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CLERK, SUPREME COURT

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(Before a Referee)

The Florida Bar,
Complainant,

Supreme Court Case

vs.

Howard Gross,
Respondent.

The Florida Bar File
Case No: 88-71,375(11G)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed **as** referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of the Florida Bar, hearings were held on January 17, 1992 and February 21, 1992. **The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits** all of which are forwarded to The Supreme Court of Florida with this report constitute the record in this case.

The following attorneys appeared **as** counsel for the parties:

For the Florida Bar: Warren J. Stamm

For the Respondent: Rhea P. Grossman

11. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. Respondent, Howard Gross, was the subject of an ongoing investigation conducted by the Dade State Attorney's Office and the Florida Department of Law Enforcement (FDLE) in reference to **the** alleged bribery **of** judicial officers.

2. In devising their "sting" operation the two agencies **placed a** fictitious defendant (Orlando Zirio) into the **Dade**

County jail system' for cocaine trafficking, conspiracy to traffic in cocaine and possession of cocaine on October 7, 1987. Undercover Agent Eugene Caso (a/k/a Ernesto Casal) posed as an agent for wealthy South American principals with recently acquired funds who wished to invest in the South Florida area. **Caso** sought legal assistance from Alan S. Rosenthal and posed **as** a representative for these foreign investors. Additionally, **Caso** sought help for a criminal matter connected with one of his "employees". Rosenthal referred Caso to Harvey S. Swickle regarding the criminal matter.

3. Previously, on September 24, 1987, Chief Justice Parker Lee McDonald of the Florida Supreme Court issued an Order authorizing the implementation of a dialed number recorder, more commonly known **as** a "**pen** register" and the installation of a trap and trace device on Harvey Swickle and Respondent Howard Gross' respective residences. Also, Agent Caso was subsequently equipped with **a** body bug utilized **to** record conversations between him and Harvey Swickle.

4. From approximately 3:55 p.m. on October 7th through 6:35 a.m. the following morning, Agent **Caso** engaged in numerous conversations with Harvey Swickle.

5. Throughout the course of these conversations, Caso

¹ In so doing, FDLE clearly violated the provisions of Florida Statute 839.13 which makes **it a** misdemeanor to falsify any records or papers filed in any judicial proceeding in any court of this state.

intimated to Swickle that he was engaged in questionable businesses with Latin American clients and that he needed to get one of his "runners" released from jail as soon **as** possible. However, Caso informed Swickle that he was unclear as to the actual details of the case (i.e., the charges, which jail the employee was in, his ties to the community, etc...) and purposefully fed the information to Swickle at a slow pace throughout the course of the evening.

6. At 5:55 p.m. on October 7th, Caso contacted Swickle and told him the Defendant was Orlando Zirio, arrested in Dade County with approximately a dozen kilos of cocaine. **Caso** reemphasized the urgency of getting the Defendant out of jail immediately. Swickle responded **as** follows: " Well, if he was arrested with that much, they won't set a bond on him until tomorrow morning, he'll have to go before a magistrate...ah, now **there's** a **possibility I might be able to get a bond set on him ah, tonight depending upon who the emergency judge is...**"

7. At 6:32 p.m. Swickle then placed **a** call to the Broward County Jail. He next called Agent **Caso** back at 6:35 p.m. and indicated that he had been unable to locate Zirio at the jails.

8, At approximately 7:25 p.m. Orlando Zirio **was** booked into the Dade County Jail by Florida Marine Patrol Officer Michael Florence and a \$250,000 standard bond was set. Subsequently, Officer Florence returned to the jail adding additional

offenses to Zirio's charges thereby raising the standard bond to \$750,000.

9. At 8:33 p.m., prior to his confirming the identity of the duty judge, Swickle expressed serious doubts **as** to getting Zirio released that night. He stated, "I don't think he, I can, I can get the emergency judge to reduce that tonight without a hearing, tell ya the reason why, ah, even if I could get him to do it he would look bad in the papers, OK. What they'll do is, they'll put that in, without a hearing, in other words, if, if I get the emergency judge to call up tonight and, and reduce the bond, somebody's gonna be asking questions tomorrow morning." **Caso** then pleaded with Swickle to do everything he could to facilitate Zirio's release that night.

10. In **an** apparent attempt to determine the feasibility of getting the bond lowered, Swickle desperately attempted to contact Judge Gross immediately after his 8:33 p.m. conversation with Caso, Thus, between 8:43 p.m. and 8:55 p.m., twelve telephone calls were placed from Swickle's home phone to Judge Gross' residence.²

11. At 9:11 p.m. **Caso** called Swickle with further information on Zirio **and** again expressed his need for help in this matter.

²The substance of the conversations between the Swickle and the Gross residences were not recorded. However, the successive calls placed within an eight-minute time span indicate that Swickle **was** unable to contact Judge Gross during this particular time period.

He further informed Swickle that his people would have no problem meeting a \$200,000 bond, Swickle then told Caso that he would call him as **soon** as he heard from "his guy". Specifically, Swickle related to Caso, "OK, I've already got a call into him, I'm just waiting to hear **back** from him now."

12. **At** approximately 9:17 p.m. pen register activity indicated an outgoing call placed from Judge Gross' residence to Swickle's residence. **Said** phone call had a 2 minute and **43** second duration.³

³**Again,** this conversation was not recorded by FDLE **as** it occurred prior to the signing of the Intercept Order by Justice Parker Lee McDonald.

13. While Swickle had previously expressed grave doubts as to his ability to get the bond lowered prior to his conversation with Judge Gross, immediately after speaking with Judge Gross, Swickle called Agent Caso at 9:25 p.m. and unequivocally stated, "...if I file an appearance on his behalf and represent him, we can **have the bond reduced tonight.**" He assured Caso that the bond would be reduced to **\$200,000.** Swickle stated, "I don't know what your situation is, I need a \$20,000 retainer, the bond will be reduced to **\$200,000.**" Caso responded that he **had** \$10,000 in his possession and would **attempt to** get **some** more money.

14. The sequence of events and the statements made indicate that the substance of the 9:17 p.m. conversation necessarily pertained to the details of Zirio's arrest and detainment. In fact, Judge Gross testified on cross-examination during the June 12, 1990 Disciplinary Hearing on Harvey Swickle that he had been informed of the charges against Zirio by Swickle just prior to his placing a call to Officer Wright at the Dade

County Jail Facility. Pen register activity confirmed two outgoing calls to the Dade County Jail placed at 9:20 p.m. from Judge Gross' residence.

15. At 9:46 p.m. Caso telephoned Swickle and informed him that he had the \$20,000 retainer. They then made arrangements to meet at the Marriott located at 6650 North Andrews Avenue.

16. At 10:33 p.m. Swickle met **Caso** at the Marriott and **Caso** informed Swickle that he was in possession of \$10,000 and would soon be receiving the balance. Swickle expressed concern over the **lack** of funds and stated, [that this] "...creates a problem, because, ahm, my situation is that I can't, I **say, I can't have someone do something unless they know that, that ah, I'm fully represented.**"

17. Upon **Swickle** having assured himself that Caso had at least \$10,000 on his person Swickle placed a call to Judge Gross' residence from the hotel lobby pay phone at approximately 10:45 p.m. The pertinent portion of their conversation proceeded **as** follows:

Swickle: Yeah, OK, I've, ah, I've got **the signed contract.**"

Gross: So they **did**, this man now **has** a lawyer.

Swickle: Yes sir.

Gross: OK, if you are his lawyer and you tell me those are the facts, I'll reduce the bond accordingly.

Swickle: Ah, what time you going to be in?

Gross: I'll be in, ah, probably eight fifteen.

Swickle: **Umm.**

Gross: I'll be there all day. I've got that murder trial.

Swickle: That's right. I am, I'm going to be tied up. How about if I meet you in the morning at the house.

Gross: Where here?

Swickle: Yeah.

Gross: Well, I don't care, it doesn't matter.

Swickle: About eight.

Gross: Yeah.

Swickle: OK.

18. The above outlined conversation between Swickle and Gross is sufficiently cryptic for the finder of fact to conclude that the attainment of "the signed contract" **was** in fact the parties' code that the funds with which to effectuate the bribery had been secured.⁴

19. Having been apprised of the necessary information, (the acquisition of the bribery money) at 10:47 p.m. Judge Gross placed a call to the Dade County Jail. Gross requested to

⁴ Judge Gross has testified that when he **asked** Swickle whether there **was** indeed a "signed contract", he was inquiring as to whether Swickle was in fact representing him. This query, Gross argues, was necessary for him to ascertain that the defendant had ties **and** that someone would be responsible for him. Although this may be a legitimate concern for an emergency judge to take into account when considering a bond reduction, it is unconvincing in this case. Gross either did not inquire about Zirio's obvious lack of ties to the community (no family, no property, no bank accounts) or did not give them any weight in his decision to lower the bond. Thus, his explanation for asking Swickle as to whether he had been retained **as** Zirio's attorney is inapposite,

Speak with Sergeant Wright and **was** informed that she had left for the evening. Judge Gross explained the purpose of his call and waited for **a** return call from the Jail to verify his identity. At 11:02 p.m. Judge Gross was called by Lieutenant Siddiqui from the **Dade** County Jail. At this time, Judge Gross instructed the Lieutenant to reduce Zirio's bond "...to two hundred thousand, on all counts."

19. At 11:25 p.m. Agent Caso telephoned the Swickle residence and communicated to Swickle that he now had an additional five thousand and that the remaining five thousand would be forthcoming. Swickle made arrangements to pick **up** the cash. Although the bond had already been lowered, Swickle deliberately kept **this** information from **Caso**. When Caso expressly asked if the bond had already been reduced, Swickle replied, "As soon as I get back over there, OK, I'll call them and they they can do it." Thus, it is evident that Swickle was attempting to secure full payment before delivering his part of the deal.

20. After picking up the \$5000 at 12:05 a.m. that night, Swickle tells **Caso** that **he** should call him as soon as the remainder of the money comes in and that he will pick it up early in the morning. He also states adamantly that he will pick up the money at around 7:00 a.m. **as** he has an 8:00 o'clock appointment.

20. At 1:00 a.m. **Caso** telephones Swickle to advise him that the final \$5000 **has** arrived and they arrange to meet at seven

at the hotel.

21. At 6:35 a.m. Swickle arrives at the Marriott and meets **Caso**. Caso delivers the last \$5000.

22. At approximately 8:00 a.m. on October 8, 1987 Swickle met Gross in the driveway of the Gross residence and handed him \$5000 in cash and a Nova University envelope containing \$1300 with the name J. Feinberg written on it.⁵ Cross testified that he took the money, put it in a desk drawer in his playroom and proceeded to leave his house.

23. Shortly thereafter, Respondent Gross was placed under arrest at his home. The \$5000 and the Judge's notes were seized. The envelope containing the \$1300 was overlooked **and** was later turned over to the authorities by Gross' criminal defense attorney.

24. Standing alone, the above outlined events would be sufficient to establish evidence of the offer and acceptance of a bribe by the Respondent. By presenting evidence that Judge Gross lowered a bond for an attorney's client in an emergency ex parte proceeding and then received a cash payment from that same attorney the very next morning, the Bar has met its burden of proof in establishing a prima facie **case**.

⁵ Testimony at this hearing has established that sometime prior to October, 1987, Judge Gross has recommended Harvey Swickle to an old friend, Howard Feinberg, for his son, Jay Feinberg who had been arrested for possession of cocaine. Although the Referee is sufficiently convinced that the \$1300 contained in the Nova envelope was given to Respondent Gross as an unlawful fee split, these charges have not been brought up by the Bar and are thus not considered.

25. Respondent Gross has testified that the payment he received from Swickle on October 8, 1986^{7-A}, was repayment of an old debt Swickle owed him. According to Gross, the debt was in the amount of \$15,000 and dated back to 1976 when Swickle and Gross shared office space.

26. For the following reasons, Gross' statement is found implausible. The only physical evidence of this debt is a piece of paper found in a jumpsuit in Gross' closet which purportedly listed payments made by Swickle to Gross in partial satisfaction of this debt.⁶ Oddly enough, however, the payments were all made within the course of eleven months and no payments were made prior to 1986. Thus, for a ten year period, according to Gross, Swickle never made any payments to Gross on this alleged debt.

27. Additionally, Judge Gross never reported this substantial amount of money owed to him by Swickle **as** an asset in his financial filings with the Judicial Qualifications Committee (JQC). Gross testified that he never thought about reporting it **as** it was not a "formal debt". Respondent Gross had also

⁶ Such informal documentation of the alleged Swickle/Gross loan is dubious when viewed in light of Respondent Gross' impeccable financial record keeping. Mr. Tarre, Gross' Criminal Defense Attorney, testified before the Referee that he requested Judge Gross to gather all his bank and brokerage statements, cancelled checks and other items from 1980 forward for the purposes of having an accountant perform a net worth analysis. Mr. Tarre stated that the gathering of information "...wasn't difficult, because he was very meticulous in his record keeping. That stuff was easily available. We did not have to write to banks or go to banks to have duplicates made of anything, or brokerage houses."

previously testified that he loved Swickle "**as** a brother". However, no matter how intimate their relationship was, it could not excuse Gross' failure to disclose the financial dealings between himself and Swickle. Swickle was a practicing criminal attorney who appeared frequently before Judge Gross and who had in fact received court appointments from Gross in the past. The underlying purpose of financial filings with the JQC is the publication of any possible conflict of interest. As a sitting Circuit Court Judge, Respondent Gross was fully aware of the significance of disclosing all possible conflicts, and thus his overt omission of the alleged debt is suspect.⁷

28. According to the Respondent, when Swickle appeared at his house on October 8th to make a payment on their long standing debt **he** stated, "Here is some of the money I owe you. I will clear everything **up** that I owe you by the first of the year." This testimony, however, is rebutted by Swickle's statements on October 8, 1987, following Swickle and Gross' arrest. Swickle, invoking **his** Fifth Amendment Right against self-incrimination, **did** not testify in either of the Bar proceedings. Therefore, the Florida Bar called Agent Coffey

⁷ Additionally Canon 5(c) of the Code of Judicial Conduct mandates that a judge should refrain from financial dealings which would involve him in frequent transactions with lawyers likely to come before the court. Thus, assuming that the Gross/Swickle debt was a reality, Respondent Gross was still in violation of the Judicial Canons by allowing Swickle to as much **as** appear before him without disclosing the relationship.

of the FDLE to testify regarding Swickle's post-arrest statements. Swickle's statements to Agent Coffey have not been considered for the truth of the matters asserted. Thus, they have been allowed in solely to show Swickle's state of mind at the time that he made the payment to Gross. Agent Coffey testified that Swickle claimed he had made arrangements to lower a bond with Gross two times. He claimed to have previously paid Judge Gross \$5000 for assisting him in lowering a bond in 1986 in the Carrandi case. Although Gross had not been the sitting duty judge on the Carrandi case, according to Swickle, Gross had made the arrangements for Judge Mastos to lower the bond. Therefore, in Swickle's mind, when he appeared at 8:00 a.m. at the Gross residence he intended to deliver the bribe money.

Of course, these statements standing alone cannot confirm that a bribe occurred nor can they be used to show Gross' state of mind. They simply come in to show that Swickle believed he was paying Gross for lowering the bond in the Zirio **case and** not for payment on any loan.

29. There is also significance in the time that the payment was made. It is highly unlikely that Swickle after having spent a virtually sleepless night running all over town would have felt compelled to meet Gross and make partial payment on a fifteen year old debt which **had** at one point remained completely unpaid for ten years. This, coupled with the fact that Swickle persisted in picking up the final \$5000 payment

from Agent Caso immediately prior to his 8:00 meeting with Gross, casts grievous doubt on Judge Gross' classification of the 8:00 a.m. payment from Swickle as repayment on a loan.

30. The Referee has considered the testimony of the various character witnesses which have appeared at this proceeding. However, none of the testimony presented touched upon the Respondent's reputation during his tenure on the bench and is of no help in this matter.

31. Having considered the evidence at the conclusion of both the Bar and Respondent's cases in chief, the Referee finds that the burden of clear and convincing evidence has been met by the Bar.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each count of the complaint I make the following recommendations, upon a showing of clear and convincing evidence, as to guilt or innocence:

I recommend that the respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of the Florida Bar and/or Disciplinary Rules of the Code of Professional Responsibility, to wit:

Rule 4-8.3(a) Reporting Professional Misconduct

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Rule 4-8.4(a)(c)&(d) Misconduct

A lawyer shall not:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do