IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	
Complainant-Appellant,	Supreme Court Case No. 85,237
v.	
DAVID I. LUSSKIN,	The Florida Bar File No. 95-51,083(17B)
Respondent-Appellee.	

THE FLORIDA BAR'S INITIAL BRIEF

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RULES REGULATING THE FLORIDA BAR

PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar". David I. Lusskin, Appellee, will be referred to as "respondent". The symbol "RR" will be used to designate the interim report of referee (the April 28, 1995 order granting an abatement) and the symbol "TT" will be used to designate the transcript of the hearing held on respondent's motion to abate. Lastly, the symbol "App." will refer to the appendix attached to this brief.

STATEMENT OF CASE AND FACTS

In a much publicized case, respondent, on January 20, 1995, was found guilty, by a jury, of two counts of solicitation to commit murder in the first degree and two counts of solicitation to commit the killing of unborn quick children. Both of these charges are serious felonies. On February 10, 1995, respondent was sentenced to 14 years in state prison and on March 3, 1995, he was suspended from the practice of law, pursuant to the automatic felony suspension rule.[1] Respondent remains suspended and incarcerated.

Finding the three year felony suspension an insufficient sanction for respondent's crimes, the bar filed this instant action on February 21, 1995 to seek respondent's disbarment. On March 13, 1995, the Honorable Gary L. Vonhof was appointed to act as referee. Shortly thereafter, respondent served his motion to abate the instant action. App.1. As the bar was opposed to any abatement, it filed a responsive pleading. App.2. Respondent's motion was heard before the referee on April 11, 1995[2] and the referee, after hearing argument on the motion, ruled that this matter should be

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[1] See R. Regulating Fla. Bar 3-7.2.

[2] The transcript of this hearing is attached at App. 3.

abated until respondent's appeal to the Fourth District Court of Appeals is resolved. App.4. The bar seeks review of that decision and requests the court to dissolve the abatement and require the referee to try this case in an expeditious fashion.

SUMMARY OF ARGUMENT

The respondent stands convicted of very heinous crimes - two counts of solicitation to commit first degree murder and two counts of solicitation to commit the killing of unborn quick children. This is the type of crime, when committed by a lawyer, that requires swift disbarment. At present, the bar and the public are being denied this swift punishment, as the referee has abated this disbarment proceeding. There is no basis in the rules or case law for the abatement of this proceeding and all the equities point towards concluding this proceeding as quickly as possible.

The referee's decision to abate is not unlike looking into a crystal ball to determine respondent's chances in overturning his criminal conviction. A referee should not engage in such speculation. The jury has spoken. It is time for the bar and this court to give that jury's verdict the dignity that it deserves by allowing this case to go forward without any further delay.

ARGUMENT

I. A DISBARMENT PROCEEDING, PREDICATED UPON A FELONY CONVICTION, SHOULD NOT BE ABATED UNTIL AN APPEAL OF THAT FELONY CONVICTION CAN BE COMPLETED.

Respondent is a convicted felon. His felonies are egregious and beyond the pale of acceptable conduct for a lawyer. The bar, based upon respondent's multiple felony convictions, has initiated this proceeding to seek respondent's disbarment from the practice of law. However, the bar has been thwarted in bringing this matter on for final hearing, as the referee has abated this action until respondent has had a chance to complete his appeal of the felony convictions and until the Fourth District Court of Appeals acts on that appeal.

A. The need for speed.

In order for the public to properly repose its trust in the disciplinary process, bar grievances must "be handled with dispatch" and " without any undue delay". The Florida Bar v. Papy, 358 So. 2d 4, 6 (Fla. 1978). This court has noted that "inordinate delays are unfair, unjust and may even be prejudicial to the accused attorney." Id. at 6. Thus, this court noted their displeasure of a case that had such an inordinate delay, The

Florida Bar v. Randolph, 238 So. 2d 635 (Fla. 1970), and explained that these inordinate delays:

> . . . permit violators to remain active in the practice. They dim the memories of witnesses. They mar effective and efficient enforcement of the cannons of ethics. Worst of all, perhaps, they undermine the public confidence in the bar's announced determination to keep its own house in order. . .

Randolph at 638.

The acts that give rise to this case occurred over two years ago. While the felony conviction is conclusive proof of respondent's criminal acts[3], there still may be a need to have various witnesses testify as to respondent's criminal misdeeds. In addition, due to the magnitude of respondent's criminality, the lack of a swift punishment in this case could undermine the public's confidence in the bar's disciplinary process. The referee, in granting an abatement, ignored these two issues, and instead engaged in speculation as to the outcome of respondent's appeal of his felony convictions.

B. An abatement is inappropriate.

The lack of finality to a felony conviction, due to an ongoing or yet to be filed appeal, does not preclude disbarment of a

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[3] See R. Regulating Fla. Bar 3-7.2 (b).

convicted lawyer. The Florida Bar v. MacGuire, 529 So. 2d 669 (Fla. 1988). Also see Mitchell v. Association of the Bar of the City of New York,[4] 386 N.Y.S. 2d 95 (N.Y. 1976); In re McDonald, 296 So. 2d 141 (Ala. 1974). The New York Court of Appeals' rationale for approving disbarment for a felony conviction, notwithstanding a pending appeal of that conviction, is as follows:

> Even though appellant here was afforded a right to appeal, this judgement of conviction is entitled equal respect as a final judgment on the merits unless and until reversed upon appeal. Mr. Mitchell has had his day in court, and has had every opportunity to refute the charges made against him. In convicting him, a jury of his peers has credited the testimony of his accusers and rejected whatever defenses and evidence he may have set forth. A strong presumption of regularity attaches to that judgement of conviction. Thus, we are of the view that an attorney convicted of a felony has no constitutional right to practice law pending an appeal of his conviction, any more than any other convicted person has a constitutional right to be at liberty pending an appeal.

Mitchell at 97-98 (citations omitted).

This court has only once addressed a referee's decision to stay or abate a then pending disbarment proceeding based upon a

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[4] This is the disbarment proceeding for John N. Mitchell, the former Attorney General of the United States, based upon his Watergate related convictions.

felony conviction.[5] The Florida Bar v. Winn, 593 So. 2d 1047 (Fla. 1992). In Winn the respondent, who was already incarcerated for his crimes, had requested an abatement due to the fact that he had already filed an appeal of his felony conviction in the federal court system. The referee denied the abatement. The case proceeded to trial and the referee recommended disbarment. Upon Winn's appeal the court rejected the premise that it was reversible error to deny the abatement and refused to grant an abatement "pending Winn's federal appeal, since this would entangle this Court in speculation about the outcome of a federal proceeding." Id., at 1048; See also In re Cally, 519 N.Y.S. 2d 650 (N.Y. 1st App. Div. 1987) [Pendency of an appeal is not grounds for delaying

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[5] This court has also resolved a similar abatement issue in favor of the bar. The Florida Bar v. Wincor, 257 So. 2d 247 (Fla. 1971). The respondent in that case had been convicted of felony number one and the bar was proceeding upon those charges when a second felony case was filed against the lawyer. The bar had previously agreed to an abatement of its first case due to the then pending felony case, but upon conclusion of felony case number one the bar brought the case to trial. Wincor unsuccessfully argued that the pendency of the second felony case and the concomitant self-incrimination issues were sufficient grounds to abate the first bar proceeding. The court disagreed as there appeared to be no nexus between felony number one and felony number two other than the victims of felony number one (the bar's witnesses) had been subpoenaed to testify in felony number two.

a disciplinary proceeding based upon a conviction of a serious crime.].

In an analogous line of cases, this court has repeatedly declined to grant a delay in the imposition of an automatic felony suspension[6] solely because of a pending appeal. See The Florida Bar v. Prior, 330 So. 2d 697 (Fla. 1976) (Overton, C. J, and England, J., concurring specially). Chief Justice Overton in his concurring opinion in Prior goes to great lengths to recite the history (as of 1976) of the court's decisions on a respondent's application to stay the imposition of an automatic felony suspension. In particular, at footnote 18, the chief justice discusses 42 cases considered by the court. Of those 42 only three secured a stay of the felony suspension. The first exception was The Florida Bar v. Cohen, 191 So. 2d 49 (Fla. 1966)[7]. Cohen secured a stay, not because of his then pending appeal, but because the bar had been dilatory in seeking the felony suspension (almost a year after Cohen had filed his criminal appeal). Cohen. The

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[6] See R. Regulating Fla. Bar 3-7.2(e).

[7] In a subsequent decision this court found the Cohen decision to be an isolated extraordinary decision and then returned to its previous pattern of suspending attorneys for a felony conviction, even if they may have had a meritorious appeal pending. The Florida Bar v. Levenson, 211 So. 2d 173 (Fla. 1968).

second exception, The Florida Bar v. Ragano, 270 So. 2d 3 (Fla. 1972), was granted because:

> . . . this court applied a relaxed standard in large part because of good character letters were written by 'numerous judicial and other public officers' at the request of the convicted attorney.

Prior at 702 (Overton, C.J. specially concurring). "In any event, the 1972 Ragano case[8] is simply not consistent with earlier decisions of this court." Id. The last exception, The Florida Bar v. Smith, 301 So. 2d 768 (Fla. 1974), is similarly distinguishable as that particular respondent had already ceased practicing law voluntarily and because his crime was of a technical nature and not one that required specific criminal intent.

Chief Justice Overton in his Prior opinion also discusses the need for bar proceedings not to be a new venue for the retrial of felony cases and that the court should not weigh the viability of a convicted felon's appeal as:

> There is neither an adequate record nor an inherent capability in this court to pass upon the validity of the attorney's conviction or the merits of his appeal. Attempts to assess the likelihood of reversal from the arguments of counsel invite a form of speculation with

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[8] Mr. Ragano has a long disciplinary history with the bar, culminating in his 1992 permanent resignation. The Florida Bar v. Ragano, 599 So. 2d 659 (Fla. 1992).

> which this court should have no part. (footnotes omitted[9])

In a more recent case, this court declined to engage in such speculation about a convicted attorney's chances on appeal. The Florida Bar v. Heller, 473 So. 2d 1250 (Fla. 1985). In Heller, the lawyer was convicted of three counts of income tax evasion and three counts of falsely subscribing to an income tax return. Heller, in the face of the bar's request for the imposition of a felony suspension, argued that "the federal criminal convictions were obtained by means of a prosecution and trial that did not conform to the basic minimum standards of fairness required under the Florida Constitution." Id. at 1251. Heller also complained of religious bias during the felony trial. In denying Heller's request for a stay of the felony suspension the court favorably noted Chief Justice Overton's concurring opinion in Prior and stated:

> The approach suggested by (the passage from the Prior decision set forth above) has been predominant in this court's disposition of petitions to withhold suspension sought on the

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[9] Footnote 11 is worth noting, however. Chief Justice Overton explains that a later Ragano felony suspension had to be vacated due to a reversal in the appellate court and that the Smith case, supra, resulted in an affirmance of the felony conviction notwithstanding the Supreme Court's speculation that there would be no affirmance on appeal.

> ground of felony conviction, thus the legal correctness of the judgement of conviction, as it is likely to be perceived by the court with jurisdiction of the appeal, is ordinarily beyond the scope of this court's consideration of a petition such as that before us in this case. In general, the judgement of conviction of a felony is conclusive proof of the commission of the felony and, on the basis of the wrongdoing thus shown, immediate suspension is considered appropriate.

Heller at 1251.

In Heller, the court recites the standard of "good cause" for granting a stay of the imposition of a felony suspension. Heller's argument on "good cause" was solely and exclusively based upon his claim to a meritorious appeal - a claim agreed with by at least two justices specially concurring with the denial of the stay request. Id. at 1252 (Boyd, C.J. and Shaw, J. specially concurring). The court found that this claim to a meritorious appeal was not "good cause" to grant a stay of the felony suspension.

In the case at hand, respondent's sole rationale for requesting an abatement is that he has a meritorious appeal. The referee agreed and granted the abatement. RR at 1. The bar contends that if this type of argument was not "good cause" in Heller and Prior, then it should not be "good cause" for this respondent to secure an abatement of his disbarment proceeding.

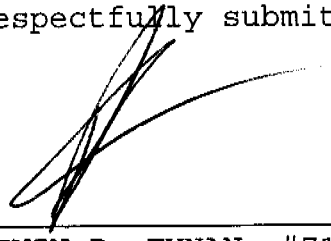
CONCLUSION

Our system of justice is predicated upon our confidence in a jury being able to render a fair and accurate verdict. In the case at hand, a jury has rendered a verdict of guilty as to certain egregious felonies and a trial judge has concurred in that result by ordering the incarceration of the respondent for 14 years. The referee, in ordering an abatement based upon his speculation that the felony convictions could be overturned on appeal, has failed to give that conviction of guilt the full dignity that it deserves.

The public demands that lawbreakers and wayward lawyers be punished swiftly and fairly consistent with due process. The bar asks for nothing more than the ability to go forward and seek a swift and fair disciplinary sanction.

WHEREFORE, The Florida Bar respectfully request this court to reject the referee's recommendation that this case be abated until respondent's criminal appeal can be resolved and further requests that this court order the referee to set this case down for final hearing.

Respectfully submitted,



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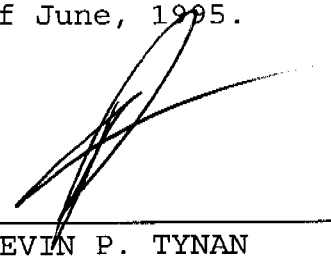
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing initial brief of The Florida Bar has been furnished via regular U.S. mail to J. David Bogenschutz, attorney for respondent, at Jefferson Bank Bldg., 600 S. Andrews Ave., Suite 500, Fort Lauderdale, FL 33301, and to John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 8th day of June, 1995.



KEVIN P. TYNAN

IN THE SUPREME COURT OF FLORIDA
(BEFORE A REFEREE)

Supreme Court Case No.: 85,237

Fla. Bar No. 95-51,083(17B)
JUDGE/REFEREE:

THE FLORIDA BAR,

Complainant,

vs.

DAVID ISAAC LUSSKIN,

Respondent.
_____/

MOTION TO ABATE PROCEEDINGS

COMES NOW the Respondent, DAVID ISAAC LUSSKIN, by and through undersigned counsel, and respectfully moves this Honorable Court, as Referee in the above-styled cause to stay and abate the proceedings herein pending resolution of the Respondent's appeal of his conviction to the Fourth District Court of Appeal and would show for cause as follows:

1. That Respondent was convicted of felony counts in the Circuit Court of the Seventeenth Judicial Circuit, and sentenced thereon to fourteen (14) years in the Florida State Prison.

2. That Defendant had never before been convicted of any criminal offense.

3. That Defendant has perfected his appeal by filing of notice of Appeal from those convictions, on March 1, 1995 (copy attached); that appeal is still pending thus Respondent's conviction is not final in this State.

4. That this Honorable Court should stay and abate these

proceedings until that conviction is either reversed or affirmed in accord with R.Reg. Fla. Bar 3-7.2(h)1,2,3, and 4.

5. It little serves the Bar or Respondent or any person so otherwise situate to base a disbarment proceeding upon a non-final judgment of guilt, when an appellate reversal may vitiate the grounds upon which the Court's action is grounded.

6. The position of the Florida Bar in its letter of March 20, 1995, relying upon Florida Bar v. MacGuire 529 So.2d 669 (Fla. 1988) is misplaced. The Defendant in MacGuire argued the two year 3.850 requirement. He had taken no direct appeal. His conviction was final. Respondent herein has perfected a direct appeal. His conviction is non-final.

7. Based upon the facts and arguments advanced, Respondent urges that this Court abate the proceedings pending final appellate mandate in this cause.

I HEREBY CERTIFY that a copy of the foregoing was furnished this 5th day of April, 1995, to Kevin Tynan, Esq., The Florida Bar, 5900 N. Andrews Avenue, #835, Fort Lauderdale, Florida 33309; and the original sent to Clerk of the Florida Supreme Court, Supreme Court Building, Tallahassee, Florida 32399; and to John A. Boggs, Director of Lawyer Regulation, the Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and to the Honorable Gary L. Vonhof, Referee, Palm Beach County Courthouse, 300 N. Dixie Highway, West Palm Beach, Florida 33401.

Respectfully submitted,
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305/764-2500

BY: J. David Bogenschutz
J. DAVID BOGENSCHUTZ
Florida Bar No. 131174

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 94-1396CF10A
JUDGE: SPEISER

DAVID LUSSKIN,

Defendant/Appellant,

NOTICE OF APPEAL

vs.

STATE OF FLORIDA,

Plaintiff, Appellee.
_____/

NOTICE IS HEREBY GIVEN that DAVID LUSSKIN, Defendant/Appellant, appeals to the District Court of Appeal, Fourth District of Florida, the judgment, sentence, and order regarding costs of prosecution, entered on February 10, 1995, in the above-styled cause.

I HEREBY CERTIFY that a copy of the foregoing was furnished this 1st day of March, 1995, to the Office of the State Attorney, Jeff Marcus, Esq., Broward County Courthouse, 201 SE 6th Street, Fort Lauderdale, FL 33301; and the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor, West Palm Beach, Florida 33401.

Respectfully submitted,

BOGENSCHUTZ & DUTKO, P.A.
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305/764-2500

BY: /s/ David Bogenschutz
J. DAVID BOGENSCHUTZ
Florida Bar No. 131174

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

DAVID ISAAC LUSSKIN,

Respondent.
_____/

Supreme Court Case
No. 85,237

The Florida Bar File
No. 95-51,083(17B)

RESPONSE TO MOTION TO ABATE

THE FLORIDA BAR, complainant, responds as follows to respondent David Lusskin's motion to abate:

1. Respondent stands convicted of two counts of solicitation to commit murder in the first degree, as well as two counts of solicitation to commit the killing of unborn quick children, and is incarcerated.

2. Respondent now comes before this referee and asks, without reference to any authority, that the referee abate the bar's attempts to disbar him for his crimes.

3. The Supreme Court has consistently held that "disciplinary proceedings should be handled with dispatch and without undue delay. The Florida Bar v. Papy, 358 So. 2d 4 (Fla. 1978). The delay of a disciplinary proceeding should be avoided because:

> *. . . they dim the memories of witnesses. They mar effective and efficient enforcement of the cannons of ethics. Worst of all perhaps, they undermine the public confidence in the Bar's announced determination to keep its own house in order. The Florida Bar v. Randolph, 238 So. 2d 635, 638 (Fla. 1970).*

4. On at least three occasions the court has declined to grant an abatement of a

disbarment action due to a then pending appeal or because, as respondent argues, the "conviction is not yet final" due to an appeal or the ability to seek collateral relief. The issue of a collateral appeal was disposed of by The Florida Bar v. MacGuire, 529 So. 2d 669 (Fla. 1988), wherein the court declined to grant an abatement. Also see R. Reg. Fla. Bar 3-7.2 which makes no provision for such an abatement. In The Florida Bar v. Winn, 593 So. 2d 1047 (Fla. 1992), the respondent sought to secure an abatement so he could appeal his federal felony convictions and the Court declared that:

> *. . . we will not hod these proceedings in abeyance pending Winn's federal appeal, since this would entangle this court in speculation about the outcome of a federal proceeding. Id. At 1048.*

Lastly, in The Florida Bar v. Heller, 473 So. 2d 1250 (Fla. 1989), the court declined to abate a then pending felony suspension proceeding because respondent had filed an appeal of his criminal convictions.

5. For all of the foregoing reasons, respondent's request for an abatement should not be granted.

WHEREFORE, The Florida Bar, complainant, respectfully requests that respondent's motion to abate be denied.

Respectfully submitted,

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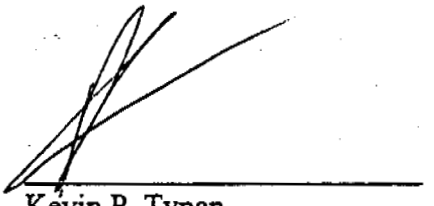
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via FAX and regular U.S. mail to J. David Bogenschutz, attorney for respondent, at Jefferson Bank Bldg., 600 S. Andrews Ave., Suite 500, Fort Lauderdale, FL 33301, and via regular mail to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 10th day of April, 1995.



Kevin P. Tynan