IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,646

THE FLORIDA BAR,
Complaintant.

vs.

MARVIN S. DAVIS,
Respondant.

PETITION FOR REVIEW
OF THE REPORT OF THE
REFEREE

BRIEF OF RESPONTANT
IN SUPPORT OF PETITION

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RESPONDANT PRO SE.

TABLE OF CITATIONS

OTHER CITATIONS.

TABLE OF CONTENTS.

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This petition for review is from the report of the Referee dated July 13th, 1987. The Courthas jurisdiction under Article V, Section 15 of the Florida Constitution.

STATEMENT OF THE CASE

This case arose from events which took place on June 4, 1986, during a juvenile hearing before then Circuit Court Judge Dominick J. Salfi in the morning and a sentencing hearing before Circuit Judge Kenneth M. Leffler in the afternoon.

Then Circuit Judge Dominick J. Salfi filed a complaint with the Grievance Committee of the Florida Bar on or about June 30, 1986. Judge Leffler filed no complaint.

A hearing on the complaint was held pursuant to notice, by the Grievance Committee on August 26, 1986, with violations of

Respondent filed an answer, motion to dismiss, and motion to purchase transcripts on or about December 11, 1986.

A final hearing was held on April 24, 1987, and on April 30, 1987 before a referee. At the conclusion of the final hearing, the Respondent's motion to dismiss was denied.

The report of the referee was filed under the date of July 13, 1987. In that report, the referee recommended that the defendant be found guilty of the following disciplinary rules of the Florida Bar's Code of Professional Responsibility: 1-102(A)(5) for conduct prejudicial to the administration of justice, and 1-102(A)(6) for misconduct adversely reflecting on his fitness to practice law.

The referee further recommended that respondant be publicly reprimanded, that he be required to pay all costs amounting to $2,442.30 and that he be placed on probation for a period of two years and undergo evaluation.

On September 21, 1987, a Petition for Review of the referee's report was filed by the Respondant following a decision of the Board of Governors not to seek a review.

STATEMENT OF THE FACTS

On June 4, 1986, the Respondant appeared before then Circuit Court Judge Dominick J. Salfi, representing a juvenile in a violation of probation hearing. Then Judge Salfi had scheduled a special pre-trial conference for June 2, 1986 of which Respondant had received no notice. Then Judge Salfi had issued a capias for the juvenile for failure to appear.

Respondant, learning that the capias was issued and the juvenile case taken off the trial docket, attempted to speak with the Assistant State Attorney on the case. Failing in that attempt, Respondant and his assistant went to the chambers of then Judge Salfi where Respondant was advised to go to then Judge Salfi's Court.

In the court room, Judge Salfi pronounced the Respondant intoxicated and directed the Respondant to report to the Seminole County Jail for a breath test. No transcript was made of this proceeding.

The results of the breath test were .110% and .098% for the first and second tests which were conducted at 12:21 and 12:22 p.m. respectively. Respondant told the officer administering the test that the only thing he had taken that day was a dose of cough syrup in the morning.

The Respondant then appeared before Judge Kenneth Leffler at 1:30 that same afternoon. A transcript of that sentencing hearing was made and is a part of the record in the instant proceeding.

A plea bargain for the defendant had been agreed upon. However, he withdrew in the best interests of the client.

That same afternoon, at 4:00 p.m., then Judge Salfi held a special hearing in chambers. No transcript was made of that proceeding. Then Judge Salfi indicated that Respondant should contact Florida Lawyers Assistance, Inc. without delay.

Respondant did so on June 6, 1986 and was interviewed by Charles Hagan, Director on June 9, 1986. Mr. Hagan advised the Respondant that unless the Respondant underwent evaluation in a Miami, Florida facility immediately, then Judge Salfi would file a complaint.

Respondant felt that then Judge Salfi had violated Respondant's rights in that:

1) There were adequate facilities in the Central Florida area which were competentto do such an evaluation.

2) Then Judge Salfi had no right to any confidential report on the Respondant for the use of said Judge without any safeguards for the protection of Respondant and his family.

When Mr. Hagan informed Judge Salfi of the Respondant's decision, charges were then filed with the Grievance Committee on June 30, 1987.

POINT I

THE RECOMMENDATION OF GUILTY BY THE REFEREE IS CONTRARY TO LAW AND TO THE WEIGHT OF THE EVIDENCE

ARGUMENT

The Respondant in the Grievance Committee hearing called four witnesses, his assistant, the juvenile and her two parents, as well

as testifying himself.

The Respondant, in the final hearing, called his assistant and Mr. Hagan in addition to testifying himself. Respondant had lost contact with the juvenile and her parents, however, their testimony was entered into the record of the final hearing. Not only did the referee completely ignore this testimony in its entirety, but also ignored testimony of witnesses called by the Florida Bar elicited on cross examination which supported the innocence of Respondant. Thusly, the referee "rubber stamped" the findings of the Grievance Committee which had originally "rubber stamped" the complaint by then Judge Salfi.

BASICALLY, THE EVIDENCE AT THE HEART OF THIS case is that of Judge Leffler on the one hand, who Respondant submits was candid and forthright, and the testimony of former Judge Salfi whose recollection was vague and sketchy. The remaining major evidence against the Respondant was the results of the breath test taken by the Respondant on June 4, 1986.

Respondant, his assistant, the juvenile and her two parents all testified that Respondant was not drunk on June 4, 1986. Respondant has consistently testified that he could not explain the test results of the breathalyzer. Respondant has neither the time or resources to raise a defense such as the one in State v. Everett, 4 Fla.Supp 2d (Brevard Cty.1984) where the defendant's motion to surpress a breathalyzer reading on the grounds that the machine was susceptible to radio frequency interference and was unreliable would be granted unless the State could demonstrate otherwise.

Respondant is at complete loss to explain the breathalyzer test results.

Because the recommendations of the referee are not supported by the weight of the evidence, his findings should be quashed. The Florida Bar v. Johnson, 313 So.2d33 (Fla. 1975).

POINT II

EVEN IF THE RESPONDANT IS GUILTY THE RECOMMENDATIONS OF THE REFEREE AS TO DISCIPLINARY MEASURES ARE TOO SEVERE

The referee recommends that the Respondant be publicly reprimanded, that he be ordered to pay costs andto be placed on probation for a period of two years. As a condition of probation, Respondant is required to undergo evaluation for alcohol abuse.

When deciding what punishment is proper in a Bar discipline case, a number of interests are to be balanced. As this Court stated in Florida Bar v. Pahules, 233 So. 2d.130 (Fla. 1970):

> First, the judgement must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as the result of undue harshness in imposing a penalty. Second, the judgement must be fair to the Respondant, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgement must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The record does not show that any client of the Respondant was prejudiced in any way. With respect to the juvenile case before then Judge Salfi, the Respondant had appeared on two occasions before the day in question and on four occasions after the day in question. In the end, the charges against her were dropped. That case was taken by the Respondant on a gratis basis, as the father of the juvenile was a former client of the Respondant.

The client involved in the afternoon sentencing hearing received the benefits of the plea bargain negotiated by Respondant.

The record does not show any complaint filed by any client as the events of June 4, 1986 against the Respondant.

Respondant submits that the punishment of a public repremand is too severe.

With respect to evaluation of the Respondant for evaluation and treatment, Respondant submits that such evaluation was and is totally unnecessary. The Respondant from June 6, 1986 until December 31, 1987, will have participated in approximately 15 criminal trials including 4 capital cases as counsel for the defense. Respondant has been defense counsel in a number of criminal causes which either were dismissed or the subject of a plea.

With respect to the matter of probation, the Respondant submits that is inappropriate. At all times pertinent to this matter, Respondant has and does have a Florida Safe Driver's license. Respondant has had no traffic tickets of any kind. Respondant has never been arrested for any offense. Respondant has never been the subject of any disciplinary action by any authority whatsoever, from elementary school to the present.

In conclusion, Respondant submits that he is innocent of

the charges filed against him in the report of the Referee in this cause and that if this Court finds him guilty, that the punishment is too severe.

Respectfully submitted,

Marvin S. Davis

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of The Florida Bar, 605 East Robinson Street,Suite 61 Orlando, Florida 32801, and the Office of the Florida Bar, Tallahassee, Florida 32301-8226 this 22nd day of November, 1987.

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