IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOSE M. INSUA,

Respondent.

_____/

Supreme Court Case
No. 77,958

On Petition for Review

Answer Brief of Complainant

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INTRODUCTION

In this Brief, The Florida Bar will be referred to as either "The Florida Bar" or "The Bar". Jose M. Insua will be referred to as "Respondent" or "Mr. Insua". Other witnesses will be referred to by their title and surnames for clarity.

Abbreviations utilized in this Brief are as follows: "TR" will refer to the transcript of the final hearing which began on December 9, 1991 and concluded on December 12, 1991.

STATEMENT OF THE CASE AND OF THE FACTS

On May 15, 1991, The Florida Bar filed its complaint charging Respondent with misconduct which arose from his admissions under oath that he had brokered between ten and twelve aircraft knowing that they were going to be used to smuggle narcotics into the United States, that he had procured an aircraft for Andrew Barnes and John Torres for the purpose of smuggling controlled substances into the United States, and that he participated with a group who successfully imported approximately one to two thousand pounds of marijuana into the United States. (Complaint, Appendix "A").

A final hearing was held before the Honorable Jeffrey E. Streitfeld, on December 9, and on December 12, 1991. The Bar presented excerpts of Mr. Insua's sworn testimony as a confidential informant at the trial of United States of America v. Alfredo Duran, Case No. 89-802-CC-Kehoe, elicited on April 11-13, 1990. (TR 22) The Sworn testimony revealed that on February 12, 1988, Jose Insua entered into a plea agreement with the United States government which provided that he would begin cooperating with different agencies of the Federal Government and would be pleading guilty to a count of conspiracy to import in excess of five kilograms of cocaine. The conspiracy charge involved Mr. Insua's role in procuring an aircraft to be used for drug smuggling. (TR 13-14) At the trial, Mr. Insua also admitted that from 1986 to 1988 he had procured aircrafts for drug smuggling anywhere between ten and twelve times. (TR 14-15) He further swore that he leased an aircraft to a group who he knew would be smuggling eight thousand pounds of marijuana into the United States. (TR 15/19)

The Referee then took judicial notice of hi3 order granting a Motion to Quash Subpoenas filed by the United States Government as to the appearance of the Assistant United States Attorneys who dealt with Mr. Insua. (TR 23) The United States Government took the position that the plea agreement prohibited them from using any of Mr. Insua's statements against him in any forum, even in a disciplinary proceeding. (Motion to Quash, page 2, Appendix "C") The Florida Bar then rested its substantive case. (TR 23) Thereafter, Respondent's Motion to Dismiss the charges was denied by the Referee. (TR 28)

The Respondent then testified as the only witness in his case in chief. He described his involvement in his family business which leased aircraft and supplied aircraft parts to foreign governments. (TR 29) Respondent explained that in the 1980's the business was legitimate. (TR 30) In 1988, the Respondent was approached by the Federal Bureau of Investigation purportedly because of their "concern" about Respondent's brokering of aircraft. (TR 30) As a result, Respondent agreed that he would cooperate with the Government. (TR 33) Respondent went on to say that he has put his life and his family's life in jeopardy "for the government's interest of stopping this thing and joining in on the war on drugs.'' (TR 43) On cross-examination Mr. Insua admitted that a substantial reason for his cooperation was to obtain leniency from the Federal Government for his criminal conduct. (TR 56)

Respondent also stated that as to the ten to twelve acts of brokering airplanes for smuggling he had no actual knowledge of the

purpose that the crafts were to be used. He then asserted that there were two occasions where he "should have known" that criminal activity was afoot. (TR 44) He later stated that there were three to four occasions where he "should have known" of criminal activity. (TR 51) On cross-examination the Florida Bar asked Respondent why he did not state at the Federal trial that he did not "knowingly" engage in criminal conduct. (TR 63) At first, Mr. Insua stated that he was nervous. (TR 63) He later stated that Assistant United States Attorney John O'Sullivan told him to "not try to qualify his answers unnecessarily." (TR 68)

On direct examination Mr. Insua asserted that he bore no ill will toward the United States Government or The Florida Bar. (TR 49) On cross-examination, however, he blurted out that he had been used by the United States Government and the people who leased the aircraft. He continued on to say that he had been treated unfairly because others were not prosecuted and he was the only one in the "hotseat". (TR 65-66)

The Florida Bar presented Douglas Williams, an attorney, in rebuttal, as an expert witness. (TR 79) Respondent stipulated to Mr. Williams' qualifications as a well regarded criminal defense attorney who primarily practiced before the Federal courts. (TR 81) Mr. Williams asserted that the "should have known" defense also known as "deliberate ignorance" or "conscious avoidance" can be treated as the equivalent of actual knowledge. (TR 93-95)

Respondent presented Miguel Caridad, his Assistant Federal Public Defender in mitigation (TR 112) Mr. Caridad testified to his belief that Mr. Insua was a minor participant in the drug

smuggling scheme because his involvement was limited to obtaining aircrafts. (TR **119)** The witness also stated he believed Mr. Insua was rehabilitated. (TR **121)**

The Florida Bar presented Donald Bierman, as a witness in aggravation. (TR **98)** Mr. Bierman was one of the attorneys who represented Alfredo Duran. (TR 99) He testified that Mr. Insua has a very bad reputation in the legal community. (TR **102)**

The Referee found Respondent guilty of violating Rule **4-8.4(b)** and found Respondent not guilty of violating Rule **4-8.4(c)** because such **a** finding would be duplicitous. (TR **135-137,** Report of Referee page **2,** Appendix "B") Thereafter, although the final hearing was to be concluded on that day, the Referee expressed his concern to Respondent's counsel that he had not heard any persuasive testimony about the Respondent's good character or reputation or any demonstration that he has otherwise been an upstanding model citizen. (TR **168,174,176)** Respondent then requested a continuance to present further evidence in mitigation. (TR **177)** Over **the** Florida Bar's objection the request was granted. (TR **179,180)** The Florida Bar was given an opportunity to present further witnesses in aggravation. (TR **182)**

The final hearing recommenced on December **12,** 1991. Attorney, **Carlos** Castro testified on behalf of **The** Florida Bar in aggravation. (TR **192)** He asserted that in **1984** or **1985 he** employed the Respondent, as a salaried attorney. (TR **194, 197)** Within a year Mr. Castro discovered that Mr. Insua had been running his own practice out of the office, without the permission of the partners. (TR **195-196, 202-203)** Upon confrontation, Mr. Insua did not deny

the occurrences and was fired. (TR 197,207)

The Respondent's wife testified in mitigation. (TR 209) She stated that when the Respondent was first intercepted by the authorities he told her that he was thankful that it had happened since to date had not done anything really terrible, "but who knows in time what I(he) could have done." (TR 212) The Respondent presented his accountant, Raul Botana, in mitigation. (TR 219) He stated that he had recommended clients in the past to Mr. Insua and would continue to do so if Mr. Insua did not lose his license. (TR 223) Fransisco Ybarra, a private investigator, was presented as Mr. Insua's final witness in mitigation. (TR 230) Mr. Ybarra asserted that he would continue to send clients to the Respondent in the future. (TR 232)

Juan Carrera, an attorney, was produced as The Florida Bar's last witness in aggravation. (TR 239) Mr. Carrera explained that in 1984 he shared office space with Mr Insua. (TR 240) Mr. Carrera had received a telephone call from a client asking about the progress of his case. It was then that Mr. Carrera discovered that the client had given betwen $1,500 and $1,800 for Mr. Carrera to Mr. Insua. (TR 242) Upon confrontration, Mr. Insua admitted his wrongdoing and returned $1,100 to Mr. Carrera, (TR 243) Additionally, Mr. Carrera discovered that Mr. Insua had persuaded a secretary to place his name on an appellate brief to the Florida Supreme Court, when he had no involvement in the appeal or the underlying litigation. (TR 247-248)

As its final exhibit in aggravation, The Florida Bar presented the Respondent's driving record. (TR 254) The record reflected

that Respondent was driving without a license and failed to appear in court. (TR 264-265)

Thereafter, the Referee recommended that Mr. Insua should be disbarred. (TR 264) The Report of Referee followed. Respondent filed his Petition for Review and this appeal commenced.

SUMMARY OF ARGUMENT

Respondent's guilt was clearly established by his sworn testimony at a federal trial, together with his admissions to the Referee.

Additionally, the Referee was correct when he failed to find that Respondent's cooperation with the Federal Government was not a sufficient factor to mitigate discipline below a disbarment. Respondent expressed his ill will toward the Government by stating that he was unfairly prosecuted. Moreover, Respondent cooperated, once apprehended, and did so to obtain a lenient sentence. Further, much evidence in aggravation was presented which established that the Respondent began to act unethically almost as soon as he became a member of The Florida Bar in his law career, as well as his personal life. Thus, given the commission of various criminal acts, together with the existence of evidence in aggravation, disbarment is appropriate.

POINTS ON APPEAL

I

WHETHER THE FLORIDA BAR PRODUCED CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE FINDING THAT THE RESPONDENT WAS GUILTY OF VIOLATING RULE 4-8.4(b)?

II

WHETHER RESPONDENT FAILED TO PRESENT EVIDENCE IN MITIGATION WHICH WOULD REQUIRE THE IMPOSITION OF A LESSER DISCIPLINE? (RESTATED)

ARGUMENT

I

THE FLORIDA BAR PRODUCED CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE FINDING THAT RESPONDENT WAS GUILTY OF VIOLATING RULE 4-8.4(b).

Respondent is attempting to convince this Honorable Court that The Florida Bar has failed to prove that he committed criminal acts. Mr. Insua maintains that his admissions at a federal criminal trial, while under oath, together with his statements at the disciplinary trial should not have persuaded the Referee that he was guilty of the violations alleged by The Florida Bar because those statements were ambiguous or did not provide proof of the commission of criminal acts.

The following is excerpted from Mr. Insua's testimony at the federal trial.

ON DIRECT EXAMINATION

Questions by Assistant United States Attorney, John O'Sullivan and Answers by Respondent, Jose Insua:

A. Mr. Barnes and myself -- they wanted me to procure an aircraft for the purpose of smuggling controlled substances into the United States.

****

Q. Prior to that time, had you, on occasion assisted Mr. Torres and others in obtaining other aircraft?

A. Yes.

Q. On approximately how many occasions did you do that?

A. I would say anywhere between ten to twelve occasions.

Q. How far back does that go? When did you start doing that type of illegal activity?

A. That goes back to 1986.

Q. In addition, during that time, did you also participate with a group who attempted to import marijuana into the United States?

A. Yes.

Q. Did that marijuana make its way to the United States?

A. I believe some of it did.

Q. How many pounds of marijuana was it?

A. Approximately a thousand or two thousands pounds.

Q. That is what made its way to the United States?

A. I believe so.

Q. What happened to the rest of the marijuana?

A. It was taken.

Q. In what country?

A. In Mexico.

Q. What was your involvement in the smuggling scheme?

A. I leased an aircraft to some individuals who had a use for aircraft for smuggling purposes.

(TR 14-16)

****

ON CROSS EXAMINATION

Questions by Attorney, Edward Shohat and Answers by Respondent, Jose Insua:

Q. In fact, Mr. Insua, going back to the Spring of 1985, you began committing crimes, Federal crimes involving the negotiating and brokering of smuggling aircraft, did you not?

A. That's correct. I gave complete disclosure to the government.

(TR 16, Argument of Counsel deleted)

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Q. However, if we refer back to the Spring of 1985 -- if we go back in history, Mr. Insua, you began a criminal spree that included the brokering of at least twelve smuggling aircraft, correct?

A. That's correct.

(TR 18-19, Argument of Counsel deleted)

There is nothing ambiguous about Respondent's statements. He knowingly participated in a litany of criminal acts. Moreover, it is difficult to fathom Respondent's argument that the foregoing acts do not constitute criminal conduct. Additionally, as a result of being intercepted by the Federal Government while engaged in these illegal activities Respondent entered into a plea agreement with the United States Government which stated that Jose Insua would plead guilty to a count of a conspiracy as a result of his involvement in procuring an aircraft for the purpose of drug smuggling, provided that he rendered cooperation to law enforcement agencies. (TR 13-14).

In The Florida Bar v. Lancaster, 448 So. 2d 1019 (Fla. 1984), this Court held that an attorney was precluded from challenging actions which he stipulated were in violation of the disciplinary rules. The case sub judice goes much further. Mr. Insua's admissions, unlike Mr. Lancaster's were made under oath before a Federal tribunal. Further, this Respondent, like Mr. Lancaster, admitted his criminal conduct to the Referee. This Court found that a Respondent's admissions to a Referee supported a finding that the rules of discipline were violated. Lancaster, supra at 1023.

Questions by the Honorable Jeffrey Streitfeld, Referee, Answers by Respondent, Jose Insua.

A. In 1984, I got admitted. In 1985, I started having these problems. In 1986, 1987 and 1988, the agents come into my life and turn it upside down. It has been hell.

Q. What problems were you having in 1985 and 1986 and 1987?

A. I meant 1988. In 1986 and 1987, I didn't get an opportunity to develop my practice of law. I was a novice.

I feel that I could have developed that area more, that I could have expanded on that area more; that I could make a life out of this.

It was stupidity on my behalf. It's like a stupid kid. I never made a dime on any of this stuff. I never made any money on this.

This thing has turned me upside down.

(TR 47-48)

****

A. I am not here to say, 'Judge, I'm not guilty of anything.' I know I have done wrong.

(TR 66)

Although the Respondent ultimately did make admissions concerning his conduct to the Referee, at first he was far from forthright. At the Federal trial, Respondent admitted to knowingly engaging in various criminal activities, as previously excerpted. During the Bar disciplinary proceedings Respondent began to posit the novel theory that he did not knowingly engage in criminal activity, but rather, that he "should have known'' that he was engaging in criminal activity. Significantly, the Referee seemed perplexed at Respondent's sudden injecting of the "should have known" theory and wondered why Mr. Insua had not explained his conduct as such at the Federal trial.

Q. This is the heart of the case, Mr. Friedman.

Looking at Mr. Insua and listening to his additional testimony today, the admissions are significant and they are damning.

He has to come up with a persuasive explanation as to why he did not previously testify, "Yes, 1 participated in the sale of at least a dozen aircraft within a year of my getting my license to practice and participated in the importation of almost eight thousand pounds and **two** thousand pounds of marijuana, which actually got into the country, but I didn't know about it," but never ever saying, "I really didn't know about it and I was used." And he hasn't said that today.

That's the guts of the case. Why **was** there not qualifying to any of the answers in the Federal proceedings?

Why was that Mr. Insua?

A. I have no idea, sir.

You utilized the word "used". I feel that I have been used. I have used on both spectrums.

I have been used by the U.S. government and I have used also by people who wanted to lease aircraft.

I have been used **as a** stick, **as** an idiot and I have been thrown around.

You don't see any of these other people prosecuted. Even the owner of the DC-4 wasn't prosecuted.

You just see me in the hotseat. Mr. Insua in the hotseat. Mr. Insua has been in the hotseat through this entire thing.

Nobody else has been in the hotseat. Owners of the aircraft weren't prosecuted -- and they leased the aircraft to these people.

(TR *65-66*)

Clearly, Mr. Insua's responses to the Referee were not helpful to his cause. Nevertheless, because of Respondent**'s** "defense". The Bar presented an expert witness that testified that the "should have known" theory, also known as deliberate ignorance or conscious

avoidance for the purposes of criminal proof, would constitute actual knowledge. (TR 95)

Respondent has not provided any support for his theory that his admissions at a Federal trial, together with his admissions to the Referee cannot support a finding of guilt. Respondent is therefore suggesting that this Honorable Caurt is powerless to act with respect to an attorney who admits, under oath before a Federal District Court Judge that he has engaged in several acts of criminal conduct. The Bar has proven its case.

ARGUMENT

II

RESPONDENT FAILED TO PRESENT EVIDENCE IN MITIGATION WHICH WOULD REQUIRE THE IMPOSITION OF A LESSER DISCIPLINE. (RESTATED)

Initially, at the conclusion of the proceeding before the Referee Mr. Insua's testimony and presentation in mitigation was so utterly unconvincing that the hearing was continued to give the Respondent an opportunity to present something, anything in mitigation (TR 179-180). Respondent presented three further witnesses in mitigation. They were his wife, his accountant and a friend. Despite their testimony the Referee nevertheless concluded that there was not evidence sufficient to establish any mitigation. Respondent's argument to this Court suggests that simply because a Respondent presents a theory, a Referee must adopt it.

This Referee knew that Mr. Insua rendered cooperation to the Federal Government. The Referee, however, based on the testimony presented did not find that such cooperation should constitute a mitigating circumstance.

> During the course of two days of final hearings on this cause I closely observed the demeanor of the Respondent and carefully scrutinized his testimony. I was left with the distinct impression that Mr. Insua was anything but remorseful for the egregious acts he committed. In fact, at no point did he actually say, 'yes, I did these things with full knowledge of my actions and I am sorry.' Instead he blamed these acts on his own stupidity and seemed to believe that he deserved recognition for cooperating with the United States Government and their agencies. He fails to recognize that his cooperation is but a small price that he must pay for a series of bad acts spanning over at least a

> three year period of time. Consequently, I do not find that Respondent's cooperation should serve as a mitigating factor sufficient to avoid disbarment.
>
> (Report of Referee, page 3, Appendix "B")

It is well established that the Referee is charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors. The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991). The Referee did just that.

Moreover, in The Florida Bar v. Eisenberg, 555 So. 2d 353 (Fla. 1990), that Respondent was indicted for laundering drug money. As a result, he agreed to render cooperation to the government in exchange for leniency. This Court upheld the Referee's recommendation of disbarment despite the fact that the Respondent rendered assistance to law enforcement agencies. In The Florida Bar v. Pettie, 424 So. 2d 734 (Fla. 1983), Mr. Pettie was involved in one conspiracy and turned himself into the authorities. He presented evidence that he was a well respected lawyer and had no prior problems. Consequently, that Referee did not recommend that Mr. Pettie be disbarred.

The Referee in the instant case was presented with a completely different picture. The Referee perceived that Respondent was evasive, hostile and failed to recognize the gravity of his acts. (TR 147,150,152) In fact, Mr. Insua originally claimed that he rendered cooperation to the government because he wanted to join the "war on drugs" (TR 43) Only after cross-examination by The Florida Bar did he admit that he was motivated by his desire to reduce the criminal sanction to be imposed. (TR

55) Mr. Insua, unlike Mr. Pettie was anything but a well revered member of The Florida Bar. In fact, two attorneys testified to this Respondent's unethical behavior. Carlos Castro hired Mr. Insua in **1984** or **1985.** Mr. Castro terminated his employ a year later when he discovered that Mr. Insua was running a phantom practice out of the office. (TR **194-197, 202-203)** In **1984,** Juan Carrera shared office space with the Respondent. Mr. Carrera discovered that Mr. Insua had wrongfully obtained between **$1,500** and $1,800 from one of Mr. Carrera's potential clients. Respondent admitted his wrongdoing and returned $1,100 to Mr. Carrera. (TR **242-243).** Ms. Carrera also attested to an incident wherein Mr. Insua convinced a secretary to place his name on an appellate brief to this Honorable Court, when he had no part in its preparation or the underlying litigation. Mr. Carrera first noticed Mr. Insua's name when this Court issued its decision. (TR **247-248)**

This Referee was additionally presented with Mr. Insua's driving history which reflected that he was cited for driving without any valid driver's license and failing to appear in court. (TR **254)**

Based on the evidence and testimony presented it is not difficult to understand why mitigation was not found. The sanction of disbarment in the instant case is exceedingly fitting.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Report of Referee should be upheld.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Answer Brief was sent by Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Benedict Kuehne, Attorney for the Respondent at Two South Biscayne Boulevard, 1 Biscayne Tower, Suite 2600, Miami, Florida 33131 on this 30 day of June, 1992.

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