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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

PHILLIP SAMUEL DAVIS,

Respondent.
_____/

Supreme Court Case
No. 82,786

The Florida Bar File
No. 91-71,419(11K)

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". Phillip Samuel Davis will be referred to as "Respondent", "Mr. Davis" or "Phillip Davis". 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 May 16, 1994 and concluded on May 18, 1994. "App. A" will refer to the Complaint filed by The Florida Bar on November 30, 1993, in that it is attached as the first document in the Appendix included in this brief. "App. B" will refer to the Report of Referee issued on May 24, 1994, in that it is attached as the second document in the Appendix included in this brief.

STATEMENT OF THE CASE AND OF THE FACTS

On November 30, 1993, The Florida Bar filed its complaint charging Respondent with violations of the Rules Regulating The Florida Bar, while serving as a Dade County Circuit Court Judge. (App. A) A Final Hearing was held before the Honorable Thomas M. Lynch, IV, on May 16, 17 and 18, 1994. The Referee announced his ruling in open court on May 18, 1994, and issued his Report of Referee on May 24, 1994. (App. B) Respondent is seeking to overturn the Referee's factual findings, as well as his disciplinary recommendation. The Bar takes no issue with the Report, and thus has not sought to appeal same. The Florida Bar has set forth its statement in good part based upon its direct examination of witnesses and would rely on Respondent's statements as to cross examination of those witnesses.

The Florida Bar's first witness was Special Agent, John Burke, of the Florida Department of Law Enforcement. Agent Burke is also a member of The Florida Bar. (TR. 13) He was the lead agent for the Department of Law Enforcement in the investigation commonly known as "Operation Courtbroom." (TR. 14) Operation Courtbroom was the code name designation for a judicial corruption investigation undertaken by the United States Attorney's Office, the Dade County State Attorney's Office, the Federal Bureau of Investigation and The Florida Department of Law Enforcement, which began on August 4, 1989. (TR. 13) The investigation was supervised by Assistant United States Attorney John O'Sullivan. Attorney, Raymond Takiff was the government's cooperating witness. (TR. 14) Agent Burke

worked closely with Takiff throughout the investigation and was kept apprised of all occurrences. When the investigation began in August of 1989, the Respondent, Phillip Davis, was not a target of the investigation. (TR. 15)

Prior to August 16, 1990, Raymond Takiff, in his undercover capacity had already engaged in acts of corruption with former Dade County Judges Roy Gelber and Harvey Shenberg. (TR. 15) Shenberg had already received a $50,000 payoff. Soon thereafter, a dispute arose between Takiff and Shenberg as a result of Takiff's telephone call in the middle of the night to Shenberg. In August of 1990, Shenberg and the Respondent roomed together at a Judicial Conference. (TR. 16) On August 16, 1990, the Respondent telephoned Takiff and asked to meet him at his chambers. (TR. 16,17) Takiff and the Respondent met on August 16, 1990 in Respondent's chambers. Takiff was wearing a recording device. (TR. 17) The Respondent told Takiff he was in dire financial straits and wanted to "interact" with Takiff. (TR. 18) There was also a short discussion concerning the fact that the Respondent was then occupying the chambers, previously occupied by former Dade County Judge Howard Gross who had been arrested years earlier for taking a bribe. (TR. 19) Subsequent to that meeting, the Respondent continued not to be a target of the investigation. (TR. 20)

Agent Burke attested to a meeting between Takiff and the Respondent on September 7, 1990, beginning in Takiff's car and continuing in a restaurant. The meeting was monitored. Takiff asked the Respondent if he had a drug problem. The Respondent said

he did not. (TR. 20) Takiff told Respondent doing business with him would be lucrative. They also talked about the Respondent becoming a part of the team. (TR. 21) A portion of that audio was played in open court, although a transcription of the entire conversation was admitted into evidence as Petitioner's Exhibit 1. (TR. 23) Respondent became a target of the investigation after his September 7, 1990 encounter with Takiff. (TR. 23)

On September 13, 1990, Takiff met with the Respondent in his chambers. Takiff gave Respondent a list of four fictitious names. Takiff stated the names were of individuals who were part of a cartel. Takiff requested that Respondent use his influence to find out whether the individuals were wanted by authorities. (TR. 23) Such disclosure was a violation of Rule 3.140 of the Rules of Criminal Procedure. (TR. 24) An audio of that entire conversation was played in open court, as well as a transcription submitted as Petitioner's Exhibit 2.

On September 25, 1990, there was a taped conversation between Takiff and the Respondent in the stairwell of the Dade County Criminal Courthouse, then known as the Metro Justice Building. (TR. 25) In that conversation Takiff asked the Respondent "Do you think that $10,000 was just for getting information on four names." He goes on to say that was just a taste, some for today, and for tomorrow and for the future. (TR. 26) A transcript of that conversation was admitted as Petitioner's Exhibit 3. (TR. 27) On October 3, 1990, Takiff entered Respondent's courtroom and approached him while on the bench. (TR. 28) Takiff had a $10,000

payoff with him and asked the Respondent where to place it. The Respondent told Takiff to place the envelope with the cash in the medicine cabinet in the bathroom of his chambers. (TR. 29) After Takiff did so, he returned to the courtroom and advised the Respondent, while on the bench that the $10,000 was placed behind the baby powder. (TR. 29) The audio of that conversation was played in open court and admitted as Petitioner's Exhibit 4. (TR. 30)

There was no significant contact between the cooperating witness, Takiff and the Respondent between October 3, 1990 and April 10, 1991.

Pursuant to the undercover operation, the fictitious case of Francisco Gadea had fallen into the Respondent's division. Gadea was charged with drug offenses and had a bond of $250,000. (TR. 30) On April 10, 1991, Takiff met with the Respondent in his car. Takiff outlined to the Respondent that he wanted him to reduce the bond. (TR. 31) The Respondent requested a payment of $20,000, as well as an automobile, to perform the corrupt act. A portion of the audio was played and the entire transcript was admitted as Petitioner's Exhibit 5. (TR. 31) On April 2, 1991, a Court Hearing was held in Respondent's courtroom on Gadea. Government impostors appeared as witnesses. The Respondent lowered the bond to $25,000. (TR. 32) A transcript of that court hearing was admitted as Petitioner's Exhibit 6. (TR. 32) On April 18, 1991, a meeting between Respondent and Takiff in Takiff's car occurred. The two critiqued the court hearing. Respondent commented on failing to

swear in the witnesses to avoid any perjury concerns and also that Respondent had deliberately lowered a bond on the previous day on a similar case to avoid any suspicion. (TR. 33-34) Takiff gave Respondent $20,000 during that car ride. (TR. 33) A video tape with dialogue was introduced as Petitioner's Exhibit 7. (TR. 36) The final contact from Respondent in the undercover operation was his telephone call to Takiff on June 7, 1991 requesting a vehicle as part of the payoff pursuant to their earlier discussions. (TR. 37)

The Florida Bar presented Kent Wheeler as its second witness. Mr. Wheeler has been a member of The Florida Bar since 1983. (TR. 69) He was an Assistant State Attorney from approximately 1983 until 1986, when he went into private practice. (TR. 69-70) In August of 1991, Mr. Wheeler entered into an immunity agreement with the United States Government in exchange for his testimony regarding the Operation Courtbroom probe. (TR. 70) In March of 1991, the Respondent while clothed in his judicial robes approached Mr. Wheeler in the courthouse and told him he needed money. (TR. 70-71) Wheeler, believing Respondent was referring to lunch money, pulled out the contents of his pockets. (TR. 71) The Respondent corrected Wheeler and told him he needed $500 and asked Wheeler to bring it the following day. (TR. 71) The following day Wheeler handed Respondent $500, in his chambers. Respondent thanked Wheeler and said he would repay him a thousand times or a hundred times. Respondent also asked Wheeler what he wanted; a small one, a medium one or a big one. Wheeler understood that statement to

refer to court appointments. Wheeler said, "the bigger the better or a string." A string means when an individual is arrested there might be a dozen connected burglaries which could be billed separately. Within a week or two Wheeler did receive court appointments from the Respondent and never received repayment of the $500. (TR. 72, 80)

The Florida Bar then read a number of the Respondent's admissions into the record. Respondent had testified at his criminal trial to his use of cocaine, alcohol and prescription drugs while in the courthouse serving as a circuit court judge. (TR. 84-87) Other of Respondent's statements admitted that he was aware that phony witnesses were to be presented on behalf of the Francisco Gadea case he had fixed with Takiff. (TR. 92) He also was instructed by former Judge Gelber to reduce another bond on another defendant to avoid suspicion. (TR. 92) Respondent also admitted receiving $20,000 for his act of corruption with the remainder to be given at a later date. (TR. 98-99)

The Bar also presented Respondent's admissions at the courtbroom trial as they related to the defendant, Geraldo Balmaseda. Balmaseda had been stalking and threatening his former girlfriend. The charges fell before Respondent's division. Respondent admitted that had he not been under the influence of narcotics and alcohol, he would have imposed a harsher sanction. Upon his release, Balmaseda murdered his girlfriend, Celtina Montenegro and injured a police officer, in broad daylight in front of hundreds of people at the Dade County Auditorium. (TR. 100-102)

Respondent admitted to feeling responsible for Celtina Montenegro's death. (TR. 100-104)

The Bar then called its third witness, Anthony Genova. Mr. Genova had been a member of The Florida Bar for eight (8) years. (TR. 106) He had clerked for the Respondent when he was a law student. (TR. 106) Genova received a telephone call from the Respondent in February of 1991 while he had cases pending in Respondent's division. Respondent asked Genova to borrow $700 for plane tickets to attend a funeral. Genova did lend $1,000 to Respondent's wife believing it was inappropriate to lend $1,000 to a sitting judge. (TR. 108) A week later the Respondent summoned Genova to his chambers and thanked him for lending $1,000 to his wife. Respondent also apologized to Genova for failing to give him court appointments. Thereafter, Mr. Genova did receive a court appointment from the Respondent. (TR. 109) In that particular case, the Public Defender was arguing that they had not certified a conflict, requiring a special appointment. Genova said he would handle the case on a pro bono basis. (TR. 110) Genova felt uncomfortable about the appointment and in fact never billed the county for his services. He also never received the $1,000 back which he had loaned to the Respondent's wife. (TR. 112)

Leonard Haber, a psychologist, was The Florida Bar's next witness. he had been a clinical psychologist in the fields of clinical and forensic psychology for the past thirty-five (35) years and had received court appointments. (TR. 113) From 1988 to early 1991, Haber had received seventeen (17) court appointments

from the Respondent. (TR. 113-114; 118) In early 1991, the Respondent summoned Dr. Haber to his chambers. He asked Dr. Haber to lend him $500. (TR. 118) Dr. Haber refused because he felt such a transaction did not give the right appearance. A week or two later, the Respondent again summoned Dr. Haber to his chambers and asked him whether he had reconsidered the loan. (TR. 119) Dr. Haber again declined to do so. Thereafter, Dr. Haber did not receive any court appointments from the Respondent. (TR. 120)

The Florida Bar submitted the testimony of Victor Gomez in the operation courtbroom trial as its final witness in the Bar's case in chief. (TR. 147) Mr. Gomez was friends with the Respondent for many years and supplied drugs to the Respondent prior to his ascendance to the bench.

The Respondent presented Rodney Thaxton. Mr. Thaxton was admitted to The Florida Bar in 1982 and had been employed as an Assistant Public Defender since that time. (TR. 127) The witness assisted in Respondent's campaign. (TR. 138) Mr. Thaxton handled a first degree murder case before the Respondent soon after he was elected to office. (TR. 128) The Respondent yelled constantly at Mr. Thaxton throughout the trial. (TR. 129) The witness concluded at a later time that the Respondent must have been using drugs. (TR. 132) Respondent's perceived drug use became a topic at the Public Defender's office. The witness believed the Respondent was unfit to be a Judge. (TR. 138) Mr. Thaxton did not report the Respondent to any authority pursuant to Rule 4-8.3 of the Rules Regulating The Florida Bar. (TR. 138-139)

Mr. Thaxton stated that there is a policy within the Public Defender's Office restricting the filing of complaints against Judges. (TR. 142,145) Respondent also told Mr. Thaxton he believed the police were following him. (TR. 132) Mr. Thaxton told the Respondent to be careful because the police cannot be trusted. (TR. 135) The witness believes that law enforcement targets Black elected officials throughout the country for prosecution more than White elected officials. (TR. 136)

The Respondent called Daniel Velayos. He had been a Senior Public Defender for seventeen (17) years. (TR. 172) He supervised the Respondent's division. (TR. 173) Mr. Velayos said the Respondent was erratic on the bench, failed to appear on schedule and would berate assistants. (TR. 174) The witness, together with other lawyers, speculated that the Respondent was using drugs. (TR. 178) The witness did not believe, however, that Respondent's behavior rose to a level which would cause him to file a complaint with the Judicial Qualification Commission. (TR. 183-184) He believed there were times that the Respondent performed his judicial duties properly. The witness said that there is not a policy within the Public Defender's Office prohibiting the filing of complaints against Judges. (TR. 185)

Oliver Morales testified next for the Respondent. He was a Public Defender working in the Respondent's courtroom for a year. (TR. 187) Mr. Morales said the Respondent was frequently late and his temperment would change throughout the day. (TR. 188) There were times when the witness thought the Respondent behaved

properly. (TR. 192) Mr. Morales thought the Respondent was a jerk whose power had gone to his head. (TR. 189,192)

Jules Trop, a physician specializing in addictionology testified for the Respondent. (TR. 245) He met the Respondent in September of 1992. (TR. 251) At first the Respondent did not admit to using cocaine. (TR. 256) Although there were a number of drugs involved, the principal drugs were alcohol and cocaine. (TR. 257) The witness opined that the Respondent was addicted to cocaine sometime during 1990 and 1991. (TR. 261) The witness believed the Respondent was now doing well and not presently impaired in his judgment. (TR. 270,272)

The Florida Bar presented Patricia Seitz as a witness in aggravation. Ms. Seitz had been a member of The Florida Bar since 1973 and a member of the Washington, D.C. Bar since 1975. (TR. 195) Ms. Seitz started practicing with Steel, Hector and Davis (formerly known as McCarthy, Steel, Hector and Davis) as their first female attorney in 1974 and became a partner in 1980. (TR. 196-197) She had been involved in Bar activities for many years. (TR. 198) At the time of her testimony she was President of The Florida Bar. (TR. 198) The witness had received letters and comments from members of The Bar and the bench evidencing their anger that the Respondent remained a member of The Florida Bar, despite his transgressions. (TR. 200) Ms. Seitz testified that she had been approached by a number of state prosecutors who were concerned that the Respondent's appearance in court and representation of defendants undermined the judicial system. (TR. 209) Also as part

of the job of President of The Florida Bar, the witness reviewed the newspaper. Ms. Seitz saw an article in November of 1993 reflecting that the Respondent was co-counsel for a Defendant in a California Court in which the Court granted a new trial because of the Respondent's admitted incompetence of counsel. (TR. 210) Ms. Seitz testified that Respondent's reputation in the legal system was not one of truth and honesty. (TR. 213) Ms. Seitz stated that the Respondent should be permanently disbarred. (TR. 214)

The Florida Bar presented William Berk as a witness in aggravation. He became a member of The Florida Bar in 1982 at which time he became employed by the Dade County State Attorney's Office. He worked there until about 1986 and then went into private practice. (TR. 297) The witness assisted another State Attorney in the prosecution of State v. Roy C. McCullen, in 1984, an armed robbery case before former Judge Ellen Morphonios. (TR. 298-299,300) The Respondent was the defendant's attorney. Reginald Lynn was an essential state witness. (TR. 299) William Berk had met with Reginald Lynn prior to the trial to review his testimony. Lynn was a cooperative State witness. The State made arrangements for Reginald Lynn's transportation to and from the trial. (TR. 300) When the State called Mr. Lynn as a witness he had disappeared. (TR. 301) Mr. Berk telephoned Mr. Lynn the following day and then took his sworn statement on March 2, 1984. (TR. 301,302) Mr. Lynn said that Phil Davis had approached him in the hallway and told him that he had not been subpoenaed and therefore had the right to leave. Davis told Lynn more than once

that he could leave. Lynn told Davis that since he was already there, he might as well stay and testify. Lynn said Davis continued to encourage Lynn to leave. He left because of Phil Davis' approach. (TR. 306-308) William Berk believed that the Respondent had procured the absence of the State's witness, Reginald Lynn and that there was probable cause to believe witness tampering had occurred. (TR. 314-315) He thought the Respondent went out of his way to pressure the witness to leave. (TR. 319) Berk forwarded the information to his superiors in the State Attorney's Office. (TR. 315)

Rosemarie Antonacci Pollack also testified in aggravation. At the time she was a member of The Florida Bar for nine (9) years and employed as a major crimes prosecutor in the Dade County State Attorney's Office. (TR. 325) In 1988, Ms. Pollack handled the prosecution of State v. Gregory "Slim" Bernard Williams. Phil Davis represented the defendant. (TR. 326) The case involved the theft of traveller's checks from an elderly Canadian couple. Davis' client was not alleged to have actually stolen the checks. Several attempts to depose the couple in Canada were unsuccessful as a result of the Respondent's unavailability since he was running for judicial office. (TR. 327) Ultimately, the Respondent advised Ms. Pollack that he simply could not attend the depositions and since the couples' testimony would not break his case he would stipulate to it and at the same time save the taxpayers some dollars. (TR. 328) Ms. Pollack joked with the Respondent about the nobility of his gesture and said she was going to call the

witnesses to advise them. The trial was set to be held on a Monday in late September of 1988. Ms. Pollack was set to leave the state for a wedding. (TR. 329) In an abundance of caution Ms. Pollack placed the case on calendar on Wednesday or Thursday preceding the trial. She had prepared a written stipulation. She and Mr. Davis appeared before Judge Knight. She testified that the Respondent lied to Judge Knight by stating that he had never agreed to stipulate to the testimony of the couple. (TR. 330) Mr. Davis advised the Court that he would not only go to Canada but refused to waive his client's presence, as was his right under the Rules of Criminal Procedure in effect at that time. (TR. 331) The police were unable to escort the defendant into Canada because they did not have prior State Department approval to bring weapons into Canada. Another prosecutor flew to Montreal, picked up the elderly couple and drove them across the border to Burlington, Vermont. At the same time two Metro Dade Detectives picked up the defendant and escorted him to Vermont. (TR. 332) Mr. Davis said he wished to go but refused to travel in the same car as the police and his client and thus required a third rental car. (TR. 332-333) As a result of the last minute arrangements, the State had to purchase expensive plane tickets, costing a few thousand dollars. (TR. 333-334)

Kurt Klaus was The Florida Bar's next witness in aggravation. He became a member of The Florida Bar in 1980 and served on the Grievance Committee that found probable cause on the instant matter. Mr. Klaus reviewed a Motion to Dismiss Based on Newly Discovered Evidence filed by the Respondent in the disciplinary

proceedings. (TR. 340) The motion stated that Mr. Klaus had contributed to Respondent's opponents campaign as well as actively soliciting support for his opponent in the legal community. (TR. 343) The motion stated that as a result of the foregoing Mr. Klaus should not have participated in the grievance procedure and as a consequence had violated the Rules Regulating The Florida Bar. (TR. 343) Mr. Davis also said in open court that he had a conversation with a member of The Florida Bar saying that Kurt Klaus was an active recruiter of other Bar members for the Respondent's judicial opponent. (TR. 343-344) Mr. Davis never presented the testimony of the "informer." Mr. Klaus testified that he contributed $50 to the opponents campaign because he was a partner of a friend and had attended a fundraiser. He had in fact supported the Respondent, voted for the Respondent, attended a fundraiser for the Respondent, contributed to the Respondent's campaign and never told anyone he supported Respondent's opponent. (TR. 344)

As its final evidence in aggravation The Florida Bar read numerous admissions by the Respondent at this criminal trial into the record. They were all statements showing dishonesty made by the Respondent. (TR. 351) The Respondent was asked by the Chief Judge whether he had a drug problem and if so help could be provided. The Respondent said he had no problem. (TR. 352) The Respondent gave a televised interview with his wife and girlfriend. He said he lied during the interview as well as lying to his friends. (TR. 355) The Respondent also admitted that he lied in an interview with a reporter from the Miami Herald about not having a

drug problem. (TR. 356,358) Respondent also took a drug test pursuant to the Chief Judge's request and passed it by concealing his drug use with a portable test kit. (TR. 358-363) The Respondent also tried to defraud a bank into giving him credit by stating that his son Levon, had died of a serious illness which caused an expenditure of money resulting in his bad credit. The Respondent never had a son nor did he have a child who died. (TR. 363-371) Respondent also admitted that he lied on another loan application about his use of drugs. (TR. 445) Respondent also admitted that he was aware of Roy Gelber's kickback scheme (TR. 446)

Mr. Davis presented Georgia Ayers as a witness in mitigation. She is a social worker and executive director of the Alternative Program which interacts with the criminal justice system in the Dade County Circuit Court. (TR. 373) Ms. Ayers gave the Respondent an award for working harmoniously with her organization as well as his concern for the community. (TR. 374-375) Ms. Ayers feels positive about the Respondent because a jury found him not guilty. (TR. 383)

Arthur Jackson testified in mitigation. He is a Minister and has a congregation of 3,000. (TR. 386) Minister Jackson met the Respondent when he was seeking judicial office. (TR. 383) The Minister observed a deterioration in Respondent's conduct after he was elected. (TR. 391) The witness said the Respondent was now doing a good deal of charity work. (TR. 388) The witness said that the Respondent loves the Lord, children and humanity. (TR. 389-390)

Barbara Wade, a professor at Florida International University testified in mitigation. She is a Director for Positive, Inc., a program that works with gang leaders. (TR. 396) The Respondent was a mentor and advisor and attended weekly meetings. (TR. 399) The witness was drug addicted as a result of injuries she sustained. (TR. 401) She believes that having been a junky she could speak the Respondent's language. (TR. 407) Mr. Davis attended almost weekly meetings between 1988 and 1992 yet Ms. Wade was unaware of Respondent's purported drug use. (TR. 410-411) The witness observed the Respondent in his courtroom, as well, and did not notice anything unusual. (TR. 412)

William Kilby, the Executive Director of Florida Lawyer's Assistance, Inc. testified in mitigation. (TR. 414) The Respondent signed a contract with Florida Lawyer's Assistance, Inc. on March 24, 1993. (TR. 425) The witness felt the Respondent was doing well. (TR. 420) The witness had no explanation for Respondent's allegedly discontinuing using drugs in June of 1991, then waiting to see Dr. Trop in September of 1992 and waiting until March of 1993 to enter into the contract. (TR. 425-426) Respondent had no positive drug or alcohol tests since he entered the program in March of 1993. (TR. 421) The witness believed Respondent had a legitimate addiction problem. (TR. 424)

Jeffrey Manners, Respondent's monitor with Florida Lawyer's Assistance, Inc. testified. (TR. 424) He has been a member of The Florida Bar since 1988 and a member of the Texas Bar since 1984. (TR. 428) He was Respondent's monitor for a year and a couple of

months. (TR. 429) He believed Respondent's progress was good. (TR. 431) Beginning in November of 1993 and consistently thereafter Respondent did comply fully with the program. The Florida Bar filed its complaint against the Respondent in November of 1993. (TR. 441)

The Referee found Respondent guilty of all charges and recommended disbarment. Respondent's appeal followed.

SUMMARY OF THE ARGUMENT

Phillip Samuel Davis was elected to serve the people of Dade County, as a Circuit Court Judge. He was indicted and prosecuted by the Federal Government for taking bribes, all of which were captured on both audio and video tape. He admitted to having a drug habit at the trial as well as being in fear of the Government's cooperating witness, and was acquitted.

The Florida Bar proceeded against the Respondent before a Referee where it essentially proved up all of the criminal allegations, as well as presenting a strong case in aggravation. The case in aggravation set forth acts of dishonesty, as well as incompetence beginning in 1984 and ending in November of 1993. The Referee, based on all of the evidence found the Respondent guilty of all charges and recommended that the Respondent be disbarred for a period of ten (10) years. Respondent contends that the Referee's findings of fact and imposition of discipline should be overturned. The Bar believes that the case against the Respondent was overwhelming and the disciplinary recommendation is correct based on Respondent's conduct throughout his career.

POINTS ON APPEAL

I

WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE? (RESTATED)

II

WHETHER THE REFEREE'S IMPOSITION OF DISBARMENT WITHOUT LEAVE TO REAPPLY FOR TEN YEARS WAS CORRECT? (RESTATED)

I

WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE (RESTATED)

It is well established that a Referee's findings of fact in an attorney disciplinary case are presumed correct and will be upheld on appeal unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Winderman, 614 So.2d 484 (Fla. 1993). The Respondent has been unable to establish that such has occurred in the case at hand.

Respondent takes issue with the style of the Referee's report and complains that it lacks a factual analysis. First, the Referee in his oral pronouncement, which encompassed six pages of the transcript confirmed that he quite clearly understood the allegations and believed they had been proven. Second, Rule 3-7.6(k)(1) of the Rules Regulating The Florida Bar sets forth the items which must constitute the contents of the Referee's Report. The Referee's Report must include findings of fact as to each item of misconduct and recommendations as to whether the Respondent should be found guilty of misconduct justifying disciplinary measures, as well as other undisputed items. The Referee's Report sub judice does set forth those precise items and thus is not defective.

The Florida Bar charged Respondent with accepting a personal loan and exchanging it for a court appointment. (App. A; See Count IV of the Complaint of The Florida Bar). In support of that allegation Kent Wheeler testified. Respondent in his brief

essentially argues that he did not agree with Mr. Wheeler's version of the events. The Referee, however, listened to and observed Mr. Wheeler, as well as reviewing the Respondent's testimony at the courtbroom trial, which set forth the Respondent's version. The Referee's finding in this matter in essence has resolved any dispute. He stated:

> "From his own testimony, he was hustling loans from lawyers and experts with cases before him and at the time of his testimony, he saw nothing wrong with that -- which is amazing -- and he rewarded the lenders with appointments" (TR. 521-522).

A Referee is in a unique position to assess the credibility of the witnesses and his judgment regarding credibility should not be overturned absent clear and convincing evidence that the judgment is incorrect. The Florida Bar v. Thomas, 582 So.2d 1179 (Fla. 1991). Simply because the Respondent subjectively believes his version of the events, does not bind the Referee or this Honorable Court.

In Count IV, paragraph 25 and 26 of the Complaint, The Florida Bar charged that the Respondent solicited a loan from Dr. Leonard Haber. (App. A) Dr. Haber declined, believing the behavior was not acceptable, and was no longer appointed by the Respondent. He had previously received seventeen (17) appointments and thereafter none. Respondent argues that because Dr. Haber did not conclude that no longer being court appointed had any connection to Dr. Haber's refusal, the Referee must come to the same conclusion. The Referee, the finder of fact, in his province, did not agree nor is he bound to agree. Further, it is logical to conclude that if

Responded "rewarded" those who loaned him money with court appointments, he would "punish" those who would not! Moreover, the Referee also heard the "before and after" statistics, which speak for themselves.

In Count V, paragraphs 36-40, of The Florida Bar's Complaint, it was alleged and the Referee found that the Respondent admitted under oath to using and being under the influence of cocaine, alcohol and prescription drugs while presiding as a Judge and that his performance as a Judge was adversely affected. (App. A) Respondent presented no evidence to refute that he made those statements under oath, nor has he presented any evidence to refute that those statements were true. As to State v. Balmaseda, Respondent stated under oath at his federal trial that his drug use impaired his judgment and impacted on the lives of those involved. Respondent now is saying he really did not use bad judgment and the resultant dead victim could have happened to any sober Judge. Respondent's position is quite disingenuous. Did he admit poor judgment and profess guilt so as to evoke sympathy from the jury in the federal trial and now is guiltless because he was acquitted and is being disciplined by his peers? One would wonder. Surely, if Respondent now is receding from sworn statements and has admitted to perjury before the federal courts his position becomes quite untenable. The Referee accepted Respondent's sworn testimony and agreed with Respondent's admission of responsibility by finding him guilty of the charge.

As to Rule 5.11(e) of the Florida Standards for Imposing

lawyer sanctions, it appears that the Referee's intended finding was that the Respondent attempted or conspired or solicited another to commit any of the offenses listed in sections (a)-(d); rather than the Respondent engaged in the sole distribution or importation of controlled substances. A scrivener's error appears to have occurred.

The Respondent has taken issue with all of the Referee's findings in aggravation. In fact, the testimony of William Berk is undisputed. The Respondent never testified nor did he present any evidence to refute the allegation of witness tampering. Moreover, Respondent claims to have been disadvantaged because he could not confront the witness Respondent tampered with. The Rules of Civil Procedure are applicable to disciplinary proceedings. Rule 3-7.6(e)(1) and (2) of the Rules Regulating The Florida Bar; The Florida Bar v. Daniel, 626 So.2d 178 (Fla. 1993). The Respondent neither formally nor informally requested to be advised of The Florida Bar's witnesses, nor did the Referee require same. Certainly, The Florida Bar cannot take responsibility for Respondent's failure to do pretrial discovery. Additionally, Respondent, a former circuit court judge, did devote time to presenting a Motion to Dismiss, therefore, evidencing his knowledge and ability to engage in pre-trial preparation.

The Referee found, based on Rosemarie Antonelli-Pollack's testimony, that the Respondent had lied to a Judge and a State Attorney. The Referee observed the witness and believed her. The Respondent presented no contradicting testimony.

Respondent says the Referee's findings that he lied to various individuals is grossly erroneous. Respondent's argument must fail, unless like in the Balmaseda situation, he is now admitting to perjury. Respondent made those statements under oath. He did not testify at the disciplinary proceeding and is bound by his statements.

Respondent also says that the Referee erroneously found that his allegation in a Motion to Dismiss as well as in open court that a member of the Grievance Committee had been recruiting supporters for his opponent in the judicial race was deceptive. Respondent merely says that the totality of the circumstances would lead to a different conclusion. The Referee was not presented with any evidence from the Respondent on this issue, other than his bald face allegation. The Referee's finding, based on the testimony of the Grievance Committee member was therefore supported by competent evidence.

Respondent contends that the Referee, by finding that he had refused to acknowledge the wrongful nature of his conduct was depriving him of his right to invoke certain privileges. Respondent at no time asserted any privilege since there was no effort to compel Respondent's testimony. Respondent's decision not to present live testimony was of his own doing. The Respondent did present his testimony at the courtbroom trial. That testimony did not address the allegations filed by The Florida Bar since they occurred subsequently.

The Respondent says that the Referee failed to consider the

existence of certain mitigating factors. The Referee certainly "considered" the evidence presented with which Respondent attempted to establish those circumstances, but "failed to find them". There is a world of difference. There is no requirement that the Referee outline each proposed mitigating circumstance and/or defense and explain why he did not find that they exist. In fact, the Referee did state that the Respondent failed to prove any defense whatsoever. (TR. 519; App. B) Respondent states that there was inescapable testimony of his erratic behavior by those who worked with him. Not one of those individuals, despite their alleged observations, took any action to either report or assist the Respondent. (TR. 138-139; 183-184) In fact, Daniel Velayos, Senior Assistant Public Defender, testified that Respondent's behavior did not rise to a level which would have caused him to report the Respondent to the Judicial Qualification Commission. (TR. 183-184) Rodney Thaxton, Assistant Public Defender, said the same thing (TR. 139) Oliver Morales, Assistant Public Defender, thought the Respondent was a jerk, whose power had gone to his head. With the foregoing equivocation, and failure to take action it is not hard to understand the Referee's conclusion.

Additionally, the Respondent did not maintain that he had a drug problem beginning in 1984 when he tampered with a witness or lied to a Judge and State Attorney in 1988. Thus, any evidence regarding a drug problem in 1990 is irrelevant to his previous acts of misconduct, as presented by The Florida Bar in its case in aggravation. The Florida Bar v. Hogsten, 127 So.2d 668 (Fla.

1961).

Respondent maintains that his witnesses testified that he had a good reputation in the community and that factor is mitigating. Georgia Ayers, who is connected with the legal community, could only testify as to her relationship with the Respondent and not as to his reputation in the community. (TR. 375) Minister Jackson, who is not connected with the legal community said that Respondent's reputation in the community is good. (TR. 392) The Bar, however, presented Patricia Seitz, the former President of The Florida Bar as its witness in regard to the Respondent's reputation in the legal community, as well as other items. Certainly, the President of The Florida Bar, more than most, can feel the pulse of the legal community through all of her contacts. Ms. Seitz testified that she had in fact been telephoned, approached, and written to by members of The Florida Bar who believed the Respondent was a disgrace to the profession. She said that Respondent's reputation for truth and honesty in the legal community <u>was not good</u>. (TR. 213) It is apparent that the Referee must have found Ms. Seitz's testimony to be more persuasive than Minister Jacksons', in light of his limited, if not non existent, contact with the legal community.

Respondent makes much of his voluntary membership to Florida Lawyer's Assistance, Inc. since March of 1993. The Bar pointed out, however, that Respondent purportedly gave up drugs in June of 1991 and only sought to see Dr. Trop an addictionologist in September of 1992. (TR. 423-426, 251) The courtbroom trial began

in late 1992. Respondent did not commence his involvement with Florida Lawyer's Assistance, Inc. until March of 1993, just prior to the conclusion of the courtbroom trial. Respondent's own monitor with Florida Lawyer's Assistance, Inc. testified that Respondent only began to take the program seriously in November of 1993, the same month that The Florida Bar filed its complaint. (TR. 441) The Referee apparently understood The Florida Bar's attempt to point out that Respondent's resort to rehabilitation was tied in with both the criminal and bar prosecution and being used as a tool. Further, in The Florida Bar v. Routh, 414 So.2d 1023 (Fla. 1982) this court held that evidence of rehabilitation based on a Respondent's conduct subsequent to the misconduct was not relevant and, thus, refusal to consider such evidence was proper. In this case the Referee went further on and considered the evidence, but did not "find" it.

The Respondent has failed to prove that the Referee's findings of fact are unsupported by competent and substantial evidence and therefore must be upheld.

II

WHETHER THE REFEREE'S IMPOSITION OF DISBARMENT WITHOUT LEAVE TO REAPPLY FOR TEN YEARS WAS CORRECT (RESTATED)

Although a Referee's recommendation of discipline is subject to a broader scope of review by the Court, the recommendation comes to the Court clothed with a presumption of correctness. The Florida Bar v. Roberts, 626 So.2d 650 (Fla. 1993).

It is almost hard to imagine any acts more worthy of disbarment than those committed by Phillip Davis. Phillip Davis, while under surveillance, accepted $30,000 in bribes while a sitting judge. In one instance, he was divulging confidential information which was available to him because he was a Judge. He accepted the money while he sat in his judicial robes on the bench by directing the deliverer to place the payoff in his chambers. (TR. 29) In the second instance Phillip Davis accepted $20,000 to fix a bond on a case. He knew that phony evidence was being presented. He laughed at the State and revelled at his own cleverness. (See Petitioner's Exhibit 7) He hustled lawyers for loans and gave them payoffs by appointing them to cases paid for the taxpayers. He stated he did drugs and that it impaired his judgment. The Referee found no mitigation. Phillip Davis did not simply become dishonest in 1990. He was dishonest as a defense attorney in 1984 when he tampered with a State witness. He was dishonest on a loan application. He even lied about the death of his child. He continued to be dishonest when he lied to a State Attorney and a Judge in 1988. He lied to the Chief Judge, the

press, and his own attorney. He remained dishonest when The Bar prosecuted him and he lied about a Grievance Committee member. Phillip Davis claims he had a drug habit in 1990, yet he cannot use that crutch to justify his proven acts of dishonesty beginning in 1984.

Respondent seems to be very confident in his conclusion that he was acquitted in the criminal trial because he was entrapped and coerced. Respondent could not know why he was acquitted. No one can know. Any number of factors could have caused that result. Respondent should feel that he received a chance of a lifetime.

The Florida Bar v. Gross, 610 So.2d 442 (Fla. 1992) concerned a Judge who accepted a bribe in return for reducing a criminal defendant's bail. Gross was acquitted and then disbarred for five (5) years. The instant case is more egregious. There are two instances of bribery, drug use on the bench and numerous acts of dishonesty beginning in 1984 and concluding in the disciplinary proceeding. In The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991) that attorney attempted to bribe a State Attorney and was disbarred for five (5) years. Respondent's multiple long lasting acts of misconduct are certainly worthy of an enhanced disbarment.

This court has accepted ten years disbarment from two other corrupt officials. They were former Miami Beach Mayor, A. Alexander Dauod (September 30, 1993) and former Circuit Judge Harvey Shenberg (December 23, 1993).

It is important for this court to remember that the Referee, who is in the best position of evaluation, did not find any

significant mitigation, much like in The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990). There, the court found that the Respondent continued to work regularly and failed to establish that his addiction rose to a sufficient level of impairment to outweigh the seriousness of his offenses. Shuminer, like Phillip Davis, continued to work effectively during the period in issue. Shuminer stole money, and Davis took bribes.

Even had the Referee found Respondent's purported drug use as a mitigating factor, it must be balanced against the seriousness of the misconduct. In The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1980) Golub had stolen money while having a serious alcohol problem. Even though the Referee did find, and this court agreed that there was a mitigating circumstance, Golub was disbarred. The conduct was simply too egregious as is the conduct of the instant Respondent.

The Referee's recommendation of disbarment, without leave to reapply for ten (10) years, must be upheld.

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 Answer Brief of Complainant was sent by Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Melvin S. Black, Esquire, Attorney for Respondent, at 2937 S.W. 27th Avenue, Miami, Florida 33133, on this 5th day of October, 1994.

RANDI KLAYMAN LAZARUS
Bar Counsel

A P P E N D I X

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