that I was not guilty of.

The cases cited by counsel are of no relevance here.

CONCLUSION

The undersigned requests that this Court will reject the report of the referee as being clearly erroneous as to Count I of his report and that the respondant be permitted to remain in practice.

Respectfully submitted,

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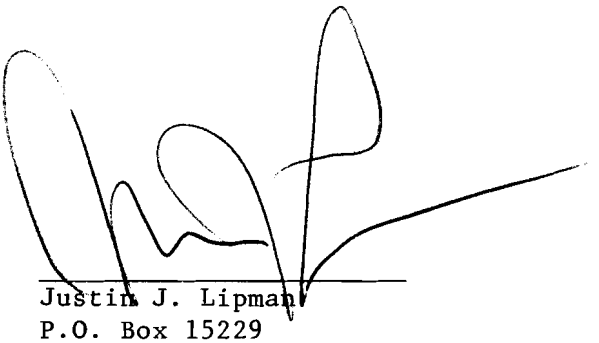
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Reply Brief was mailed to Thomas H. Bateman, III, Counsel for the Florida Bar, 3722 Lifford Circle, Tallahassee, Florida 32308 on this the 27th Day of June, 1986



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