IN THE SUPREME COURT OF THE STATE OF FLORIDA

SUPREME COURT CASE
NO. 82-786

THE FLORIDA BAR
CASE NO. 91-71,419 (11K)

* * * * * * * * * *

PHILLIP S. DAVIS

Respondent

vs.

THE FLORIDA BAR

Petitioner

* * * * * * * * * *

An Appeal From the Referee

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RECORD REFERENCES

This is an appeal raising objections to the Report and Recommendation of Referee Thomas Lynch (hereinafter "Referee") regarding the Complaint for Disciplinary Action by the Florida Bar (hereinafter "Florida Bar"). The Appellant Respondent Phillip Davis is referred to as Respondent herein. The record consists of (a) documents and transcripts of the hearings before the Referee on which will be referred to as (CR.#:Page); (b) Respondent's admitted exhibits referred to as (R.Ex.#:Page); (c) Respondent's exhibits cited by Answer and Answer to Request For Admissions referred to as (R.Ex.Letter:Page); (d) Complainant Florida Bar's admitted exhibits referred to as (C.Ex.#:Page); and (e) transcripts of video tape recorded statements referred to as (C.Ex.7:Page).

INDEX

REFERENCES TO CLERK'S RECORD

REFERENCE TO RESPONDENT'S ADMITTED EXHIBITS

REFERENCE TO RESPONDENT'S ADMITTED EXHIBITS (Continued)

R.Ex.No.	
8	Respondent's sworn testimony - cross examination - Operation Courtbroom Federal trial 1/25/93 - afternoon session covering pages 9555-9724
9	Respondent's sworn testimony - cross examination - Operation Courtbroom federal trial 1/26/93 - morning session covering pages 9742-9790; and 9791-9848.
10	Death Certificate of Ivan Ariza
11	Roy Gelber's sworn testimony - cross examination - Operation Courtbroom federal trial 1/7/93 covering pages 7758-7769
12	Dr. Mary Haber's sworn testimony - direct and cross examination - Operation Courtbroom federal Trial 1/20/93 covering pages 9857-8968
13	Judge Ralph Person's sworn testimony - cross examination Operation Courtbroom federal trial 9/23/92 covering pages 214-230
14	Judge Ralph Person's sworn testimony - direct examination Operation Courtbroom federal trial 1/20/93 covering pages 8933-8936 and 8943-8948
15	Deborah Davis' sworn testimony - direct examination Operation Courtbroom federal Trial 1/21/93 covering pages 9172-9215
16	Herb Smith's sworn testimony - direct examination Operation Courtbroom federal trial 1/20/93 covering pages 8858-8872
17	Herb Smith's sworn testimony - cross examination Operation Courtbroom federal trial
18	Bruce Fleisher's sworn testimony - direct examination Operation Courtbroom federal trial 1/20/93 covering pages 9010-9017
19	Gary Pont's sworn testimony - direct examination Operation Courtbroom federal trial federal trial 1/20/93 covering pages 9049-9059

REFERENCE TO RESPONDENTS EXHIBITS RESPONDENTS ADMITTED (Continued)

R.Ex.No:

20	Arianne Cross' sworn testimony - direct examination Operation Courtbroom federal trial 1/20/93 covering pages 9064-9077
21	Hair Analysis detecting chronic amounts of cocaine in Respondent
22	Sermon 5/15/94 of Phillip Samuel Davis

REFERENCE TO RESPONDENTS REMAINING EXHIBITS CITED IN ANSWER AND ANSWER TO REQUEST FOR ADMISSIONS

R.Ex.Letter:

D	Tomi Poveda's sworn testimony - direct examination - Operation Courtbroom federal trial 1/20/93 covering pages 9105-9113
E	Letter of Ismael Arnaiz to Judge Spellman
F	Article: South Florida Informer on Louis Villageliu
H	Raymond Takiff's sworn testimony - cross examination 11/30/92 covering pages 4721-4722
I	Alcee Hastings closing argument 3/9/93 covering pages 11648-11724
K	Dr. Leonard Haber's sworn testimony - direct examination Operation Courtbroom federal trial 3/3/93 covering pages 11013-11023
L	Dr. Leonard Haber's sworn testimony - cross examination Operation Courtbroom federal trial 3/3/93 covering pages 11026-11035
N	Miami Herald interview of Judge Ralph N. Person
R	John Bishop's sworn testimony - direct and cross examination Operation Courtbroom federal trial 1/21/93 covering pages 9155-9177
DD	Complaint - State of Florida v. Geraldo Balmaseda

REFERENCE TO COMPLAINANT'S ADMITTED EXHIBITS

C.Ex.No.

1. Audio tape and transcript 9/7/90 pages 55-76

2. Audio tape of 9/13/90, no transcript

3. Audio tape and transcript 9/25/90

4. Audio tape 10/3/90

5. Audio tape 4/10/90 pages 18-35

6. Gadea hearing 4/12/90

7. Video tape 4/18/90

8. Victor Gomez sworn testimony - direct and cross examination - Operation Courtbroom Federal Trial

9. Letter from Pat Seitz to Dennis King

10. Motion for New Trial and Memorandum of Law, United States v. Pamela Allen Green, Central District, California

11. Judge Richard Gadbois' Order, United States v. Pamela Green, Central District, California

12. Reginald Lynn's sworn statement

13. Detective Porth's sworn statement

14. Respondent's Motion to Dismiss Based on Newly Discovered Evidence filed 2/17/94 in The Florida Bar vs. Phillip Samuel Davis

STATEMENT OF THE CASE

Respondent, Phillip Davis, a member of The Florida Bar and Circuit Judge for the 11th Judicial Circuit, was indicted in the Southern District of Florida Case Number 91-708-CR-Gonzalez as part of "Operation Courtbroom". The Defendant stood trial along with Circuit Judge Alfonso Sepe, County Judge Harvey Shenberg and former Circuit Judge David Goodhart. The Respondent was acquitted of all charges. Shenberg and Goodhart were convicted. Sepe was acquitted of some counts and mistried on other counts.

Thereafter, Davis resigned his judgeship and returned to private practice. The Florida Bar filed a Complaint for discipline with five Counts: Count I, the receipt of a bribe in October 1990; Count II, the receipt of a bribe in April 1991; Count III, conducting an ex parte communication; Count IV, solicitation and receipt of loans from persons appearing before Respondent in his judicial capacity; and Count V, abuse of controlled substances. Respondent filed a Motion to Dismiss alleging that one of the Grievance Committee members was a campaign supporter of the Respondent's opponent in a judicial election. The motion was denied. After a three-day hearing on the complaint, the Referee issued a report finding that the Bar Complaint was proven and recommending disbarrment without leave to reapply for 10 years. This appeal is then from the Referee's Report and Recommendation

STATEMENT OF FACTS

RESPONDENT'S RELATIONSHIP WITH RAYMOND TAKIFF PRIOR TO INVESTIGATION

Respondent met Raymond Takiff, a veteran lawyer, in 1980 when Respondent was a recent law school graduate interning at the Dade County State Attorney's Office. The two became acquainted with one another. R.Ex.6:9279. Upon the Respondent leaving the State Attorney's Office, the relationship grew. R.Ex.6:9280. Takiff used Respondent to cover cases for clients who were from large drug cartel organizations which Takiff represented. R.Ex.6:9293-94. Takiff handled the communications with the clients and arranged for fees. R.Ex.6:9280,9293; R.Ex.7:9541-43.

One of the cases Takiff and Respondent handled was a major drug smuggling conspiracy case in the United States District Court in Arizona. The defendants included Jack Fernandez, represented by Takiff and Respondent's client, Ivan Ariza. R.Ex.6:9281-82. Another co-defendant, Louis Villageliu, was identified on pleadings, newspaper articles and by other lawyers as a suspected hit-man of this drug cartel. Villageliu became a fugitive and is still at large. R.Ex.6:9287; R.Ex.F.

The Respondent's client, Ariza, was missing from the Arizona trial when it began. R.Ex.6:9283. Upon Ariza's arrest, Respondent flew with his client for appearance in Tucson, Arizona. Upon arrival in Arizona, Respondent learned that Takiff was in the case representing Jack Fernandez. R.Ex.6:9283-84.

Later, Takiff asked Respondent whether Ariza planned to cooperate with the prosecution and what information Ariza had given to Respondent. Respondent refused to violate the confidences of his client. Takiff made angry statements warning Respondent he was over his head in dealing with these strong and powerful people and that something could happen. R.Ex.6:9284-87. Thereafter, Respondent distanced himself from Takiff. R.Ex.6:9285. Ariza and Respondent became close and associated with each other in social and family events. R.Ex.6:9286.

Ariza was later kidnapped. R.Ex.6:9287. Respondent was in communication with Ariza during this time. R.Ex.6:9287. Ariza's corpse was eventually found in a car trunk mutilated and shot multiple times in the head. R. Ex.6:9288. Respondent and Tomi Poveda, Ariza's wife, were interrogated by the police who were looking for leads in the investigation. R.Ex.6:9288.

Takiff questioned Respondent about what was said to homicide detectives. R.Ex.6:9290. Respondent explained to Takiff that neither he nor Tomi Poveda had information as to what happened to Ariza. R.Ex.6:9290.

Subsequently Takiff explained to Respondent why Ariza was killed gangland style. R.Ex.6:9288-9289. Takiff had Respondent meet with two people to allay their fears that Ariza had told Respondent information that would be damaging to others. R.Ex.6:9290. Takiff called Respondent after the meeting and reassured Respondent that now everything was okay. R.Ex.6:9291-92. Respondent did not go to the authorities because of fear. R.Ex.6:9292.

Thereafter, Respondent avoided Takiff until they met by happenstance in 1988 at a birthday party for an attorney. R.Ex.6:9292-94. Respondent was afraid when he spoke to Takiff at the party. R.Ex.6:9295. A few days later Takiff called Respondent to check up on him. R.Ex.6:9295.

RESPONDENT'S RELATIONSHIP WITH TAKIFF, THE GOVERNMENT AGENT

In 1989 a wide ranging investigation of the State Criminal Courts was initiated. By this time Respondent had been elected to a circuit judgeship. According to Florida Department of Law Enforcement (FDLE), Special Agent John Burke, lead investigator for Operation Courtbroom, the investigation began with Raymond Takiff as the confidential informant on August 4, 1989. CR.6:13.

In 1989 Takiff went to Respondent's chambers and told him never to discuss the Arizona case and the killing of Ivan Ariza. R.Ex.6:9343-44. Subsequently, in 1989, Takiff again went to Respondent's chambers and demanded that Respondent testify for Jack Fernandez in a federal criminal case in Miami. Fernandez was a lawyer who worked with Takiff and had been a co-defendant in the Arizona case with Nelson Bacallao, Ismael Felipe Arnaiz, Louis Villageliu, and the now murdered Ivan Ariza. R.Ex.6:9346. When Respondent expressed a reluctance to testify, Takiff became angry and demanded that Respondent testify. R.Ex.6:9347.

Afterward, Respondent was monitored frequently by check-up calls from Takiff. R.Ex.6:9347-48. Respondent felt threatened by the continuous coercion that was placed on him by Takiff. The Respondent understood the check-up calls to mean that Takiff and people with whom he was connected could inflict harm. R.Ex.6:9348.

ROY GELBER EXTORTION OF RESPONDENT

Respondent also testified he was the victim of an extortion scheme conducted by ex-Judge Roy Gelber. Shortly after Respondent was elected, Gelber claimed a debt by Respondent for $20,000 for placement of election signs. Respondent catergorically denied this debt. R. Ex.6:9296-9307. Gelber persisted in asking Respondent to pay him $20,000 and used a bail bondsman Tiseo to pressure Respondent to pay. R.Ex.6:9305-07.

Gelber was aware of a separate investigation involving the Respondent and his close friend, Joan Headly, R.Ex.6:9329. Special Agent John Burke testified that Headly was arrested and gave information about the Respondent's purchasing and consuming cocaine from a street seller. CR.6:51-55.

Gelber began extorting Respondent with the threat that if he paid Gelber $20,000, he would have his family and his political organization keep the Respondent's drug habit and relationship scandal out of the paper. R.Ex.6:9329-30. Respondent began paying Gelber money. R.Ex.6:9331. At one point, Respondent, was paying extortion money to Gelber of approximately of $1,500 a month. R.Ex.6:9331.

Respondent began to borrow money from family, friends, and lawyers to pay Gelber. R.Ex.9:9743-44; R.Ex.9:9785. Respondent could not pay fast enough or in the amounts that Gelber wanted. Relegated to doing anything Gelber asked of him, Respondent did Gelber's calendar and ran menial errands. R.Ex. 6:9336-38.

RESPONDENT'S ADDICTION TO COCAINE, DRUGS, AND ALCOHOL

In 1989, beset by pressure from Gelber and Takiff, Respondent resorted to ingesting cocaine, prescription drugs and alcohol. R.Ex.6:9310. Respondent, took an array amphetamines, barbituates, anti-depressants and cocaine. To the Respondent cocaine "was an everything drug and it began to be a way of life." R.Ex.6:9310-12.

Respondent's addiction to prescription drugs, cocaine, and alcohol permeated his entire existence both on and oft the bench. By the time the year 1990 began, Respondent was experiencing a nervous breakdown. R.EX.6:9310. When a home equity loan was denied, the Respondent screamed and yelled, causing a ruckus in the bank. R.Ex.6:9333-34. Due to a great deal of pressure Respondent could not handle the job of circuit court judge. R.Ex.6:9310. He took amphehtamines to get going and anti-depressants and muscle relaxants to slow down. R.Ex.6:9310. Cocaine and alcohol were abused the most. R.Ex.6:9310.

Respondent consumed the drugs throughout the day and night. R.Ex.6:9311. The Respondent described this substance abused as a craving that became so intense that the ingesting of drugs went from being a choice to being a need, a second nature. R.Ex.6:9311.

RESPONDENT'S BEHAVIOR

The mental state of the Respondent deteriorated over time. Respondent's supervisors, Chief Judge Gerald Wetherington and Criminal Division Administrative Judge Ralph Person, were aware of the evident signs of drug use and the resulting behavior. R.Ex.6:9326-29; R.Ex.9:9788. Those same supervisors had the

Respondent sent to New York, onstensibly to observe drug programs for court purposes. In actuality, the Chief Judge used this as an opportunity to have the Respondent observed by a substance abuse professional, and it was determined that Respondent was in "denial". R.Ex.13:221-22: R.Ex.14:8933-36; 8943-48. Respondent's erratic and bizarre behavior was observed and recognized by staff, family, and many of the lawyers that practiced in front of him. R.Ex.R:9155-71; R.Ex.15:9172-76; R.Ex.16:8858-72; CR.7:172-186; CR.6:126-146; R.Ex.18:9010-17; CR.7:186-192; R.Ex.19:9049-59; R.Ex.20:9069-77.

RESPONDENT'S DRUG USE KNOWN PRIOR TO "OPERATION COURTBROOM"

FDLE Special Agent Burke testified that agents knew Respondent was purchasing and using cocaine prior to any activity in "Operation Courtbroom". CR.6:52. Takift informed lead agent Burke, along with others at FDLE, that Respondent was acting in a manner consistent with one being under the influence of cocaine. CR.6:51. Respondent was the only person under investigation who had a substance abuse problem which was discussed amongst agents and Takiff. CR.6:45. Takiff reported to Special Agent Burke that Respondent had admitted using cocaine. CR.6:48.

FDLE was aware that Respondent was purchasing cocaine for personal use as early as August or September 1989, a year before the "Courtbroom" investigation targeted respondent. CR.6:52. FDLE agents surveilled Respondent purchasing cocaine from a street dealer. CR.6:53. During electronic surveillance of Gelber, Takiff and Gelber discussed concerns that Respondent might be arrested on personal use of cocaine charges. CR.6:44,55. Gelber supplied demerol to the Respondent. R.Ex.6:9373.

Respondent admitted that he would purchase and consume one to two grams of cocaine three to four times per week coupled with pills and alcohol. R.Ex.8:9586. He testified that he was under pressure due to debts owed and that those debts went unpaid because of the need to buy cocaine. R.Ex.9:9742. Spending up to $300 per week on the purchase of cocaine, Respondent borrowed money from others. R.Ex.9:9743. He testified that during the years of 1990 and 1991, when Takiff was recording his conversations, he was consistently and habitually abusing cocaine, alcohol, and prescription drugs. R. Ex.9:9819.

Respondent testified that he knows now that drugs and alcohol, combined with Takiff and Gelber, caused him to do and say things that did not make sense. R.Ex.9:9819. Respondent admits that he was frequently untruthful on the tape recordings. R.Ex.9: 9819-20.

RESPONDENT'S INVOLVEMENT IN "OPERATION COURTBROOM"

The August 16, 1990 meeting between Takiff and Respondent

On June 19, 1990 Respondent coincidentally came into contact with Takiff on the escalator at the Metro-Justice Building. R. Ex.6:9349. Takiff gestured Respondent to come to Judge Roy Gelber's office. R.Ex.6:9350. In Gelber's office, Takiff insisted on Respondent going on a trip to Atlantic City with him and Gelber. R.Ex.6:9356. Special Agent Burke confirmed that there was an effort to get Respondent to go to Atlantic City. CR.6:40. Over the next six weeks Gelber kept insisting that he and Takiff wanted to take Respondent to Atlantic City. R.Ex.6: 9351.

Respondent became fearful about being with Takiff and Gelber in Atlantic City. R.Ex.6:9353. Respondent explained to Gelber that he did not want to go to Atlantic City because of his being extorted by Gelber and his knowledge of Takiff's and others connection with Ivan Ariza's death. R.Ex.6:9354.

Gelber later said he had repeated Respondent's concerns to Takiff and Takiff wanted to see Respondent immediately. R.Ex.6:9354. Gelber told Respondent that Takiff was upset and that both Takiff and Gelber were wondering whether Respondent would become an informant. R.Ex.6:9354-55. Gelber told Respondent to meet with, appease, and placate Takiff. Gelber told Respondent to borrow money from Takiff in order to pay for the signs and silence about the Headly scandal. R.Ex.6:9354-55.

The Respondent, compelled by fear, thereafter called and met with Takiff on August 16, 1994. R.Ex.6:9355. Respondent felt he had no other choice but to meet with Takiff. R.Ex.6:9356. Respondent felt that in Takiff's world, snitches and informants end up dead. R.Ex.6:9382. Respondent met with Takiff to prevent Takiff from calling others and jeopardizing Respondent and his family. R.Ex.6:9356-57.

The September 7, 1990 Dinner With Takiff And Respondent

After the August 16, 1990 meeting, no future meeting had been planned. R.Ex.6:9358. Takiff made numerous phone calls to Respondent between August 16, 1990 and August 22, 1990, but Respondent did not return any of those calls. R.Ex.6:9357. On August 22, 1990 Takiff came unexpectedly to Respondent's chambers and asked Respondent why his calls were not returned. R.Ex.6:9358.

Respondent replied that he had been busy and was unable to return calls. R.Ex.6:9358. On August 23, 1990 Gelber summoned Respondent to Gelber's chambers for a call from Takiff. R.Ex.6,9358. At Gelber's chambers Takiff was on the phone and again asked Respondent why he hadn't you returned the phone calls. R.Ex.6:9358. In an effort to convey that Respondent wanted to be left alone, he expressed that the FBI, FDLE, CIA, DEA, Supreme Court and Third District Court of Appeals had golden handcuffs on him. R.Ex.6:9358-59.

Gelber continued to place pressure on Respondent that Gelber and Takiff were concerned that Respondent was an informant. R.Ex.6:9359.

Gelber insisted that Respondent sit, meet, and talk with Takiff and Gelber. R.Ex.6:9359. Gelber instructed Respondent on how communication should be conducted between Respondent, Gelber, and Takiff. R.Ex.6:9360.

On September 4, 1990, Takiff called Respondent wanting to have dinner on the 5th. Respondent cancelled and Takiff reset it for the 7th.

Dinner at Christy's Restaurant September 7, 1990

Respondent out of fear went to dinner at Christy's Restaurant with Takiff. R.Ex.6:9361-62. The Respondent's goal was to appease and allay the fears that Takiff had about him. R.Ex.6: 9362.

On September 7, 1990, Respondent had consumed cocaine and alcohol throughout the day. R.Ex.6:9364. Respondent was intoxicated on cocaine and alcohol during the meeting with Takiff. On the tape of the Christy dinner meeting there is hysterical laughter, cussing and swearing, and exaggeration. The Respondent was passive in the conversation and many of his responses to Takiff's statements are "right", "right", "right", "right", right". R.Ex.6:9364; C.Ex.1:55-76.

Takiff testified that he is a seductive speaker and that during the conversations, Takiff could direct the conversations how he wanted to direct them. R.Ex.9:9817-18. Takiff led the conversation. R.Ex.8:9651; C.Ex.1.

Subsequently Takiff told Respondent "you don't know what the fuck I am talking about". C.Ex.1:56. It is Takiff that talks about leaving the bench and going into private practice. C.Ex.1:59-62. Abruptly, Takiff switched the conversation and asked for a "lock" in Respondent's division. C.Ex.1:63. There was a pregnant pause, and Respondent's formerly loud tenor changed to a soft low voice and there is a complete absence of laughter coupled with an muted "yes". C.Ex.1:63. Respondent testified that he knew he could not afford to say no. R.Ex.6:9368.

Respondent placated Takiff and reassured him that he "has always been with him", "never complained", "been a soldier", "never counted his (Takiff's) money", "did what he (Takiff) said", "been a solider", "you (Takiff) never doubted me (Davis)". C.Ex.1:65-66. Takiff immediately tells Respondent "forget about never doubting you". C.Ex.1:66. Respondent was referring to the

time when he use to work for Takiff, saw large cash amounts in his office, and accepted whatever Takiff wished to pay him with no complaint. R.Ex.6:9368-69.

Takiff went on to say "I am risking myself". C.Ex.1:67-68. Respondent answered "You could have said anything to me you wanted to say"; "I was always your friend whether I was in or out, up or down". C.Ex.1:67-68.

Takiff became physical during the dinner and begain banging the table and blaming Respondent for not helping him. R.Ex.6:9371; C.Ex.1:182. Takiff complained that he had been in the hospital with a heart condition and Respondent had not come to check on him. R.Ex.6:9371; C.Ex.1:182. Takiff made it clear he saved Respondent's life yet Respondent was not there for him. R.Ex.6:9371; C.Ex.1:182. Respondent began to cry and plead with Takiff not to punish him. R.Ex.6:9371; C.Ex.1:182.

Respondent was intoxicated prior to the meeting and became more inebriated during the conversation due to the alcohol that he and Takiff were consuming. R.Ex.6:9372; C.Ex.1:84,98,122,143,151. Takiff told Respondent he had heard from forty to forty-five people that Respondent was using cocaine. R.Ex.6:9373.

The September 13, 1990 Meeting

Takiff called Respondent on the morning of September 12, 1990 asking to see him to run some names by to determine their fugitive status. R.Ex.6:9373. Takiff told Respondent that "Gelber would be calling next". R.Ex.6:9374. Gelber called and told Respondent to "do what Takiff tells you to do". R.Ex.6:9374. Gelber told Respondent to "get the money Takiff is going to give you and make sure you give it to me". R.Ex.6:9374.

On September 13, 1990 Takiff arrived at Respondent's chambers and gave Respondent four names which he wanted Respondent to check for arrest warrants. R.Ex.6:9374-75. Takiff told Respondent "there is ten in it for you". R.Ex.6:9375. Respondent told Takiff "it is public information". R.Ex.6:9375.

Respondent Attempts To Retreat But Is Pressured

On the morning of September 14, 1990 Takiff called Respondent for the information. Respondent told Takiff he couldn't get it. R.Ex.6:9376. Takiff came to the courthouse to see Respondent who told Takiff that he did not want to do this request. R.Ex.6:9377. Respondent suggested that Takiff hire Al Fuentes who is a private investigator. R.Ex.6:9377. Respondent stated to Takiff he did not want the $10,000. R.Ex.6:9377.

Respondent was very worried and frightened. R.Ex.6:9377-78. Takiff got upset and told Respondent "you've known me Phil, you know I don't do things like that". R.Ex.6:9378-79. Respondent gave in to pressure and agreed to do it. R.Ex.6:9379. Respondent testified he believed that he should take money, as instructed by Gelber, lest Gelber and Takiff thought he was an informant and would cause jeopardy to Respondent and his family. R.Ex.6:9379.

Gelber testified in the criminal trial of "Operation Courtbroom" that Takiff wanted the information from the frightened Respondent for the purpose of getting the Respondent in the middle of assisting Takiff in other things. R.Ex.11:7766-67. Through a system of code developed by Gelber and Takiff, Respondent was told what to do and how to do it. R.Ex.6:9380. He was given instructions from Gelber in a scheme to get money from Takiff using Respondent as an unwilling middleman. R.Ex.6:9380.

On September 17, 1990 Respondent informed Takiff that he did not want to be involved. R.Ex.6:9381. Agent Burke admitted that in this conversation Respondent is tentative, slow, and reluctant to participate. CR.6:59.

During September 17, 1990 conversation, Respondent told Takiff that he wanted to remain a judge and didn't want to jeopardize his position. R.Ex.6:9382. Respondent informed Takiff that people were counting on him. R.Ex.6:9382. Respondent apologized to Takiff for having mentioned Ariza and Arizona to Gelber. R.Ex.6:9382. Respondent tried to convince Takiff that he would not mention or talk about that issue again. R.Ex.6:9382. Takiff told Respondent he was concerned about him "flipping", turning, or becoming a "snitch" or an informant. R.Ex.6:9382. Respondent was concerned about Takiff because "in the world that Takiff works in snitches and informants end up dead". R.Ex.6:9382.

On September 18, 1994 Takiff called Respondent and said "you hurt my feelings". R.Ex.6:9383. Respondent again told Takiff "don't worry about it, everything is okay". R.Ex.6:9383. Thereafter, Gelber called and told Respondent that Takiff knew that Respondent was afraid to do anything. R.Ex.6:9384.

Respondent Returns List Without Providing Information

Gelber told Respondent that Takiff was concerned about the piece of paper with the four names and that he desperately wanted it back. R.Ex.6:9384. Respondent returned the list to Gelber and thought that was the end of this affair. R.Ex.6:9384. Takiff himself testified, in part, that Respondent did not provide the information to him but that Gelber did. R.Ex.H:4721-22.

The September 25, 1990 Meeting

On September 25, 1990, Takiff and Gelber discussed how they wanted to take Respondent to lunch. C.Ex.3:63. Gelber and Takiff arrived at Respondent's chambers unexpectedly. R.Ex.6:9386. Respondent was asked to go to lunch and accepted reluctantly R.Ex.6:9386. Gelber went ahead to get the car, and Takiff directed Respondent to a stairwell, where Respondent indicated to Takiff that he did not obtain the information nor did he provide the information that Gelber delivered to Takiff about the four people. R.Ex.6:9387-88; C.Ex.3:72. In the stairwell Respondent was experiencing paranoia, fear, anxiety, and a nervousness. R.Ex.6:9388. Agent Burke testified that Gelber, not Respondent, provided the information to Takiff and in the process returned the list to Takiff. CR.6:58.

The October 3, 1990 Meeting In Open Court

Takiff called Respondent and asked to see him and on September 30, 1990 Takiff came to Respondent's home. R.Ex.6:9389-90. Respondent's mother, Classie Davis, was in town at the time. R.Ex.6:9390. Takiff knew Respondent's mother from meeting her years ago and so Respondent reintroduced the two. R.Ex.6:9390. Respondent informed his mother that Takiff wanted to loan some money but he did not think it was right. R.Ex.6:9390. Respondent put Takiff in contact with his mother in order to discourage Takiff in the hope he would leave. R.Ex.7:9475. Takiff agreed to lend the mother $10,000. R.Ex.6:9391. Respondent's mother wanted to have the agreement reduced to writing. R.Ex.6:9391. Takiff agreed to prepare the paperwork for the loan. R.Ex.6:9391.

On October 3, 1990 Takiff unexpectedly came to Respondent's courtoom while court was in session. R.Ex.7:9467. Respondent was shocked and surprised to see Takiff. R.Ex.7:9468. Takiff's said he was "worried sick all night, could not rest thinking about your mother". R.Ex.7:9468. Takiff had the money for the loan to Respondent's mother. R.Ex.7:9468. Respondent instructed Takiff to give it to his secretary because he had nothing to hide. Takiff did not want to give the money to the secretary, and she would not let him into Respondent's private office. Takiff was then instructed to go to the office bathroom and place it in the medicine cabinet. R.Ex.7:9468.

Two days after delivery of the $10,000 loan, Takiff called Respondent and told him not to give it to Roy Gelber. R.Ex.7: 9462. Subsequently, Gelber on October 7, 1990 came to the home of Respondent, banging on the door demanding the $10,000 which Takiff had loaned to the Respondent's mother. R.Ex.6:9392. Gelber was informed that the loan was executed between Takiff and Respondent's mother. R.Ex.6:9392. Gelber told respondent that the $10,000 was his money for the work he had done on the list. R.Ex.6:9393. Later, Respondent took the $10,000 loan money to Connecticut and handed it over to his mother. R.Ex.6:9393.

Gelber Intimidates Respondent

In early April of 1991 Gelber called Respondent and used threats to effectuate a meeting with him. R.Ex.6:9395. Gelber told Respondent that Gelber, Takiff and two other people who had visited Respondent asking about Ariza in 1986 wanted to see Respondent at the Chart House, a restaurant in Miami. R.Ex.6: 9395-96.

Respondent asked Missouri Diaz, a friend, to drive him to the restaurant. R. Ex.6:9396-97. Respondent told Diaz that he was being summoned by individuals who were connected with a past case where a client had been killed. R.Ex.6:9397. Diaz advised Respondent not to meet with these people. R.Ex.6:9397. Respondent told Diaz that he had to go and meet those people. R.Ex.6:9396.

In the parking lot near the Chart House restaurant Respondent was approached by Gelber who walked over from a group of people. R.Ex.6:9399. Gelber accused Respondent of stealing the $10,000 delievered by Takiff the prior October. R.Ex.6:9399. Gelber claimed that the loan money from Takiff to Respondent's mother was not a loan but, was actually money which Takiff had intended for delivery to Gelber. R.Ex.6:9399.

Gelber told Respondent he could rectify the situation by performing a favor. R.Ex.6:9399. Gelber stated he had spoken to Takiff regarding a case that was coming in Respondent's court division involving the son of an organized crime boss, and that Takiff and the family of the son wanted to have the boy released on a reduced bond. R.Ex.6:9399.

Before going to this meeting, Respondent had consumed drugs and alcohol. R.Ex.6:9400. Respondent testified he had reluctantly agreed to the bond reduction scheme out of fear and concern for his family, especially his mother who had taken the loan. R.Ex.6:9400. Gelber cautioned Respondent that if he went to the authorities, he would be facing the same plight as that of Ivan Ariza. R.Ex.6:9400. Gelber instructed Respondent to make

contact with him after Takiff had spoken to Respondent. There were numerous unanswered phone calls from Takiff to Respondent before and on April 9, 1991. R.Ex.6:9401.

Bond Hearing

On April 10, 1991, Takiff called Respondent at 6:45 a.m., instructing Respondent to come and meet, that it was important, more important than anything else. R.Ex.6:9401. Takiff called several times to Respondent on April 10, 1991 to be sure the meeting would take place. R.Ex.6:9401. Takiff picked Respondent up and said in a tape recorded conversation that there was a case in his court involving a family member who belonged to an organized crime boss named "Gadea". R.Ex.6:9402; C.Ex.5:18.

Takiff told Respondent that the Gadeas are "the families, part of the families out of Philadelphia, whose nose is not quite so bent and they got a kid in trouble here". C.Ex.5:19. Takiff told Respondent that he "has orders from the old man who sent $300,000 to him in 40 minutes". C.Ex.5:21; R.Ex.6,9402. Takiff displayed the wire transfer document. R.Ex.6:9402.

During the April 10, 1991 conversation, Takiff told Respondent "he has been given marching orders and now needs to implement them". C.Ex.5:21-22. On the April 10, 1991 tape Takiff told Respondent he "does not fuck with the Gadeas". C.Ex.5:22. Takiff told Respondent he "gets their money released and gets on a plane and gets it to them". C.Ex.5:22. On tape Takiff told Respondent "you don't fuck with the Gadeas". C.Ex.5:23. Respondent stuttered on the word "Gadeas" and Takiff confirmed his understanding that Gadeas, "could hurt somebody". C.Ex.5:23.

In the April 10, 1991 tape Respondent acquiesced to Takiff by constantly saying the word "right" over 50 times from page 19 to page 24 of the transcript. C.Ex.5:23-24.

Respondent was concerned about the belligerence Gelber had displayed at his home and the threats expressed at the Chart House restaurant. R.Ex.6:9403. Respondent testified that he acquiesced to the wishes of Takiff out of fear. R.Ex.6:9404. Gelber told Respondent "that from now on any cases that you have that are similar to the Gadea case, set the bonds the same way so that you don't raise a red flag". R.Ex.6:9404.

Respondent had misgivings about doing these acts but could not psychologically and emotionally overcome the fear and the thought of the killing associated with Ivan Ariza. R.Ex.6:9405.

The April 18, 1990 Meeting Between Takiff And Respondent

On April 18, 1990 Takiff come to pick up Respondent at home. R.Ex.6:6407. Respondent was fearful, distraught and hysterical R.Ex.6:9407; C.Ex.7, (Video Tape). During this meeting Respondent was under the influence of drugs and alcohol. R.Ex.6:9407. During the tape recorded conversation Respondent said he had lost weight, had been thinking all night long, couldn't sleep, and that everthing was tossing and turning in his head. R.Ex.6:9408; C.Ex.7,14.

Early in the conversation Respondent told Takiff that he did not want to do anything, did not want to take money, did not want to be involved, and that Takiff didn't have to give him anything. R.Ex.6:9407-08; C.Ex.7,11-12. Takiff told Respondent that he is getting him, Takiff, crazy with this kind of talk. C.Ex.7,12.

Takiff told Respondent that he was worried about the "shit you're telling me", C.Ex.7,12. Respondent responded "no no no we don't have to talk about it." C.Ex.7,12. Takiff rejoined "I mean are you that fuckin crazy" C.Ex.7,13. Respondent answered "I don't know if I am crazy or not". C.Ex.7,13.

Takiff further stated **"If I (unintelligible) you know where you would be today? You would not be sitting where you are right now okay? Use your fuckin head. Now if there is a way you can read my mind. Touch my brow."** C.Ex.7,13. Respondent told Takiff that "they go way back and what I have done for you. I would've done for you regardless". C.Ex.7,14. Takiff responded "when you come off this way you hink me up. You get me worried about what and where you are". C.Ex.7,15. Respondent answered "right, right, okay. I won't". C.Ex.7,15.

Respondent did not want to know the fine details of the Gadea case. C.Ex.:7,15. Takiff then stated "how will I know, how will you know whether or not what you do is gonna wave a red flag unless you know some details". C.Ex.:7,16. Later on the conversation Takiff said **"I understand that you are scared but you are scaring me."** C.Ex.:7,16.

In the video taped conversation the Respondent's appears frightened, confused, paranoid, submissive, and erratic. C.Ex.7. Respondent indicated he was paranoid about a bondsman named Hodus who "watches and watches him". C.Ex.7:26. Takiff remarked that Respondent's "paranoia is at work". C.Ex.7:26.

The Respondent's mental state at the time is reflected in his statement that he had to convince himself that this was Ray Takiff who fed him, helped his mother, and that all he had to do is sit with Ray Takiff and he will resolve the problems. C.Ex.7:28. Takiff replied that Respondent "was getting crazy the other day". C.Ex.7:29. Takiff told Respondent that he "always felt comfortable with you Phil until you go crazy" and that Respondent, "has a way of uncorking and going fucking crazy". C.Ex.7:31. Respondent explained that he was crazy becaused he had no friends, lived in a sheltered world, no circles, no clubs, and no one got close. C.Ex.7:31.

The Respondent's lack of propensity to commit the offense was revealed when Takiff asked Respondent if he had dealt with anybody else along these lines. Respondent answered emphatically "No, no, no, I have not. . . God as my secret judge". C.Ex.7:40.

Impaired Respondent Unable To Avoid Mistakes

Respondent received $20,000 from Takiff. C.Ex.7:28; R.Ex.6:9410. The amount was to be $30,000 which Gelber had told Respondent to request. R.Ex.6:9410; R.Ex.8:9670. Arrangements for the remaining $10,000 were made for a later date. C.Ex.7:68; R.Ex.6:9410.

Due to Respondent's impaired state of mind he made mental mistakes in using the code and asking for the amount to be given. R.Ex.8:9689. Fear and confusion prevented the Respondent from getting a fix on the conversation, as to what was going on and what was being said. R.Ex.8:9689.

Respondent Delivers $20,000 To Gelber As Instructed

On April 19, 1991 Respondent took the $20,000 to his chambers and gave it to Gelber as instructed. R.Ex.6:9411; R.Ex.8:9686.

AGGRAVATING AND MITIGATING FACTORS

During the course of the Disciplinary Hearing the parties presented aggravating and mitigating evidence. This testimony and evidence is discussed in detail in the Argument Section of this Brief.

SUMMARY OF ARGUMENT

The Respondent's acquittal in the criminal trial confirmed the fact that the Respondent had been legally entrapped and coerced by Raymond Takiff and Roy Gelber. As demonstrated at the criminal trial and at the Bar hearing, the Respondent was struggling during 1989, 1990, and 1991 with a serious substance abuse problem which made him especially vulnerable.

Although the legal defenses of entrapment and coercion have limited applicability to a determination of fitness to practice law, there must be some focus in the Statement of Facts on the combination of factors which led Mr. Davis into the woeful actions: Takiff's masterful manipulation both before and after the investigation started, Takiffs eerie ability to strike fear in the Respondent, Gelber's greedy pressure on the Respondent and, sadly, the debilitation of the Respondent's will through drug abuse.

Once these factors are understood, the Respondent's heroic efforts at rehabilitation since 1991 can be evaluated. The

Respondent concedes that acquittal from criminal charges does not automatically demonstrate his fitness to continue the awesome responsibilities of practicing law. However, the Respondent's personal dedication to rehabilitation and a fair understanding of the pressures by Takiff and Gelber cry out for a far less harsh discipline than the ten-year disbarrment suggested by the Referee.

A survey of Bar discipline cases involving judicial corruption reveals that the 10 year disbarrment recommended herein is disproportimate and unduly harsh. The Referees findings as to some of the complaints and aggravating factors are wholly unsupported by evidence and are clearly erroneous. Additionally, the Referee ignored several mitigating factors which suggest that the proper discipline is a suspension subject to a showing of rehabilitation, rather than disbarrment.

ARGUMENT

THE REFEREE'S RECOMMENDATION IS BASED UPON CONCLUSIONS WITH NO FACTUAL BASIS, IGNORES RESPONDENT'S REHABILITATION, AND IS DISPROPORTIONATE TO OTHER BAR CASES

INTRODUCTION

The Referee's Report and Recommendation, disbarrment without leave to reapply to for 10 years, is the maximum penalty impose in bar cases. The 10 year disbarrment is rarely used especially when mitigating circumstances are present such as in this case.

The Respondent was acquitted in the criminal trial because he was entrapped and coerced by Takiff and Gelber at a time when

his will had been ravaged by drug abuse. The Respondent concedes that notwithstanding his acquittal in a criminal case, this Court must still evaluate how his actions reflect on his present fitness to practice law. Additionally the Courts must evaluate the appropriate punishment for his actions and how his responsibility for those actions is tempered by the coercion, manipulation, and entrapment.

In this discussion, the Respondent will demonstrate that some of the Referee's findings of fact are flatly wrong and cannot be used to support the extreme penalty recommended.

The Referee did not make detailed findings of fact or analyze the evidence. Instead the Referee made a blanket finding: "After considering the Florida Bar's Complaint this Referee finds that all facts are true as stated in the Florida Bar's Complaint to wit: . . ." The written Report merely recites verbatum each word of the Florida Bar's Complaint. Amended Report of Referee, CR.10. The oral ruling contains virtually no factual analysis and solicited a proposed written Report from the parties. CR.9:524.

The Respondent will also demonstrate that the appropriate Sanction is one which fairly considers his vulnerability at the time of the incidents, the extreme pressure placed on him by Takiff and Gelber, and his devoted efforts at rehabilitation since 1991. In this context of disciplinary measures in other cases, the appropriate discipline is a suspension with leave to resume practice when rehabilitation is demonstrated.

KENT WHEELER

Paragraph 22 of the Report finds Respondent, while acting in his capacity as a Circuit Court Judge, did request and receive a loan from an attorney who respondent later appointed as a special public defender.

Respondent concedes that he did receive loans from family, friends, lawyer friends, and professional friends. However, Respondent flatly denies receiving a loan from Kent Wheeler. R.Ex.9:9785. Respondent had no relationship with attorney Kent Wheeler other than knowing Wheeler practiced law in the Metropolitan Justice Building. Wheeler acknowledged there was no relationship between him and Respondent. CR.6:73.

Wheeler was given immunity in exchange for cooperation with the federal government in the prosecution of "Operation Courtbroom". CR.6:70. Wheeler claimed that the Respondent borrowed money in exchange for a court appointment. CR.6:71-72.

Respondent testified in the trial of "Operation Courtbroom" that Wheeler was a friend of ex-judge Gelber. One day Gelber sat as a substitute judge for Respondent and appointed Wheeler to a complex case. R.Ex.9:9785. Upon returning to the bench, Respondent removed Wheeler from the case due to Wheeler's inability to handle a complex case. R.Ex.9:9785. According to Respondent, Wheeeler was offended and as a matter of protocol was then appointed on a case of lesser magnitude and complexity. R.Ex.9:9785-86.

Wheeler testified in the Bar hearing that Respondent did, in

fact, take him off the case and that he was appointed on another case. CR.6:75-76. Wheeler conceded that this new appointment may have occurred by operation of rule rather than as a repayment of loan on the part of the Respondent. CR.6:76-77. Wheeler testified that he did not know whether he received this court appointment before or after this alleged loan to the Respondent. CR.6:80. Wheeler knew that the court appointment came out of Respondent's division but cannot state with certainty that the appointment was not the result of a courthouse practice whereby an attorney would automatically be appointed to any new case of a client he already represented as court-appointed counsel. CR.6:76-77.

LEONARD HABER

Paragraph 26 contains a finding that Respondent solicited a loan from forensic psychiatrist Leonard Haber and when Haber refused, he was no longer appointed to do evaluations by Respondent. This is a clearly erroneous finding. Haber testified that he had no basis to conclude that his not getting court appointments had anything to do with the fact that he did not make a loan to the Respondent. CR.6:121-122.

The evidence is clear and convincing that Haber was appointed by several methods and procedures that had nothing at all to do with the Respondent. CR.6:121. Haber was requested to be appointed by defense counsel or prosecutors, and his appointment or non-appointment, at any time, could not be attributed to the Respondent. CR.6:121-122.

Haber testified that there is no implication that supports an allegation that he did not get appointments due to his refusal. CR.6:123. The Referee's findings ignored the substantial clear and convincing evidence to the contrary.

GERALDO BALMASEDA

The Referee adopted verbatim the allegations in the Bar Complaint paragraphs 32-35. The Respondent is alleged to have testified under oath in the "Courtbroom" trial that his use of cocaine, alcohol and prescription drugs adversly affected his judicial performance particularly in regard to State v. Geraldo Balmaseda. The Respondent testified that Balmaseda had been a defendant in his Court division charged with assaulting his former girlfriend Celtina Montenegro. The Complaint alleges:

> PARAGRAPH 33: That respondent stated that although the prosecutor and the victim's family members pleaded with the respondent not to release Balmaseda, because they feared he would harm Ms. Montenegro, he did so anyway.
>
> PARAGRAPH 34: That two days after the Respondent caused the release of Balmaseda, Balmaseda killed Cetina Montenegro in broad daylight in front of the Dade County Auditorium.
>
> PARAGRAPH 35: That the Respondent admitted that had he not been under the influence of cocaine, alcohol and prescription drugs he would have given greater weight to the concerns of the prosecutor and the victim's family and would not have allowed Balmaseda's release.

The evidence that was before the Referee concerning the Balmaseda matter demonstrated that when the Respondent testified in the federal trial of "Operation Courtbroom", he was expressing personal guilt feelings rather than legal responsibility for Balmeseda killing of Montenegro.

In fact, the transcripts of the Balmaseda proceedings indicate that the **prosecutor wished to have Balmaseda out on probation pursuant to a negotiated plea.** R.Ex.1; R.Ex.2. The transcripts demonstrate that contrary to the allegations that family members begged for Respondent not to release Balmaseda, there were no family members pleading with the Respondent not to release Balmaseda. R.Ex.1; R.Ex.2. The transcripts indicate that there was no "release" of Balmaseda because he was not actually in custody. R.Ex.1; R.Ex.2. The fact of the matter is that Balmaseda was not held in detention because there had been a negotiated plea of probation by the state attorney and the defense. R.Ex.1; R.Ex.2.

The Respondent's testimony taking the blame for the death of Montenegro was an expression of personal guilt about his use of cocaine and prescription drugs as a circuit judge and his resulting downfall. However, it is clear from testimony transcripts and other documentation that there is no basis for a legal finding that the Respondent's drug abuse caused the death. Given the same set of facts and circumstances, a thousand sober judges would have probably reached the same conclusion and accepted the negotiated plea calling for the release of the defendant.

SALE, DISTRIBUTION OR IMPORTATION OF CONTROLLED SUBSTANCE

The Referee found that Section 5.11(e) of Florida Standards for Imposing Lawyer Sanctions applied to Respondent. This provision calls for aggravation of the discipline if the attorney engages in sale, distribution or importation of controlled substances. There is simply no evidence to support this finding. The only reference to controlled substances throughout this trial was to the Respondent's personal abuse and ingestion. This inflammatory aggravating factor is wholly unproven, and the finding is clearly erroneous. It is impossible to calculate the extent to which this error contributed to the ultimate recommendation of the harshest sanction.

In this regard, the Referees reliance upon **The Florida Bar v. Insua**, 609 So. 2d 1313 (Fla. 1992) is inopposite.

In the **Insua** case, unlike the case at bar, this Court determined that disbarrment was warranted because of **knowing particpation** in the drug importation scheme by Insua. **Insua** at 1314. This Court in **Insua** recognized that the Respondent Insua "testified unambiguously under oath in a federal court that he **knowingly participated** in a drug importation scheme on numerous occasions". **Insua** at 1314. In the instant matter the Respondent has testified that he did not willingly participate, that he was addicted to cocaine, prescription drugs and alcohol, in addition to being subjected to ongoing and continuous coercion by Takiff and Gelber.

The Respondent has demonstrated through substantial and competent evidence that he did not benefit from the criminal activity for which he was charged. The Respondent testified that in the first incident concerning the $10,000, he made every attempt to abandon and retreat and avoid any involvement in the acts that Takiff wished him to engage. The evidence supports this testimony in that the Bar's witness, Agent Burke, testified that the Respondent did not provide the information that was requested by Takiff. In the second incident involving the $20,000, the Respondent was used as an coerced middle man who delived the $20,000 to Gelber as instructed.

IMPROPER FINDINGS OF AGGRAVATING FACTORS

WITNESS TAMPERING

William Berk, former assistant state attorney from Dade County had been opposing counsel in a criminal trial in 1983. Berk claimed that a witness named Reginald Lynn was spoken to by Respondent and became unavailable to testify because he left the courthouse. CR.8:301. Lynn gave a voluntary statement to Berk after the trial was completed. CR.8:301.

That statement was admitted over the Respondent's objection on hearsay grounds during the Bar hearing. The sworn statement was taken by Berk ten years prior and presented a disadvantage to the Respondent in that he could not confront the witness Lynn. CR.8:304-305.

In the statement Lynn stated that during a break in a criminal trial, Respondent came over and advised him he had the right to leave the courthouse because he had not been supbeonaed

to come to the trial. CR.8:307. Lynn stated that he felt that Davis was trying to get him to leave and that he was already tired because he had been there all day and finally decided he would go ahead and leave. CR.8:308. Lynn, upon questioning by Berk, stated that he was encouraged, in a way by Respondent, to leave. CR.8:308. It is apparent from Lynn's statement that he was tired and was familiar with the mother of the Respondent's client who was on trial. Lynn discussed with her how to get home and she offered to give him bus money so that he would be able to leave. CR.8:309-311.

Detective Porth and a Detective Anchipolopsky were also in the hallway during Lynn's conversation with Respondent. Berk also took a statement from Detective Porth in this investigation ten years ago. Porth testified he did not hear anything Respondent or Lynn said except that Respondent told Lynn that he was "crazy" as Lynn was walking away. CR.8:320.

Berk testified that he forwarded the statements to the Chief Assistant State Attorney George Yoss for further scrutiny. CR.8:315. As a result of the investigation there was no criminal charges or Bar complaint filed by Berk at that time in 1983. CR.8:315-316.

Berk was unable to produce any subpeona that had been issued for Lynn. CR.8:318. Berk, on cross examination stated that **in his view** the Respondent ordered Lynn to leave. CR.8:314. No where in the record is there any statement by Lynn or Porth that the Respondent forced or told Lynn to leave. CR.8:319.

LYING TO A STATE ATTORNEY AND THE COURT

Assistant state attorney, Rose Marie Antonacci Pollock, testified that the Respondent lied to her in reference to an agreed stipulation in 1988 when she and Respondent were adversaries in an criminal proceeding before Circuit Court Judge Knight. CR.8:330. Pollock stated that the Respondent reneged on an oral agreement regarding testimony by victims and refused waive his client's presence at an out of town deposition of those witnesses. CR.8:331.

There were no documents, sworn statements or transcripts of hearings presented to prove the stipulation or proceedings for deposition. CR.8:334. The witness did not produce a copy of the motion setting the matter down in front of the Judge Knight for hearing regarding the stipulation. CR.8:334. Pollack was unable to state the date when the alleged conversation regarding the possibility of a stipulation took placed. CR.8:335. Pollack was unable to produce a confirming letter after that conversation regarding the stipulation between Respondent and herself. CR.8:335. Pollack never filed a complaint with The Florida Bar in regard to this alleged lie. CR.8:337.

LYING TO INDIVIDUALS ABOUT DRUG PROBLEM

The Referee's finding that Respondent lied to individuals as set forth in his ruling is grossly erroneous. The Referee relies upon the truthful testimony by the Respondent from his sworn testimony in the "Operation Courtbroom" trial to substantiate the admission by Respondent that he lied or denied to a host of people his addiction to cocaine, prescription drugs, and alcohol.

The Respondent testified truthfully when he admitted lying to the Chief Judge and his Administrative Judge when they offered him help for his drug problem. The Respondent testified truthfully when he admitted that he lied to his family, friends, to colleagues and doctors regarding his drug problem. CR.10:520.

During the hearings before the Referee, Dr. Jules Trop was accepted as an expert witness in the field of addictionology. CR.7:251. This certification by the Court was allowed with no objection from The Florida Bar. CR.7:251.

Dr. Trop stated that he was able to make a diagnois of the Respondent based in part on a hair analysis taken in 1991 indicating that he was a heavy cocaine user from 1990 and through 1991. Trop's diagnosis was assisted by listening and watching some video tapes of the Respondent when he met with Takiff during the investigation, and by a thorough evaluation of the defendant while he was in out-patient treatment for eight weeks in the initial phase of treatment. CR.7:252-57.

Dr. Trop testifed that the Respondent was using many controlled substances such as cocaine, multiple tranquilizers, benzodiazepines, barbituates, and narcotic pills. CR.7:256-57. Dr. Trop testified that the principle drug used by the Respondent was cocaine and alcohol. CR.7:256-57.

Extensive testimony was given by Dr. Trop regarding the phenomenon known as "denial". CR.7:254. Dr. Trop testified that the Respondent originally was in a strong state of denial. CR.7:254. Dr. Trop explained that "denial is a protective mechanism whereby an addict seeks to minimize the problem that the

addict is experiencing, that is to say that "denial equates to I don't need help". CR.7:257.

Dr. Trop explained that "**denial**" is different from conscious lying CR.7:257. Dr. Trop stated that "when an addict tells you they don't have a problem they mean it for the most part". CR.7:257. Addicts, according to Trop, "can lie pretty well, but there is a differentiation between the lies and the fabrication that an addict will tell and denial, in which he geniunely believes that he does not have a problem. Denial is the second most common symptom in chemcial dependancy". CR.7:258-258. Dr. Trop stated that in the treatment program, the job is to break through denial because unless or until the addict breaks through denial and faces the problem, the chances for recovery are remote. CR.7:258.

In the case of Respondent, Dr. Trop testified that he did break through the denial with the Respondent after which Respondent admitted to heavy cocaine usage. CR.7:258-59.

Testifying as an expert in the field of addictionology Dr. Trop explained that heavy use of cocaine impairs judgement, cognitive reasoning, moral judgement and conscience. CR.7:259.

Dr. Trop explained that "the heavy use of cocaine makes very often the line between truth and not the truth very indistinct". CR.7:259. In the words of Dr. Trop, the impairment of self image "in the cocaine addict in particular, becomes grandiose, kind of a super person in their own mind, and invulnerable, able to accomplish all kinds of wonderful things, none of which are true". CR.7:260.

Trop also testified that a cocaine addicted person does not always display erratic or bizarre behavior and at times would appear to be lucid and may even be lucid most of the time. CR.7:261. Dr. Trop explained that individuals who are long-term cocaine addicts also are able to function as doctors doing complicated surgery, or attorneys conducting intricate trials, but, there is the presence of judgement impairment and moral impairment existing, particularly judgement impairment. CR.7:262.

Dr. Trop testified that there are bizarre behaviors associated with cocaine addiction. CR.7:263. Trop stated that the best way to describe this behavior is that it is excess in everything. Excess in flamboyance, braggadocio, rapid speech pattern, disconnected thoughts basically, bizarre decisions, quick to anger, paranoia and fear of the people around you, and distrust. CR.7:263. Dr. Trop stated that **"all of these behaviors were present with the Respondent (Phil Davis)"**. CR.7:263. Dr. Trop went on to inform the Referee that his diagnosis of the Respondent was chemical addiction with impaired judgement during the period of time 1990 through 1991. CR.7:263-64.

Dr. Trop testified that a person with an otherwise intact moral code or just plain common sense will lose his conscience and the normal constraints of fear of legal or social consquences and will start doing all of the bizarre things that were mentioned in his diagnois. CR.7:264.

SUBMISSION OF FALSE EVIDENCE, FALSE STATEMENTS, OR OTHER DECEPTIVE PRACTICES DURING THE DISCIPLINARY PROCESS

The Referee based this aggravating factor under Section 9.22 (f), submission of false statement during disciplinary process, on the allegation that Respondent falsely advised the Referee by both motion and in open court that a member of the grievance committee had solicited contributions for the Respondent's judicial campaign opponent.

The Respondent filed a motion to dismiss alleging that Kirk Klaus, vice chairman of the grievance committee 11(K) that determined probable cause of the Complaint in this matter, had supported and contributed to Fitz Mann's campaign and actively solicited support for Mann within the legal community of Dade County. CR.8:340; C.Ex. 14.

In addition, the Respondent made a statement in open court at the time of the hearing on the motion to dismiss that he, as late as days before the motion, had a conversation with a member of The Florida Bar who said Klaus was an active recruiter of other lawyers to support the Respondent's opponent, Mann, during the time of the judicial election, which was in 1988. C.Ex.14; CR.8:343.

Klaus testified in the proceedings below and stated that he did indeed donate fifty dollars to the Fritz Mann campaign; however, he had never solicited anyone to support Mann. CR.8:344. Klaus stated that he did not vote for Mann, did not support Mann, but that he supported the Respondent.

Klaus stated that although he gave a contribution to Mann he also gave a contribution to the Respondent, which is not documented in any of the Department of Election Records regarding the Respondent's campaign. CR.8:345-46. Klaus does not remember to whom he gave the contribution to in regard to the Respondent. CR.8:346. Klaus never checked his bank records to see if there was a returned check evidencing a contribution to the Respondent; there was none. CR.8:347. Klaus in testifying before the referee did not recall the amount that he allegedly gave to Respondent as a contribution to the Respondent's campaign. CR.8:348.

There was no evidence to contradict Respondent statement that he had heard that Klaus actively solicited support for Mann. The statement was hearsay, not false or deceptive. CR.8:342. There is evidence that Klaus had given financial support to Mann. Given the totality of all the circumstances, the statement by Respondent in his motion is not a bad faith or false pleading which can fairly be used to aggravate discipline.

REFUSAL TO ACKNOWLEDGE WRONGFUL NATURE OF CONDUCT SECTION 9.22(g)

The Referee stated that the Respondent failed to admit unequivocally the violation of any rule regulating The Florida Bar as evidenced by Respondent's answer to The Florida Bar's request for admissions, as well as Respondent's failure to testify as such. The Respondent contends that the Referee erred in not recognizing the right of the Respondent under the Rules Regulating the Florida Bar 3-4.8, 3-7.6(g)2 and 4-8.4(g) to invoke any proper priviledge, immunity or disability available to him.

In The Florida Bar v. Temmer, 632 So. 2d 1359 (Fla. 1994), this Court found that categorical denial of complaint filed with state bar association was not a false statement justifying more severe discipline than authorized under rules which were amended to condone such denial. This court stated in its finding that the rule was amended after the referee's hearing in the Temmer and agreed with Temmer that her denial of the charges should not be the basis for imposing more severe discipine when such conduct is now condoned by the disciplinary rule. Temmer at 1360. The fact that the Respondent has failed unquivocally to admit to the violation of any rule in the complaint is not a matter which should be considered as an aggravating factor.

The Referee inappropriately used the Respondent's failure to testify at the Bar hearing as an aggravating factor within his findings. The Referee ignored the fact that the Respondent's sworn testimony from "Operation Courtbroom" was admitted into evidence by way of stipulation on the part of the Bar and the Respondent and that such sworn testimony became evidence in the Bar proceeding. In essence, the Respondent did testify through the stipulated sworn testimony which was admitted into evidence.

THE REFEREE FAILED TO CONSIDER THE RESPONDENT'S MENTAL STATE AND EXISTENCE OF MITIGATING FACTORS

Standard 3.0(b) and (d) of the Florida Standards for Imposing Lawyer Sanctions states: "In imposing a sanction after a finding a lawyer misconduct, a Court shall consider the following factors ... (b) the lawyer's mental state;... and (d) the existence of

aggravating or mitigating factors". See also The Florida Bar v. Golub, 550 So. 2d 455 (Fla. 1989).

The Referee failed to consider abundant evidence regarding the Respondent's mental state and the existence of certain mitigating factors. The failure to give careful consideration to mitigating factors was condemned by this court in The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991). There, a lawyer who knowlingly misappropriated a client's property was given a suspension rather than disbarrment because of mitigating circumstances.

The only mention in the record of mitigating factors is the Referee's statement "there are some mitigating factors. Your community service is admirable. Your work in the church is very good, and I wish you continued success in your recovery, but you don't deserve to be a lawyer". CR.9:523.

No where else in the record or in his Report does the Referee analyze or recognize the mitigating factors that were demonstrated through evidence and argued during the proceeding.

Section 9.31 of the Florida Standards for Imposing Lawyer Sanction defines mitigation or mitigating circumstances as any considerations or factors that may justify a reduction in the degree of discipine to be imposed. Section 9.32 of the Florida Standards for Imposing Lawyer Sanctions sets out the standard matigating factors that can be considered by a Referee. The Respondent contends that the following mitigating factors under 9.32 apply:

9.32 (a) Absence of a prior disciplinary record

The Referee and Bar recognized that the Respondent had no

prior discipinary record. See Amended report of Referee page 11.

9.32 (c) Personal or emotional problems

Respondent demonstrated erratic behavior on tape and by his own testimony and the testimony of others who worked with him in the court system. Lawyers who practiced in front of the Respondent, doctors, and administrators all recognized that the Respondent was mentally and emotionally troubled during 1989-1991. CR.6:126-134; CR.7:172-178,186-191; R.Ex.12:8957-8968; R.Ex.13:221-22; R.Ex.14:8933-36,8943-8948; R.Ex.16:8858-72; R.Ex.18:9010-17; R.Ex.19:9049-59.

9.32 (g) Character or reputation

Numerous individuals testified as to Respondent's reputation at the present time in the community. It is clear from the testimony of community professionals and others that the Respondent at the present time enjoys a good reputation. The Referee also recognized in his rationale and findings that the Respondent had a good reputation. The Referee stated "you had everything going for you because of the hard work and the faith of an awful lot of people, many of whom are sitting in this courtroom today. Thousands more are not sitting in the courtroom. They were counting you and amazingly enough they still support you". CR.9:532.

9.32 (j) Interim rehabiliation

The Respondent has made enormous effort to rehabilitate himself. Evidence demonstrates he went to Dr. Jules Trop for treatment of his problem with cocaine, prescription drugs and alcohol. The Respondent has been working with Dr. Jules Trop and

the Florida Lawyer Assistance Program. Respondent has been working the anti-gang unit and speaking at schools and other functions involving the church. The Respondent has sought religious guidance in order to help himself rehabilitate and as such has been licensed as a minister in the Baptist Church.

9.32 (1) Remorse

The Respondent within the sworn testimony that was admitted into evidence, in these Bar proceedings, from the "Operation Courtbroom" trial expresses his remorse when he stated during cross examination:

> **Question:** "and you let all those people down ----"
> **Answer:** "yes, I did. yes, I did. I let them down, I let them down, and I am sorry. I apologize. I'm sorry that I let you down. I let myself down, because I was somebody. I could have been somebody, now I am nobody. All I got left is my wife and my kids and my God, Jesus Christ. And hopefully after all of this is over, I will be able to do something with myself. That's all I got. That's all I got. You are right, you are absolutely right." R.Ex.9:9790.

Clearly, the Referee did not take into consideration the statements of remorse made by the defendant during the trial of "Operation Courtbroom". This former testimony was introduced by stipulation in the Florida Bar proceedings and should have been considered.

In addition, there were a number of people who testified before the Referee indicating that Respondent had shown his remorse by his actions which are directly related to rehabilitation and community service.

Georgia Ayers, a social worker and Executive Director of the

Alternative Program, a criminal court diversion program in Dade County, testified that the Respondent is helping a great many people and that there are individuals in the community who want to have the Respondent work with offenders in the criminal justice system because of his experience as a judge. CR.8:384.

Arthur Jackson, Jr., Pastor of New Shiloh Missionary Baptist Church, testified that the Respondent is very much involved in the South Florida Jail House Ministry, the teaching of the mission class, the feeding of the hungry under the bridge and the clothing of the Women at the Agape Home in South Dade. CR.8:388. In addition, Pastor Jackson testified that the Respondent is a regular Monday night bible class participant, and works with the motivation and self-esteem of young men between the ages of 10-16 in the Youth Ministry which serves about a hundred and fifty young people. CR.8:389.

Pastor Jackson testified that the Respondent is part of the Five Hundred Role Model Program in Dade County through the School Board. In his estimation Respondent's sincerity is unquestionable. CR.8:389-390.

Lastly, Barbara Wade, Executive Director of the Positive Incorporated Anti-Gang Program testified that the Respondent has been very open and apologetic in demonstrating remorse to others in and around the community and needs a chance to prove his rehabilitation. CR.8:396,402.

VOLUNTARY ADDICTION TREATMENT

The Respondent has been a member of F.L.A. since March of 1993. William Kilby the Executive Director of the F.L.A. Inc.,

testified that the Respondent has been a contract client of F.L.A. since March of 1993 and as such is doing well and showing appropriate progress, development, and growth. CR.8:419-20. The Respondent according to Kilby has had no positive drug test or alcohol test since joining the program. CR.8:421. Kilby testified that if the Respondent continued in the way he is going that his recovery is very positive for a long term basis. CR.8:421-22.

Kilby testified that he is called upon by the The Florida Bar to give opinions and/or recommendations regarding the disposition of disciplinary proceedings against attorneys. CR.8:422-23. Kilby stated that the Respondent, from a chemical dependency standpoint, is presently qualified to practice law. CR.8:424. Kilby stated that there was no indication that the Respondent fabricated a drug abuse problem as a way of incurring sympathy. CR.8:424. Kilby stated unequivocally that the Respondent does have a legitimate addiction problem. CR.8:424.

Jeffrey Manners, the F.L.A. monitor for the Respondent, also testified. Manners indicated that the Respondent is committed to recovery. CR.8:441-42. Manners testified that Respondent is engaged in active recovery and has ongoing and constant contact with Manners up to once a week with additional phone calls up to 8 to 7 times per month. CR.8:430-31. Manners has been monitoring the Respondent for over a year. CR.8:429. At the present time Manners testified that Respondent has no impairment as to judgment. CR.8:431. Manners testified that the Respondent shows remorse and guilt over what had happend to him in this matter. CR.8:431.

THE REFEREE'S IMPOSITION OF SANCTION RECOMMENDING DISBARMENT IS OUTSIDE THE REALM OF DISPOSITIONS THAT HAVE TAKEN PLACE IN CASES SIMILAR TO RESPONDENT BUT WITHOUT THE EXTENSIVE MITIGATING FACTORS

The Respondent submits that the mitigating circumstances in this case are sufficient and warrant a departure from the range of the usual cases. A review of prior cases involving judicial bribery without regard to the mitigating circumstances here show a range of sanction from simple disbarrment with a five year readmission down to a three-years rehabilitative suspension or less.

In The Florida Bar v. Rendina, 583 So. 2d 314 (Fla. 1991), the respondent attempted to bribe an assistant state attorney. Without a showing of any mitigating factors, this Court disbarred Rendina for five years. In The Florida Bar v. Gross, 610 So. 2d 442 (Fla. 1992), involving a judge who lowered a bond for a bribe, this Court noted that Gross failed to produce any evidence to support his defense and disbarred him for five years. In the case of The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991), without the showing of any mitigating factors, this Court disbarred the respondent Swickle for five years. In the case of The Florida Bar v. Eisenberg, 555 So. 2d 353 (Fla. 1989), this Court, in finding that the respondent participated in illegal drug activity leading to felony convictions, disbarred Eisenberg for five years nunc pro tunc to the time of the supposed act or the initation of the proceedings.

In The Florida Bar v. Merkle, 498 So. 2d 1242 (Fla. 1986), with no showing of any mitigator this court imposed five year

disbarrment to Judge Merkle. In The Florida Bar v. Cruz, 490 So. 2d 48 (Fla. 1986), where Cruz attempted to bribe the Warden of M.C.C. and no mitigators were shown, this Court issued a five year disbarrment.

At the other end of the specutrum are such cases as The Florida Bar v. Corbin, 540 So. 2d 105 (Fla. 1989). This case involved a Circuit Judge who was engaged in sexual activity with a minor, who was in a familial position with the respondent. This Court issued a three-year, nunc pro tunc from the date of temporary suspension, rehabilitative suspension.

The only case of judicial corruption which falls outside this punishment spectrum is The Florida Bar v. Shenberg, ___ So. 2d ___ (Fla. 1993), involving of a co-defendant in the "Operation Courtbroom" case, where this Court issued a uncontested ten-year disbarrment. This Court is reminded that in Shenberg the respondent, who was a County Court Judge, released the name of an informant to Takiff with the full knowledge of plans by Takiff's bogus client to kill the informant. Shenberg is alleged to have marked a government witness for death. A ten-year disbarrment was issued for Shenberg where aggravating factors existed that were clearly outside of the usual range of aggravating circumstances.

This Court has determined that the purpose of attorney discipline is to protect the public, to deter other members of the Bar from committing misconduct, to impose sanctions for violations, and to "encourge reformation and rehabiliation". The Florida Bar v. Summers, 508 So. 2d 341, 344 (Fla. 1987), quoting The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970), The Florida Bar v. Hartman, 519 So. 2d 606, 608 (Fla. 1988).

To faciliate the rehabilitation principle, this Court has taken the position that a respondent's loss of control due to alcohol or drug addiction can be considered as a mitgating circumstance to discipine. Hartman, at 608, The Florida Bar v. Rosen, 495 So. 2d 180, 181 (Fla. 1986). Furthermore, an attorney's willingness to seek treatment and rehabiliation will also be noted by the court. The Florida Bar v. Hadley, 475 So. 2d 1213, 1214 (Fla. 1985), The Florida Bar v. Larkin, 420 So. 2d 1080, 1081 (Fla. 1982). In fact, this Court has clearly emphasized that "an addicted attorney who has demonstrated positive efforts to free himself of his drug dependancy should have that fact recognized by the Referee and this Court when considering the appropriate discipline to be imposed". The Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987).

In Jahn, the respondent had injected himself and a nineteen year old female with cocaine, and at another time injected himself and a fifteen year old female with the drug. Respondent Jahn was sentenced to two, 4 1/2 year concurrent prison terms. Yet, in his bar discipinary proceedings, the attorney was merely suspended from the practice for three years nunc pro tunc commencing from two years prior to the Court's decision. Id. at 287. This Court issued the punishment based on the referee's findings that the attorney's conduct was a direct result of his cocaine addiction and that the respondent Jahn had exemplary efforts to rid himself of his chemcial dependency. Id. at 287.

This Court in dealing with cocaine addicted lawyers has held that the "extreme sanctions" of disbarrment is to be imposed only

"in those rare cases where rehabilitation is highly improbable". The Florida Bar v. Davis, 361 So. 2d 159, 162 (Fla. 1978). Furthermore, this Court in The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990), pointed out that Shuminer failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses. He continued to work effectively during the period in issue and he used a sufficient portion of the stolen funds not to support or conceal his addictions but rather to purchase a luxury automobile. Shuminer, at 432.

Once the existence of a substance abuse problem and subsequent treatment have been duly noted, this Court has balanced the mitigating factor against the seriousness of the misconduct engaged in by the attorney. The Florida Bar v. Golub, 550 So. 2d 455, 456 (Fla. 1989), The Florida Bar v. Tunsil, 503 So. 2d 1230, 1231 (Fla. 1986).

In the case at bar, it is clear that Respondent Davis' misconduct is a direct result of his cocaine, prescription and alcohol addiction. It is clear that this addiction caused him to be impaired as to his judgment both morally and rationally.

In addition, the respondent was overwhelmed by the power that Takiff had over him and this factor can not be igorned. The Respondent Davis was very much a victim of entrapment and coercion. Notwithstanding the fact that he is an attorney, he is still a human being.

At the disciplinary hearing, the Respondent introduced and played a video tape of a sermon he gave at New Shiloh Church as a

newly licensed Baptist Minister the day before the Bar proceedings commenced. R.Ex.22. The importance of having a spiritual guide post has been demonstrated by the actions of the Respondent and by the members of F.L.A. who came and spoke on behalf of the Respondent about the importance of spiritual grounding. The Respondent has dealt with his addiction and he is going to have to contend with it for the rest of his life and as such is actively doing something about it.

The Respondent is somebody who has a special quality, who has been rehabilitated, who has come back from doing terrible things, who knows about feet of clay, and somebody who can provide special good things for other people such as children with drug issues, gang related problems, and "at-risk" school students.

The Respondent has a lot to offer society and would submit that when this Court weighs the mitigating factors that are evidenced here that the appropriate resolution of this case is not disbarment but rehabilitative suspension.

CONCLUSION

For the foregoing reasons, the Respondent, PHILLIP DAVIS, submits he should be suspended and that the recommended disbarment of 10 years should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Hereby Certify that the original of the foregoing Brief of Appellant was mailed to The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a true copy was mailed to Randi Klayman Lazarus, Esquire, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; and to Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, on September 9th, 1994.

MEL BLACK