

097

4-19

FILED

SID J. WHITE

APR 5 1994

CLERK SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STANLEY E. MARABLE,

Petitioner,

v.

CASE NO.: 82,014

TFB NO.: 92-10,931

THE FLORIDA BAR,

Respondent.

PETITION FOR REVIEW

PETITIONER'S REPLY BRIEF AND

ANSWER BRIEF TO CROSS PETITION

LAW OFFICES OF
R. JACKSON MCGILL, P.A.
JACK MCGILL, ESQUIRE
1101 S. Tamiami Trail, Ste 101
Venice, Florida 34285
(813) 485-8339
Florida Bar #143136
Attorney for Petitioner

TABLE OF CONTENTS

Citations of Authority.....	ii
Statement of the Case and Statement of the Facts.....	1
Issues Presented.....	2
Summary of Arguments.....	3
Argument I.....	5
<u>THE REFEREE'S CONCLUSIONS IN THIS MATTER ARE CLEARLY ERRONEOUS AND WITHOUT AN EVIDENTIARY BASIS.</u>	
Argument II.....	10
<u>THE REFEREE'S RECOMMENDATION AS TO THE DISCIPLINARY MEASURE TO BE APPLIED IS CLEARLY ERRONEOUS AND SHOULD BE REJECTED IN LIGHT OF THE FACT THERE IS NO CLEAR AND CONVINCING EVIDENCE OF GUILT.</u>	
Conclusion.....	12
Certificate of Service.....	13

CITATIONS OF AUTHORITY

<u>CASES</u>	<u>PAGE</u>
<u>The Florida Bar v. Beasley</u> , 351 So.2d 959 (Fla. 1977).....	11
<u>The Florida Bar v. Fine</u> , 607 So.2d 416 (Fla. 1992).....	5
<u>The Florida Bar v. Neu</u> , 597 So.2d 266 (Fla. 1992).....	5
<u>The Florida Bar v. Weiss</u> , 586 So.2d 1051 (Fla. 1991).....	5
<u>The Florida Bar v. Wilson</u> , 599 So.2d 100 (Fla. 1992).....	5

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

WHEN THE TERM "PETITIONER" IS USED IN THIS BRIEF IT SHALL REFER TO THE PETITIONER, STANLEY E. MARABLE. WHEN THE TERM "RESPONDENT" IS USED IN THIS APPEAL IT SHALL REFER TO THE RESPONDENT, THE FLORIDA BAR. WHEN THE TERM "T" IS USED IN THIS APPEAL IT SHALL REFER TO THE TRANSCRIPT OF PROCEEDINGS.

The Petitioner, STANLEY E. MARABLE, would rely upon the Statement of the Case and Statement of the Facts as presented in his Initial Brief.

ISSUES PRESENTED

- I. WHETHER OR NOT REFEREE'S CONCLUSIONS IN THIS MATTER WERE CLEARLY ERRONEOUS AND WITHOUT AN EVIDENTIARY BASIS?

- II. WHETHER OR NOT, THE REFEREE'S RECOMMENDATION AS TO THE DISCIPLINARY MEASURE TO BE APPLIED IS CLEARLY ERRONEOUS AND SHOULD BE REJECTED IN LIGHT OF THE FACT THERE IS NO CLEAR AND CONVINCING EVIDENCE OF GUILT?

- III. WHETHER OR NOT THE PETITIONER SHOULD BE DISBARRED?
(AS PRESENTED IN THE RESPONDENT'S CROSS PETITION FOR REVIEW)

SUMMARY OF ARGUMENTS

SUMMARY OF ARGUMENT I

The Referee's Report, finding that the Petitioner solicited Mr. Lanzillo to commit a burglary and therefore violated the Rules of Professional Conduct as set forth by the Florida Bar in the Complaint, is lacking in evidentiary support and is clearly erroneous.

The transcripts of the meetings between Mr. Lanzillo and the Petitioner, which were admitted into evidence, together with the testimony presented at the Hearing, clearly establishes that the Petitioner never solicited Mr. Lanzillo to commit a burglary, and in fact, the evidence shows that the Mr. Marable told Mr. Lanzillo not to commit a burglary on his account.

There being no evidentiary support to establish by clear and convincing evidence that the Petitioner committed a violation of the Rules set forth in the Complaint in this matter, the findings and conclusions of the Referee are clearly erroneous and require this Court to reject the Referee's finding of guilt.

SUMMARY OF ARGUMENT II

The Florida Bar has failed to establish by clear and convincing evidence that the Petitioner committed violations set forth in the Complaint, and therefore the Referee's recommendation that the Petitioner be suspended for one year is erroneous and should be rejected.

The Respondent's Cross Petition to this Court seeking the disbarment of the Petitioner is clearly without merit. There is not any evidentiary basis to establish that the Petitioner committed any criminal acts, or in fact was guilty of the violations alleged in the Complaint filed in this matter.

ARGUMENT I

THE REFEREE'S CONCLUSIONS IN THIS MATTER ARE CLEARLY
ERRONEOUS AND WITHOUT AN EVIDENTIARY BASIS.

As pointed out in the Petitioner's original brief, this Court is confronted with the issue as to whether or not the findings and conclusions of the Referee's Report are lacking in evidentiary support or are clearly erroneous. The Florida Bar v. Wilson, 599 So.2d 100 (Fla. 1992), The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992), The Florida Bar v. Weiss, 586 So.2d 1051 (Fla. 1991).

The Respondent seeks to support its position, and bolster the Referee's report, by relying upon the general proposition that a referee who presides over a proceeding is in the best position to make judgments concerning the character and demeanor of the lawyer being disciplined. The Florida Bar relies upon The Florida Bar v. Fine, 607 So.2d 416 (Fla. 1992), as authority for its position.

In the Fine case the Referee made certain findings concerning the lawyer's explanation of his actions in transferring funds from his trust account to a general account. The Referee's Report in the instant case deals primarily with an interpretation of transcripts of conversations between the Petitioner and others, and does not primarily deal with a Referee observing the demeanor of the lawyer, since the primary evidence in this matter was not testamentary but documentary.

The Respondent argues that the evidence presented clearly establishes the Petitioner encouraged or solicited Mr. Lanzillo to

break in to a garage to obtain photographs. The Petitioner would point out that there is no evidence which clearly establishes that Mr. Marable ever encouraged or solicited Mr. Lanzillo to commit a burglary on his behalf

Although the Petitioner does acknowledge that he made the statement in the November 6th transcript telling Mr. Lanzillo that he could get her address and break in, this was not a request for Mr. Lanzillo to get photographs for Mr. Marable, but was in response to Mr. Lanzillo's continued requests for photographs or information concerning additional photographs. Mr. Marable's conduct subsequent to making the offhanded comment, clearly establishes that there was no intent on the part of Mr. Marable that Mr. Lanzillo actually commit a burglary, nor was there any encouragement on the part of Mr. Marable that any burglary be engaged in by Mr. Lanzillo or his alleged \$50 burglar friend.

As pointed out in the Petitioner's Initial Brief, at the meeting on November 8th, two days after the statement, when Mr. Lanzillo brought up the burglary, Mr. Marable clearly told Mr. Lanzillo that he was not serious when he had made the statement. Mr. Marable further told Mr. Lanzillo not to go over to the garage to commit a burglary on his behalf, and also informed Mr. Lanzillo that he would not pay anyone to commit a burglary, nor were there any words of encouragement for Mr. Lanzillo to go ahead and commit a burglary on behalf of Mr. Marable. (Exhibit 7A).

The evidence is clearly undisputed that after Mr. Marable informed Mr. Lanzillo of the above, and gave no encouragement for

any burglary, the Petitioner did not contact Mr. Lanzillo about the supposed burglary, or have any discussions whatsoever with Mr. Lanzillo for a five week period of time, until which time Mr. Lanzillo called Mr. Marable to inform him that he had committed a burglary. This five week period of time without the Petitioner contacting the Respondent clearly flies in the face of any assertion that Mr. Marable was encouraging Mr. Lanzillo to commit the burglary on the weekend of November 8, 1991. Had there ever been a solicitation or encouragement, the Petitioner obviously would have been contacting Mr. Lanzillo to find out if he had been successful in his weekend outing, however no such contact ever took place.

The transcript of the November 8th meeting does indicate that Mr. Marable thought that the photograph would be interesting to see, but that clearly is not a solicitation or an encouragement to commit a burglary to get any photographs. Had Mr. Marable indicated that it would be interesting to drive a Porsche, would that be somehow encouraging or soliciting Mr. Lanzillo to go out and commit auto theft to obtain a Porsche for Marable? The answer to this question is clearly, no, however somehow the Referee and the Florida Bar want to treat Mr. Marable's statement as solicitation or encouragement.

The Respondent next argues that the evidence established that the Petitioner was willing to engage in deceitful or fraudulent conduct to obtain photographs or incriminating material against Sheriff Wells. The Petitioner would again point out to this Court

that based upon the testimony of Frank Lanzillo, it was Mr. Lanzillo who continually asked for the photographs, and as related to any incriminating material, the Petitioner's interest was limited to material that was relevant and related to his case on behalf of Mr. Matthews.

To support its position concerning a willingness to engage in deceitful or fraudulent conduct, the Bar relies upon a statement taken out of context in Exhibit 6A, at page 19. The transcript indicates that although Mr. Marable had explained to Mr. Lanzillo in a previous conversation that if he brought him any information that related to the case, Mr. Lanzillo would have to testify to authenticate the material, and the material would have to be relevant and material, (Exhibit 2A, p.3-5), however on November 6th, Mr. Lanzillo indicated that he did not want anyone to know where Mr. Marable had obtained the bogus tape.

In responding to Mr. Lanzillo's refusal to authenticate the tape if needed, the Petitioner began to think out loud as to how he would be able to utilize the tape, and indicated that he could say it was an anonymous tape, they could re-tape the tape, and his last thought was that he could simply claim the tape as "work product". It is obvious that the Petitioner, if requested by the adverse party to disclose where he got the tape, could certainly make a claim of "work product". If the adverse party persisted to obtain the source, a Court would rule on whether or not it was protected under the work product privilege; and if it were deemed to be work product the source of the tape would not have to be

disclosed, however if it were deemed not to be work product he would be required to disclose the information.

The Petitioner's testimony concerning his statements to Mack Futch, Assistant State Attorney, that he had agreed to protect the identify of the person who gave him the tape, and did not disclose the name at that time, is certainly consistent with his position that it would be work product. The Petitioner did testify that had Mr. Futch sought a Court directive that he disclose that information he would have been required to do so. (T-145).

There is no clear and convincing credible evidence in this cause to support the Bar's position, or the Referee's erroneous conclusion, and therefore this Court must reject the findings of guilt against the Petitioner.

ARGUMENT II

THE REFEREE'S RECOMMENDATION AS TO THE DISCIPLINARY MEASURE TO BE APPLIED IS CLEARLY ERRONEOUS AND SHOULD BE REJECTED IN LIGHT OF THE FACT THERE IS NO CLEAR AND CONVINCING EVIDENCE OF GUILT.

The Petitioner would reassert his position that there is no clear and convincing evidence of any alleged solicitation or encouragement of a person to commit a burglary, and therefore any disciplinary action against the Petitioner would be inappropriate.

The Respondent seeks to have this Court reject the Referee's recommendation of a one year suspension in favor of disbarment of the Petitioner. The basis of the Respondent's position is that the Petitioner allegedly engaged in serious criminal conduct.

As was pointed out in the Petitioner's Initial Brief, the State Attorney's Office, including the State Attorney, Earl Moreland, and Assistant State Attorney, Mack Futch, completely monitored the entire investigative procedure, and subsequently made a determination that no criminal charges were warranted against the Petitioner. The determination by the State Attorney's Office, after being actively involved in the investigation, that the facts of this case did not even rise to the level of probable cause for the institution of criminal proceedings clearly disputes the Bar's position, and the position of the Referee, that the Petitioner ever allegedly engaged in any criminal activity.

The Respondent relies upon The Florida Bar v. Beasley, 351 So.2d 959 (Fla. 1977), to support its position favoring disbarment. In Beasley, Mr. Beasley actually affirmatively took action to

arrange for the sale of marijuana to his client. Mr. Beasley had indicated to his client on previous occasions that he could obtain marijuana and quaaludes for her, and at her request did actually arrange for her, the client, to meet with the person who sold her marijuana. Mr. Beasley was subsequently convicted for the criminal offense of sale of marijuana, prior to the Bar's proceedings.

The facts in Beasley are not even remotely close to the facts in this case. Here the evidence established that Mr. Marable had actually told Mr. Lanzillo not to commit a burglary on his behalf, and not to go over to the alleged place where the photographs were, and that he would not pay anyone to go over there for him, and further indicated to Mr. Lanzillo that he was not serious when he made the offhanded remark concerning Mr. Lanzillo's getting Mrs. Poindexter's address and breaking in to obtain the photographs which Mr. Lanzillo wanted.

By virtue of there being no competent evidence of Petitioner's guilt in this matter, the Court should reject both the Referee's recommendation of discipline, and the Bar's position on discipline.

CONCLUSION

Based upon the foregoing arguments, the Referee's Report should be rejected, and this Court should find that the Florida Bar has failed to prove the allegations in the Complaint, and subsequent More Definite Statement, by clear and convincing evidence.

LAW OFFICES OF
R. JACKSON MCGILL, P.A.



JACK MCGILL, ESQUIRE
1101 S. Tamiami Trail, Ste 101
Venice, Florida 34285
(813) 485-8339
Florida Bar #143136
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing has been furnished via Federal Express to THE SUPREME COURT, and a copy has been furnished by mail to DAVID R. RISTOFF, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 4th day of April, 1994.



JACK MCGILL