IN THE SUPREME COURT OF FLORIDA

CASE NO. 81-463

GRAFTON BERNARD WILSON, II

Petitioner/Respondent

-v-

THE FLORIDA BAR,

Complainant

PETITION FOR REVIEW OF REFEREE'S REPORT

AMENDED BRIEF OF PETITIONER, GRAFTON BERNARD WILSON, II

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STATEMENT REGARDING PRECEDENCE

Petitions for review in attorney disciplinary proceedings shall take precedence over all other civil causes in the Supreme Court of Florida, Rule 3-7.7(d) of the Rules Regulating the Florida Bar.

REFERENCES

The Petitioner herein shall be referred to as Respondent and the Florida Bar as the Florida Bar.

All references to transcript testimony of the hearing will be indicated by the designation "Tr." followed by the page number. References to the Referee's report will be designated by "Report" indicating the page number. References to exhibits will be indicated by the document name and the page number and references to depositions will be indicated by the designation "Depo", followed by the name of the deponent and the page number.

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WHETHER THE SANCTION OF DISBARMENT RECOMMENDED BY THE REFEREE SERVES THE THREE PURPOSES OF DISCIPLINARY ACTION ESTABLISHED BY THIS COURT IN VIEW OF THE EXTENSIVE EVIDENCE PRESENTED IN MITIGATION.

STATEMENT OF THE CASE

A hearing was held September 1, 1993 before the Honorable Raymond T. McNeal, Circuit Judge, sitting as Referee pursuant to an order of this Court. The Florida Bar was represented by John V. McCarthy and Respondent was represented by Nicholas P. Sardelis.

The Referee found Grafton B. Wilson violated Rule 3-4.3 (any act that is contrary to honesty and justice), Rule 4-8(b) (a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of The Florida Bar These acts also violated the Integration Rules, Article 11.02(3) (moral conduct involving dishonesty or conviction of a crime) and Disciplinary Rules 1-102(A)(3) (illegal conduct involving moral turpitude) and 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation) that were in effect prior to January 1, 1987. (Report 5-6).

The Respondent did not dispute that he was convicted by a New York State jury of Conspiracy in the fourth degree and Grand Larceny in the second degree. (Tr.9; 62-63). The convictions arose from a 21 page indictment charging six persons and two corporations with 11 counts dealing with the construction and operation of a nursing home in upstate New York. (Indictment). The indictment covered a broad range of activities occurring between 1983 and 1989, the great percentage of which did not involve Respondent.

There are 18 overt acts listed in the overall conspiracy count. Respondent is named in three overt acts and three counts. The balance of the counts deal with matters not suggested to involve Respondent and are separate business matters totally unrelated to Respondent or his actions. One of the three counts charging Respondent was dismissed before trial. (Tr.52-53). The conspiracy charged in the indictment alleges overt acts committed by Respondent in 1983 and that in 1987 Respondent delivered certain documents to the New York State Department of Social Services. The only active acts alleged in the indictment to have been committed by Respondent occurred in 1983, ten years ago. The alleged delivery of documents in 1987, was, as set forth in the testimony, during the investigative stage of this matter and was six years ago.

The Count dismissed prior to Respondent's trial his alleged participation in the filing of a false instrument. (Tr. 52-53)

The New York jury returned its guilty verdicts on April 14, 1992 after a trial lasting more than a month and the Respondent filed an appeal which is pending before the New York Court of Appeal. The trial judge followed the recommendation of the Florida and New York departments of probation and placed the Respondent on five years probation including the payment of $100,000 in restitution and $10,000 in collection charges to the State of New York. (Report 2). The prosecutor vigorously argued for a long jail sentence. (Tr. 54). The Respondent chose to begin serving the probationary period rather than seek a stay of sentence pending

appeal.

The Respondent stipulated to violation of the Rules Regulating the Florida Bar charged in the Complaint based in the convictions of record. (Report 9). His preparation for the hearing before the Referee was directed toward the presentation of evidence to mitigate the disciplinary action to be imposed.

Extensive evidence was presented in mitigation and directed toward the guidelines in numerous rulings of this Court establishing the purpose of attorney discipline. The Respondent maintained a law office in Gainesville, Alachua County for 17 years and before that had served up to and including the rank of Major in the Alachua County Sheriff's Office. (Sentencing Memorandum).

County Court Judge Crenshaw, by deposition, Circuit Judge, Benjamin Tench, by deposition, the State Attorney of the Eighth Judicial Circuit, (Tr.114), the Chief of Police of Gainesville, (Tr.144) and many others testified that the Respondent should not be disbarred and the public denied his services. Other witnesses testified in mitigation as to the extensive pro bono work Respondent has contributed to the poor, especially minority group members, and how he supported and fostered the participation and entry of minorities into the legal profession. (Tr. 139 and Tr. 148).

The Referee issued his report, without fully considering the purpose of attorney discipline, and, based in the convictions of record, recommended disbarment for a period of five years retroactive to the date of emergency suspension with leave to apply

for readmission upon payment of costs of this proceeding and restitution as required by the New York Court. (Report 9).

The Respondent timely filed his Petition for Review of the Referee's Report and this Court has jurisdiction pursuant to Article V, section 15, Florida Constitution. No counter petition was filed by The Florida Bar.

SUMMARY OF ARGUMENT

The Referee in the case at bar was of the mind set that a felony conviction dictates disbarment. Being of this mind set the Referee failed to take into consideration all of Respondent's extensive mitigating evidence.

Comparing Respondent's underlying predicate actions and resultant convictions to the cases cited in Respondent's initial brief, brings into serious question the applicable ultimate judgment that is appropriate and suitable in light of Respondent's postulated mitigating factors put forth to the Referee.

In Chosid, infra, the respondent therein was convicted of five felony charges in connection with the importation and distribution of marijuana and the concealment of monies from this operation for income tax purposes. Mr. Chosid was also imprisoned for a period of two years. The Florida Bar sought disbarment, and the Court imposed in lieu thereof a three year suspension.

Comparing Chosid to the case at bar, Respondent, was involved in a legitimate business enterprise that became ensnared in Medicare fraud litigation. What is distinguishably important is that Respondent did not intentionally seek to set out and participate in a criminal enterprise as did Mr. Chosid. Nor has Respondent herein profited by his transactions as did Mr. Chosid.

The record in Chosid does not tell us if Mr. Chosid put forth any of the mitigating factors that Respondent herein has. And arguing innuendo, one can surmise that Mr. Chosid by virtue of the nature

of the "drug business" had a dishonest and/or selfish motive. The very thought of a licensed attorney dealing in the drug business for whatever reason is odious in and of itself. In the case at bar, Respondent did not deliberately seek to thwart the law for his own personal pecuniary gain.

In Fertig, infra, the respondent therein pled nolo contendre to violations of Florida's RICO Act and was adjudicated guilty. Mr. Fertig deliberately embarked in a money laundering scheme. Again, comparing the case at bar to Fertig, Respondent did not deliberately seek to thwart the law for his own personal pecuniary gain. The similarities between Fertig and the case at bar is that Mr. Fertig's witnesses at the grievance hearing testified as to his honesty, ability as a lawyer, and his remorse as did the witnesses in Respondent's grievance hearing. This Court on review imposed a 90 day suspension as opposed to the recommended disbarment.

In Jahn, infra, the respondent therein was adjudicated guilty of dealing cocaine to a minor, a first degree felony, and possession of cocaine, a third degree felony. Mr. Jahn was also sentenced to 4 and one-half years incarceration. The referee in Jahn as in the case at bar took the position that a felony conviction was equal to automatic disbarment. This Court on review imposed a three year suspension. Respondent herein was not given an incarcerative sentence and did not engage in a course of conduct that fragrantly violated the law.

In Lord, infra, the respondent therein engaged in a twenty-two year pattern of non-filing of his U.S. income tax returns.

Ostensibly deliberate conduct calculated to violate the law of the land and to evade the lawful payment of income taxes. Mr. Lord on review by this Court received a six month suspension as opposed to disbarment. In the case at bar there is no clear and convincing evidence that Respondent deliberately set out on a calculated scheme to violate the law. Respondent's conviction is in essence predicated on the violation of some facet of the Medicaid statues of New York that are at issue and repeatedly the subject of civil litigation and controversy in New York's courts.

In Hirsh, infra, the respondent therein stole monies from his trust account, and, The Florida Bar sought disbarment. This Court imposed a sanction of three months suspension based on the rationale that "the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part." In the case at bar evidence is totally lacking that Respondent profited financially from the violation of the law he is charged with. On the contrary elicited evidence suggests that Respondent lost some $200,000.00. More importantly, a global settlement agreement was entered into by Respondent's co-conspirators, resolving the issue of restitution. And of most importance, is the fact that Respondent did not deliberately violate any law or laws in his capacity as an attorney thus causing direct or indirect harm to a client or clients coupled with the fact that his witnesses at the grievance hearing testified to his many redeeming characteristics in support of (Respondent's) worthiness to practice law.

In the case at bar, Respondent's postulated mitigating factors warrant suspension as opposed to the death penalty of disbarment. This Court in Hirsh in meting out the punishment of suspension relied on the comments of Henry S. Drinker who served as Chairman of the Ethics Committee for the American Bar Association which comments are found at 971, and in pertinent part are as follows:

> "Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public,is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged."

For the reasons cited in Respondent's brief together with the rationale of the Hirsh court (Drinker's succinct commentary), evidence adduced at Respondent's grievance hearing, Respondent respectfully argues that suspension is appropriate. This Court in Hirsh at page 972 concluded its holding with the following precept:

> "For this reason great care should be exercised to the end that ultimate judgment does not become an expression of frustration."

ARGUMENT

I

THE REPORT OF THE REFEREE CONTAINS CLEARLY ERRONEOUS FINDINGS OF FACT

The Respondent stipulated at the hearing before the Referee that a finding of violation of the rules charged was required by virtue of the convictions of record (Tr. 62-64). This reality is not challenged here, however, the undersigned feels compelled to identify certain errors in factual findings contained in the Report of the Referee.

The Referee found on page two of his Report that:

> "In late 1983 New York advised nursing homes that the State would make future medicaid reimbursements based on costs reported for 1983"

There is no evidence in the record to support such a finding and there is no such allegation in the Indictment. The only evidence contained in the record concerning this point is that of New York attorney Thomas Cleary who testified the decision by the State to use 1983 as a cost base year was made at least a year later. (Tr. 81-82).

The finding by the Referee on page 2 of his Report that

> "The expenses that were reported in 1983 for services from National Health Care, Inc. were false"

is inconsistent with other evidence apparently accepted by the Referee on pages 4 and 5 of the Report.

> "Grafton B. Wilson presented evidence that National Health Care, Inc. was not a shell and that it provided all of the services that were billed to the New York

> nursing homes. He claims and his accountant verified that he was never paid for some of those services. He estimates his losses at $200,000.00. Also, he points out that National Health Care, Inc. managed a third nursing home in Florida and that there were no improprieties discovered in an audit by the Florida Department of Health and Rehabilitative Services."

Third, the Referee found on page 4 of the Report that

> "he (Respondent) admits delivering other false documents to the investigator...."

The only testimony concerning the delivery of documents by Respondent is that he delivered, during a visit for another purpose, a large package of information as a courtesy (Tr. 179-80). There was no admission evidence nor was there any evidence of record that Respondent knew the files contained or that in fact they did contain false documents.

Fourth, the Referee found, at page 3 of the Report,

> "Mr. Wilson was taped during the investigation using an informant. In that conversation he discussed a scholarship agreement that was created in 1986 and predated to December 31, 1983. The money to fund the scholarship agreement was never paid, but it was added to the 1983 costs submitted to the State of New York. The guilty verdicts were based on this evidence and the additional evidence outlined by Mr. Michael T. Kelly, the New York prosecutor."

There was no testimony at Respondent's hearing that an informant was used in the underlying case. Further, it is illogical to find a 1983 cost reported and filed on May 29, 1984 (Count Three of the Indictment) could contain an item not created until 1986.

The most significant error of the Referee goes to the weight of testimony offered in mitigation.

> "He is loved and respected by many people, very influential people and common folks. To their credit and to his, they have supported him throughout the proceedings. Their support is based on their personal relationship rather than any understanding of the New York evidence" (Report 7-8).

Senior Circuit Judge Tench, County Court Judge Crenshaw, State Attorney Rod Smith, Police Chief Wayland Clifton, Police Officer Clovis Watson and second year law student John Washington certainly are qualified to understand the nature of Respondent's conviction and the conduct charged. To discount their support of Respondent "notwithstanding his conviction" is to fail to recognize their level of experience and knowledge of the criminal justice system.

New York attorney Thomas Cleary testified he was involved in the underlying case from the investigative stage to and through the trial of Respondent. (Tr. 65-68). Mr. Clearly's past experience also includes service as a New York prosecutor of Medicaid fraud cases (Tr. 66) and, certainly, his support of Respondent is based on a full and complete knowledge of the evidence presented.

Dan Eiland, CPA (Tr. 134) and Dr. Cohen (Tr. 112) also testified at the Respondent's trial and it is clearly erroneous for the Referee to have discounted their testimony in mitigation by finding they and the other witness lacked an "understanding of the New York evidence." (Report 7-8)

ARGUMENT

II

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS IN CONFLICT WITH THE ESTABLISHED PURPOSES OF DISCIPLINARY ACTION IN VIEW OF THE EXTENSIVE EVIDENCE PRESENTED IN MITIGATION ON BEHALF OF RESPONDENT.

This Court, in reviewing a referee's recommendation for discipline must conduct a scope of review broader than that afforded to findings of fact. The broader review of sanction recommendations is required because it is the Supreme Court's responsibility to determine and order the appropriate punishment, The Florida Bar v. Poplak, 599 So.2d 116 (Fla. 1992).

The fact that an attorney is convicted of a felony does not automatically require disbarment and the Referee and Court should review each case solely on its merits, Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

The Supreme Court in Florida Bar v. Hirsch, 342 So.2d, 970 (1977) set forth the underlying philosophy that should serve as a guide in this type of case:

> "1. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of Society of which they are a part.
>
> 2. Ordinarily the occasion for disbarment should be the demonstration, by a continued course of conduct, of an attitude wholly inconsistent with

> the recognition of proper professional standards. Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable.
>
> 3. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged".

The Respondent in Jahn, supra, was convicted of delivery of cocaine to a minor, a first degree felony, and possession of cocaine, a third degree felony. The Supreme Court ordered a three year suspension over the Bar's request for disbarment.

The Respondent in Florida Bar v Fertig, 551 So.2d,1213 (Fla. 1989), was convicted of violating Florida's Racketeer Influenced and Corrupt Organizations (RICO) act. The gist of the charges is that he helped a law partner and a client launder money in a drug smuggling scheme. The Referee weighed heavily the amount of time passed between the alleged offenses 1978-1983 and his 1986 plea as well as other mitigating factors. The Referee recommended a twelve month suspension, the Supreme Court ordered a 90 day suspension, Florida Bar v Fertig, 521 So.2d, 1213 (Fla. 1989). Fertig's law partner, who was also convicted and found to be the dominate of the two and a knowing participant in the scheme, also received a 90 day suspension, Florida Bar v Dolan, 452 So.2d. 563 (Fla.1984).

The Supreme Court, in Florida Bar v Stark, 616 So.2d, 41 (Fla. 1993) quoted from Florida Bar v Neu, 597 So.2d 266, 269 (Fla.

1992).

> "Discipline for unethical conduct must serve three purposes: First, the judgment 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 a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations".

The Referee failed to analyze the facts and evidence in this case in light of the purpose of discipline set forth in Neu, Supra. Those who offered evidence in support of Respondent were characterized by the Referee as:

> "many people, very influential people and common folks", (Report 7)

The Referee's Report did not identify the witnesses to whom he referred or properly weigh their testimony. Those who testified included:

1. Senior Circuit Judge B. M. Tench, Jr. testified by deposition that he is very familiar with the Respondent's reputation for truth and integrity among members of the Bar, his skill as an attorney and ethical performance. (Depo.5-6). Judge Tench further testified he has sat as a Referee in similar disciplinary cases and feels disbarment of Respondent is inappropriate and that a three year suspension is more than adequate. (Depo.10-11).

2. Alachua County Court Judge J. D. Crenshaw has served

for 17 years. Her testimony is that she is familiar with the charges against Respondent and, based in her knowledge of Respondent, that "I think disbarment is extremely not warranted". (Depo.9). The Judge further testified that disbarment of Respondent in this case would not be fair in that the Florida Bar has not sought this penalty for other attorneys in the County who have been convicted of worse offenses. (Depo.8).

3. Rod Smith, State Attorney for the Eighth Judicial testified he has known Respondent for 20 years, (Tr.115), has reviewed the indictment, (Tr.115) and read detailed newspaper accounts of the trial (Tr.115-16). Mr. Smith testified Respondent is a fine person, a fine lawyer and his reputation in the community is excellent. (Tr.116). Mr. Smith testified Respondent should be allowed to practice after a period of suspension. (Tr.120).

4. City of Gainesville Police Chief Wayland Clifton testified he has known Respondent for 15 years (Tr.144) and that the criminal charges and Respondent's convictions received wide publicity in Gainesville. (Tr.144-45). The Chief testified that the community is, without exception, behind Respondent, (Tr.146). In response to a question concerning whether Respondent should be allowed to practice law, the Chief said:

> "I have stated publicly, and I will state here for the record that I have sent clients to Mr. Wilson before: I have....I have asked his advice on legal matters myself; I would certainly do the same tomorrow"

(Tr.146).

The above testimony is representative of the large volume of evidence submitted in deposition form, live at the hearing and in countless letters addressed to the sentencing Judge and Referee. All recommended that the Respondent not be disbarred and that he is an asset to the legal profession. See particularly letters to the Referee from attorneys William Whitley, Margaret Anderson, Herbert Schwartz and Mark Nejame.

The Referee erred in striking the testimony of New York attorney Thomas Cleary that:

> "an innocent man was convicted" (Tr. 94).

This testimony was offered in mitigation as to culpability and should have been considered by the Referee. The ruling of the Referee prohibited pursuit of this line of questioning and an exploration of culpability, Florida Bar v. Diamond, 548 So.2d 1107 (Fla.1987), and violated the Respondent's right to due process as guaranteed by Article I, Section 9 of the Florida Constitution and the 14th Amendment to the United States Constitution.

The Referee's ruling to strike Mr. Cleary's response is also inconsistent with his prior ruling that Mr. Cleary's testimony that Respondent did not commit the acts charged in the Indictment was admissible. (Tr.69)

The entire testimony of Mr. Cleary (Tr.65-95) certainly should stand as a counterbalance to that of the vituperative reminiscences of the prosecutor (Tr.27-60). Both should be compared to the

charges in the Indictment in view of Mr. Cleary's comment

> "I am familiar with the allegations in the indictment. I don't want to confuse the allegations in the indictment with what may be allegations made by the prosecutor at various times during this investigation," (Tr.70)

Testimony in mitigation came also from persons who established that Respondent set an example met by too few practitioners in devoting himself to helping those in need of services they could not afford.

Clovis Watson and John Washington offered compelling testimony in support of Respondent. Mr. Watson testified that he was struggling as a youth of 17 when he met Respondent who took the time to offer him help and encouragement. Respondent, as a successful attorney represented Mr. Watson on a pro bono basis, paying the costs and expenses of litigation and even picked up and returned him to his home since Mr. Watson was without transportation. More important than the free offering of his legal services, Respondent counseled Mr. Watson in his life's direction and responsibilities as a parent. Respondent encouraged and helped Mr. Watson to enter police academy training and Mr. Watson is now a 10 year police veteran and businessman. (Tr.139-42).

John Washington testified he was a young, high school student who had no real plan for his future. Respondent gave of his time during Mr. Washington's senior year in high school, encouraged him and made him believe he could achieve success. Respondent offered encouragement and support to Mr. Washington through times of trial and he now is entering his second year of law school at the

University of Florida. (Tr.148-151).

It is significant that Mr. Watson and Mr. Washington are members of a minority group and Respondent is not. This fact demonstrates Respondent's commitment to the legal profession and society. This testimony and many letters submitted to the sentencing court and Referee clearly establish that the Respondent is the kind of person who is worthy of the right to practice law.

Mr. Herbert Schwartz, a member of the Florida Bar since 1967, submitted a letter to the Court setting forth a graphic example of Respondent's character and integrity. Near the time frame charged in the indictment, Respondent was offered and refused a $100,000 cash retainer to represent drug traffickers. This event is a positive indication that the Respondent is a person worthy of the public trust and one who has contributed positively to the image of the legal profession.

It was clear during the course of the hearing that the Referee was not receiving the evidence in mitigation and considering that evidence as probative in weighing his decisions as to meeting the purpose of discipline set forth in Neu, Supra. The Referee cut short the presentation of evidence offered in mitigation at one point by saying:

> "I realize you haven't been able to call these witnesses. I am going to accept those representations. I can't imagine that any more of this, what I think is repetitious testimony about Mr. Wilson's character and--reputation in the community would make a difference one way or another in my decision....."(Tr.153).

The Referee said at the close of the evidence,

> "and as attorneys, most of us accept as a fact that if we get convicted of a felony, we get disbarred" (Tr.183);

He continued on page 184 of the transcript,

> "But I - - -it is almost- - -if you ask me, "Judge, if you get convicted of a felony, what is going to happen?"
> "I am going to lose my job and I am going to be disbarred. You ask any lawyer that and they will tell you the same thing" (Tr.184)

Clearly the Referee was applying an inappropriate rule that disbarment is defacto automatic upon conviction of a felony contrary to the guidelines established in, Jahn, supra, and other cases cited herein.

A reading of the Referee's full comments from page 183 through 186 of the transcript also establishes that a conviction and finding of culpability were the only factors considered,

> "the question is the level of culpability, I think" (Tr.185).

The purposes of discipline as set forth in, Neu, supra, and discipline other than disbarment, were clearly not considered by the Referee as reflected by his remarks,

> "And you are asking me because of your case, it is more special than some other and you are a more special person than other people- -and - - -and - - -clearly you are; I don't deny that at all- - -but based on all that, you are asking me to recommend suspension," (Tr.183).

The Respondent has always accepted that the convictions in question constituted a violation of the cited rules. Respondent asks only for a fair consideration of the evidence offered in mitigation and that a sanction be imposed that meets the well

established tests adopted by this Court.

The Court in The Florida Bar v Diamond, 548 So.2d 1107 (Fla. 1989) considered a case very much similar to the instant case and held that, following mail and wire fraud convictions, Diamond should be suspended rather than disbarred in light of mitigating factors, particularly abundant character testimony.

Diamond was sentenced to and served a prison sentence, a one year sentence was imposed in Fertig and, in Jahn, a 4.5 year sentence was ordered. None were disbarred.

The Court should also look to Florida Bar v Stark, 616 So.2d 41 (Fla. 1993) and Florida Bar v Chosid, 500 So 2d 150 (Fla. 1987) for guidance.

In Chosid, the attorney was indicted by a Michigan federal grand jury on five felony charges concerning importing and distributing of marijuana and filing of fraudulent tax returns to hide the illegal income. Chosid pled guilty to one count of filing a false tax return, was adjudicated guilty and sentenced to two years in prison. Chosid had previously received a private reprimand from the Bar after a finding of conflict of interest. The Referee recommended a three year suspension with reinstatement only after proof of rehabilitation. The Supreme Court accepted the Referee's recommendation but moved the effective date of suspension forward 7 months.

The record in Chosid is devoid of the extensive factors in mitigation set forth in this case and involves the direct participation of Chosid in the smuggling and distribution of drugs.

Chosid also signed and filed his personal tax returns under penalty of perjury and directly benefited in taxes not paid. Further, Chosid had been the subject of prior discipline by the Bar and the sentencing judge ordered a two year term of imprisonment. In the instant case, the charge against Respondent of filing reports that lead to payment of money or the receipt of those funds was dismissed by the trial court. (Tr.52-53). Respondent received none of the money in question (Tr.128 and 131-32 and Report 4) and has an unblemished disciplinary record with the Bar. Respondent was placed on probation by the trial judge.

In Stark, two cases were consolidated. One case involved the finding that Stark exhibited a pattern of misappropriating client funds by the use of his trust accounts and, secondly, that Stark ignored the order of suspension by continuing to practice law. The Referee, in view of mitigating evidence presented which is similar to that presented by Respondent in this case, recommended a two year suspension. The Supreme Court rejected the Bar's demand for disbarment and imposed a 3 year suspension.

In The Florida Bar v McShirley, 573 So.2d 807 (Fla.1991), the Court found that the attorney, over a period from 1980 to 1986, continuously and knowingly converted client funds from his trust account to his personal use. This was not a case of isolated instances but a repeated dipping into the trust account. McShirley was caught when he declared bankruptcy.

The Court in McShirley applied the purpose of discipline test previously cited herein and found a three year suspension

appropriate.

The Report of the Referee found that the Respondent established four mitigating factors set forth in Rule 9.32, Florida Standards for Imposing Lawyer Sanctions:

1. Absence of prior disciplinary record;
2. Character and reputation
3. Imposition of other penalties or sanctions
4. Remorse, (Report 6).

The Referee, however, found the Respondent had failed to establish that the alleged offenses were remote in time. This finding is clearly erroneous.

The Indictment charged that the Respondent participated in a conspiracy in 1983, ten years ago, and then delivered documents to investigators in 1987, six years ago. These two periods of activity were testified to by the Prosecutor in the case who was called as a witness by the Florida Bar at the hearing and gave testimony by telephone. (Tr.52-53) There was no charge in the indictment or other evidence that Respondent was involved in any activity after the 1987 date. The Prosecutor said other defendants did receive funds until 1989. (Tr.42)

In Fertig, Supra, this Court found acts committed were remote in time. Fertig participated in an ongoing drug conspiracy from 1978 thru 1983, he entered a guilty plea in 1986 and this Court ruled a suspension rather than disbarment was appropriate citing the acts as being remote in time as one mitigating factor. A comparison with the instant case is appropriate:

Fertig	Respondent
1978-1983 acts	1983 and 1987 acts
1989 disposition	1993 disposition

The time frames relating to remoteness in time are nearly identical and clearly the finding of the Referee is erroneous.

The aggravating factors cited by the Florida Bar, dishonest or selfish motive, pattern of misconduct and multiple offenses can be considered inherent in the convictions and, although the Respondent is appealing his convictions, it was deemed inappropriate to attempt a trial de nova in this proceeding.

The Referee, however, has misapplied the clear meaning of "pattern of misconduct" and "multiple offenses" as intended by Rule 9.2, Florida Standards For Imposing Lawyer Sanctions.

The Referee found the

> "New York offenses are out of character for Mr. Wilson. In that sense they do not establish a pattern of conduct," (Report 7).

However the Referee went on to find

> "But the fraudulent activity began in 1983 and was followed by fraudulent activity in 1986 and 1987," (Report 7).

The Referee then concluded

> "for these reasons, the illegal activity establish a pattern of conduct," (Report 7).

It is first essential to note that there is no charge in the Indictment that Respondent participated in any activity other than a brief period in 1983 and the delivery of documents in 1987. The

Referee is apparently incorrectly utilizing the time frame estimates of the Prosecutor who estimated time frame sequences from memory in his telephone testimony at the hearing. (Tr.40-42)

The initial finding of the Referee that the "New York offenses are out of character for Mr. Wilson" is consistent with the application of Rule 90.404, Florida Evidence Code and the Florida Statutes cited therein. The language, definitions and examples cited in Rule 90.404 make it clear the charges filed against Respondent in the Indictment constitute one legal incident leading to one substantive charge and a corresponding conspiracy count. The second substantive count of filing a false instrument was dismissed prior to trial. (Tr.52-53)

The above argument applies also to the inappropriate finding by the Referee that "multiple offenses" should be considered as an aggravating factor.

The proper application and meaning of multiple offenses and pattern of conduct is exemplified in the cases cited elsewhere herein where attorneys converted client trust funds on many occasions over an extended period of time, participated in a continuous ongoing mail and wire fraud operation over a period of years, participated in long operating drug importation and distribution rings or failed to file tax returns over a period of many years. Suspensions were ordered in each case.

The Florida Bar also alleged and the Referee found a refusal to acknowledge the wrongful nature of conduct. The Referee's finding was mixed in this regard in that he also found remorse in the

Respondent and cited unchallenged the testimony of witnesses that undermine the convictions. (Report 6-7)

Vulnerability of the victim was also found by the Referee but this factor was also contrary to the finding of the Referee that the owners of the nursing home in question obtained judgments against the State of New York in amounts in excess of that claimed to have been obtained in the fraud charged in the Indictment. (Report 5)

To disbar Respondent in this case in view of the extensive evidence in mitigation would be tantamount to adopting a rule of automatic disbarment upon conviction of a felony. Such a rule would ignore the three fold purpose of discipline set forth in Neu.

The testimony of a senior Circuit Judge, a long time County Court Judge, the State Attorney and Police Chief from the Respondent's circuit cannot be ignored. These persons are the elected and appointed guardians of the public safety and welfare of the clients and persons who will be affected by this Court's decision. They were firm in their positions that it would be unduly harsh to impose the sanction of disbarment. It was inherent in their testimony that the public will be denied the services of a qualified attorney who, by his conduct over 20 years, has earned their admiration, trust and confidence.

The Court cannot fail to recognize that each of these responsible public officials put their own reputations and positions "on the line" in their unequivocal support of Respondent. Their willingness to do so will be a further guarantee that the

Respondent will never conduct himself in a manner that will violate the trust in him they have demonstrated.

The Respondent, particularly through the testimony of Mr. Watson, Mr. Washington and the countless letters of support filed with the Referee, has demonstrated a life of professional service that should be the standard of the legal profession. He offered his legal services to those in need and even paid costs and expenses for those who could not afford them. His objective was to seek proper solutions and he took the time to counsel clients to improve the lives of others. Mr. Washington will soon increase minority representation in the legal profession due in considerable part to Respondent's influence, encouragement and help over a period of years.

The testimony of the public officials and other extensive evidence set forth in the record makes it clear disbarment is not required to protect the public and such a judgment would deny the public the services of a qualified and service oriented attorney.

Secondly, this Court's judgment must be fair to the Respondent being sufficient to punish the breach of ethics while encouraging reformation and rehabilitation.

Judge Crenshaw testified that she felt disbarment in Respondent's case would be unfair based in her knowledge of him, the acts charged and by comparison to action taken against other members of the local bar who have committed "worse" offenses. (Depo. 8-9).

A comparison with other cases cited by the Florida Bar, the Referee and the Respondent also yields the conclusion that

disbarment will be unfair punishment in this case.

In Jahn, Supra., the attorney was convicted of injecting a minor with cocaine and illegal possession of that drug. Jahn was sentenced to 4.5 years in prison and suspended from the practice of law by this Court for three years.

In Fertig, Supra., the attorney laundered drug money for six years and was convicted of Florida's Racketeer Influenced and Corrupt Organizations Act. Fertig was suspended for 90 days. Fertig's co-defendant and law partner, who was determined by this Court to be more culpable, also received a 90 day suspension, The Florida Bar v. Dolan, 452 So.2d 563 (Fla. 1984).

In Diamond, Supra., the attorney was convicted of six counts of mail and wire fraud. Diamond was suspended over the Bar's request for disbarment.

In Chosid, Supra., a suspension was ordered after Chosid was convicted of a long term involvement in a drug smuggling and distribution ring and the filing of false income tax returns to hide the illegal income. He was suspended for three years.

In Florida Bar v. Lord, 433 So. 2d (Fla. 1983) the attorney failed to file federal income tax returns for 22 years and was suspended for a period of six months.

In Stark, Supra., and numerous other cases, attorneys who have been found guilty of a long lasting pattern of stealing client funds have been suspended.

The Referee found significant the sanctions imposed on the Respondent by the trial court, (Report 6). There was a high level

of publicity given the Respondent's case by the media (Tr. 115,145; Deposition of Judge Crenshaw at page 6 and Deposition of Judge Tench at page 15). The humiliation and embarrassment suffered by Respondent is punishment to a degree beyond the ability of most to imagine. The loss of a successful law practice built after nearly two decades of work, the resultant loss of income, the expense of trial in the underlying case and the expense of this proceeding are punishment of disastrous proportions. Disbarment will possibly be a fatal final blow to the ability of this nearly 53 year old person who must find a way to productively support himself and spouse as they both reach their later years in life. Certainly the sanction of suspension, with its serious consequences, in addition to the extensive punishment already experienced, is more than adequate to punish the violations charged. Suspension will allow Respondent to see the light at the end of the tunnel that began with the 1987 investigation, continues today, will last until the suspension expires and the Respondent meets the Requirements of re-admission to active practice.

Third, the sanction imposed in this case must be sever enough to deter others. The punishment described above leaves little doubt that any practitioner will be deterred from possible violations. A three year suspension from practice takes away practitioner's livelihood and destroys the value of the practice developed over a professional lifetime. Certainly this loss is more than adequate to deter others.

Should the Respondent be suspended for two years from the October

30, 1992 effective date of suspension, he will not be eligible to apply for reinstatement until after 10-30-94, five years from the date of the indictment.

The concepts of fairness, due process and equal protection as embodied in the Florida and United States Constitutions flow through this matter as well as the public perception of application of these principles by The Florida Bar in cases of attorney discipline.

Circuit Judge Tench questioned why the Bar is seeking disbarment in this case (Depo.10), Judge Crenshaw was emphatic in stating, based in what she has seen the Bar do in other cases, that disbarment is

"way out of line" (Depo.8)

The extreme penalty of disbarment in this case will clearly be perceived by practitioners and members of the public as unduly harsh, arbitrary and unequal. Such a result will undermine, not enhance, respect for the Florida Bar as an institution and the court system as the guardian of justice.

The Respondent in this case has led an exemplary life except for the acts charged. His service in law enforcement, the community, to his family, the poor and to his clients is extraordinary. He supported his family while working his way through college and law school and was successful in all three areas rising to the rank of Major in the Alachua County Sheriff's Office, becoming a respected lawyer and rearing two daughters one of whom is an assistant state attorney and another who served as an officer in the United States

Air Force. (Sentencing Memorandum).

Respondent served his profession by positively impacting the lives of those in need by his pro bono legal work, counseling and by acting as a positive role model for those who needed encouragement toward meeting their potential.

The Supreme Court in Hirsch at 971, adopted language that best phrases the argument on behalf of Respondent:

> " Just as a lawyer who has been habitually dishonest will almost certainly revert to his low professional standards when necessity, temptation, and occasion recur, so one who has been consistently straight and upright can properly be trusted not to repeat an isolated offense unless of such a nature as of itself to demonstrate a basically depraved character".

It is submitted that the public, Bar and Respondent are best served if he is permitted, after a two year suspension effective the date of his felony suspension of October 30, 1993, to apply for readmission to the practice of law upon the showing he has met the requirements for readmission set forth in the rules.

CONCLUSION

To disbar Respondent in view of the extensive mitigating factors involved would be tantamount to adopting a rule of automatic disbarment when an attorney is convicted of a felony. Such a rule would ignore the threefold purpose of the rule set forth in Neu, fail to take into account any mitigating factors and do little to further an attorney's incentive to make restitution.

In this case it is particularly important that representatives of the Judiciary and law enforcement in Respondent's Judicial Circuit recommend he not be disbarred. All are highly experienced in the criminal justice system and aware of the nature of the Respondent's convictions. Respondent's unblemished disciplinary record, service to his community in many capacities with distinction, his positive influence in the lives of others and the fact that serious and sever punishment has already been imposed, make disbarment inappropriate and unduly harsh. A two year suspension, in light of the protracted nature of the underlying case and these proceedings, will be sufficient to deter others who might be tempted to participate in similar acts.

Accordingly, the Respondent should be suspended from the practice of law for a period of two years retroactive to his October 30, 1992 date of emergency suspension.

CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of the foregoing were provided to Sid White, Clerk of this Court, and one copy to John V. McCarthy, Assistant Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 1st day of December, 1993.

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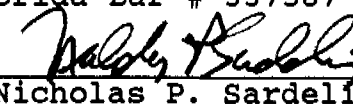
By 
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