IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,237

THE FLORIDA BAR File No. 95-51,083(17B)

THE FLORIDA BAR,
Complainant-Appellant,

vs.

DAVID I. LUSSKIN,
Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE REFEREE
IN DISCIPLINARY PROCEEDING OF THE FLORIDA BAR

APPELLEE'S INITIAL BRIEF

J. DAVID BOGENSCHUTZ, ESQUIRE
Bogenschutz & Dutko, P.A.
Jefferson Bank Building
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
Telephone: (305)764-2500

Counsel for Appellee

SUPREME COURT CASE NO. 85,237
THE FLORIDA BAR vs. DAVID I. LUSSKIN

CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent-Appellee, David I. Lusskin, certifies that the following persons and entities have, or may have, an interest in the outcome of this case.

1. JOHN T. BERRY, Esquire
   (Staff Counsel for The Florida Bar)

2. J. DAVID BOGENSHUTZ, Esquire
   (Counsel for Respondent-Appellee)

3. JOHN F. HARKNESS, JR., Esquire
   (Executive Director of The Florida Bar)

4. DAVID I. LUSSKIN, Esquire (Suspended)
   (Respondent-Appellee)

5. KEVIN P. TYNAN, Esquire
   (Counsel for The Florida Bar-Appellant)

6. The Honorable GARY L. VONHOF
   (Circuit Court Judge, Fifteenth Judicial Circuit-Referee)

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

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TABLE OF AUTHORITIES

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LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.

JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

RULES REGULATING THE FLORIDA BAR

MISCELLANEOUS

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JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

PRELIMINARY STATEMENT

Appellee, David I. Lusskin, was the Respondent and the Appellant, The Florida Bar, was the Complainant in the Bar complaint proceeding before a referee for The Florida Bar. In this brief, the parties shall be referred to as they appeared before this Court except that the Appellant shall also be referred to as the "Bar."

All emphasis in this brief appears in original citations unless otherwise indicated.

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

STATEMENT OF THE CASE AND FACTS

On October 7, 1993, the Office of the State Attorney for the Seventeenth Judicial Circuit in and for Broward County, Florida, issued a six-count Information charging the Appellee, David I. Lusskin, with two counts of Solicitation to Commit Murder in the First Degree, one count of Criminal Solicitation to Commit Killing of an Unborn Quick Child by Injury to the Mother, one count of Criminal Solicitation to Commit Killing of an Unborn Quick Female Child by Injury to the Mother, one count of Criminal Solicitation to Commit Killing of an Unborn Quick Male Child by Injury to the Mother, and one count of Culpable Negligence. On January 24, 1994, the Office of the State Attorney re-filed its Information against the Appellee charging him with seven criminal counts. The re-filed Information charged the Appellee with three counts of Solicitation to Commit Murder in the First Degree, three counts of Solicitation to Commit Killing of an Unborn Quick Child or Children, and one count of Culpable Negligence.

On November 3, 1994, the Appellee filed a *Consent to Emergency Probation* with the Supreme Court. (APPENDIX I). This Court granted the petition for emergency probation on November 17, 1994. (APPENDIX II).

On January 20, 1995, the Appellee was found guilty by 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. (*State of Florida vs. David I. Lusskin*, 17th Jud. Cir. Case No. 94-1396CF10A). On February 10, 1995, the Appellee was sentenced to fourteen years in Florida State Prison. Pursuant to Rule 3-7.2(e) of the Rules Regulating the Florida Bar, *Complaint* of The Florida Bar and being convicted of felony offenses, the Appellee was

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suspended from the practice of law on March 3, 1995. (APPENDIX III & IV). The term of Appellee's suspension is three years and thereafter until the Appellee's civil rights are restored per Rule 3-7.2(h)(1).

The Appellee filed a timely *Notice of Appeal* to the Fourth District Court of Appeal wherein he appeals the judgment, sentence, and order regarding costs of prosecution in the criminal case against him. (APPENDIX V).

On February 21, 1995, the Bar initiated the instant action seeking Appellee's disbarment. On March 13, 1995, the Honorable Gary L. Vonhof was appointed as Referee for this Bar complaint against Appellee. The Appellee filed a *Motion to Abate Proceedings*, (APPENDIX VI), the Bar filed a response to Appellee's motion, and a hearing was held on the motion before the Referee on April 11, 1995. On April 28, 1995, the Referee granted Appellee's motion and issued an *Order Granting Motion to Abate Proceedings*. (APPENDIX VII). The Referee states as grounds for granting Appellee's motion for abatement the fact that the Appellee is presently under felony suspension from the practice of law, is incarcerated thereby preventing him from practicing law, and is actively pursuing appellate relief for his criminal convictions. The Referee also indicated that, for procedural reasons, the Appellee's convictions have the potential of being set aside, and that disbarment proceedings at this time would be premature. The Referee ordered abatement of these proceedings until such time as the Fourth District Court of Appeal renders a decision regarding the Appellee's convictions.

The Appellee seeks affirmance of the Referee's *Order Granting Motion to Abate Proceedings*.

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

SUMMARY OF THE ARGUMENT

The Appellee has been convicted of felony offenses and has been automatically suspended from the practice of law. The Appellee's convictions are not final as he has instituted appellate proceedings for review of the convictions. Although the Bar seeks a speedy resolution to this matter through disbarment of the Appellee, to administer the harshest discipline before the Appellee has availed himself of the full judicial process would be premature and, potentially, counter-productive to the goals of the disciplinary rules. Premature disbarment would be voided upon reversal of the Appellee's criminal convictions, and would reflect a lack of trust and confidence in the very judicial system attorneys, the courts and The Florida Bar have sworn to uphold. This Court should allow the citizen-lawyer to seek final disposition of a case before an ultimate sentence is handed-down, and affirm the Referee's recommendation. Nothing would be disturbed by such an action, due to the current status of the Appellee, and if reversal occurs (as the Referee notes is more than possible), a further disruption of the system would be avoided.

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JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

ARGUMENT

DISBARMENT PROCEEDINGS SHOULD BE ABATED PENDING FINALIZATION OF APPEAL OF A FELONY CONVICTION

The Respondent/Appellee, David I. Lusskin, was a practicing attorney and member of The Florida Bar when charged with several felony offenses. After being charged, and in the interest of protecting public perception of the Bar, the Appellee voluntarily filed for, and was granted, emergency probation. (*See* APPENDIX I, *Consent to Emergency Probation* & APPENDIX II, *Order* of emergency probation). Subsequently, trial by jury rendered a guilty verdict thereby convicting the Appellee of felony offenses. The Appellee has timely filed an appeal of his felony conviction. (*See* APPENDIX V, *Notice of Appeal*). As a result of the felony conviction, this Court ordered the Appellee suspended from the practice of law under the provision of the Rules Regulating the Florida Bar commonly referred to as the "felony suspension" rule. (*See* APPENDIX III, *Complaint* of felony conviction & APPENDIX IV, *Order* of felony suspension). Despite the "felony suspension" and pending appeal of conviction, the Appellant/The Florida Bar, initiated disciplinary proceedings seeking Appellee's disbarment based upon the aforementioned felony conviction. Before a Bar Referee, the Appellee sought, and received, an abatement of disbarment proceedings pending the final disposition of the criminal appeal. (*See* Appendix VI, *Motion to Abate Proceedings* and Appendix VII, *Order Granting Motion to Abate Proceedings*). The Bar now requests this Court to overrule the Referee's order abating the disbarment action against the Appellee.

When determining an appropriate disciplinary sanction the Court must find that its action serves three purposes. Those purposes are that the action be (1) fair to society, (2)

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

fair to the attorney, and (3) it must be severe enough to deter other attorneys from similar misconduct. *See The Florida Bar v. Papy*, 358 So.2d 4 (Fla. 1978); *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970). The sanction of felony suspension, as imposed in the present case, is the appropriate discipline in compliance with the above-stated reasons for disciplinary sanctions.

The suspension of the Appellee is authorized by Rule 3-7.2(e) of the Rules Regulating the Florida Bar, also referred to as the "felony suspension" rule, which states:

> **Suspension by Judgment of Guilt (Felonies).** Upon receiving notice that a member of the bar has been determined or adjudicated guilty of a felony, branch staff counsel will file a "Notice of Determination or Judgment of Guilt" in the Supreme Court of Florida. A copy of the judgment shall be attached to the notice. Upon the filing with the Supreme Court of Florida by The Florida Bar and service upon the respondent of a notice of determination or judgment of guilt for offenses that are felonies under applicable law, ***the respondent shall stand suspended as a member of The Florida Bar*** on the eleventh day after filing of the notice of determination or judgment of guilt unless the respondent shall, on or before the tenth day after filing of such notice, file a petition to terminate or modify such suspension. (Emphasis added).

The felony suspension rule also provides the length of suspension in subsection (h)(1), which states that:

> Unless the Supreme Court of Florida permits an earlier application for reinstatement, ***the suspension imposed on the determination or judgment of guilt shall remain in effect for 3 years and thereafter until civil rights have been restored*** and until the respondent is reinstated under rule 3-7.10[1] hereof. (Emphasis added).

This Court examined the automatic felony suspension as it relates to public

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[1]Rule 3-7.10, Reinstatement and Readmission Procedures.

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perceptions of the Bar in *The Florida Bar v. Prior*, 330 So.2d 697 (Fla. 1976). In that case, the Court stated:

> The immediate suspension procedure set forth in our rules is designed to remove from public counseling and from the court system as promptly as possible, but not irrevocably, individuals who stand convicted of a felony offense.

Id. at 702; *The Florida Bar v. Craig*, 238 So.2d 78 (Fla. 1970). Clearly, felony suspension satisfies the objectives of imposing sanctions as the fairness to society is demonstrated by the prompt and full restriction placed upon the suspended attorney's ability to continue to practice law. The sanction is fair to the suspended attorney as a suspension is far easier to revoke than undergoing the Bar re-admission process after disbarment if the purposes for the suspension dissolve. And, lastly, the specter of automatic suspension upon felony conviction should, by its mere existence, provide discouragement of conduct likely to result in such harsh discipline. Because the Appellee's current standing as a suspended attorney serves the Court's stated purposes for disciplinary sanctions, disbarment at this point in time would be inappropriate and premature as his criminal case has yet to be finalized.

A. The Appellee has been appropriately sanctioned thereby negating any need for speed

In its brief, the Bar raises concerns for the speed with which the requested discipline should be administered. Despite the fact the Appellee is under felony suspension and the Bar now seeks his disbarment, the Bar argues several Court decisions which stand for the proposition that felony suspensions are proper. The Bar's argument for hasty disbarment of the Appellee cites cases which are easily distinguished from the present case. The cases

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

offered by the Bar are *The Florida Bar v. Papy*, 358 So.2d 4 (Fla. 1978), and *The Florida Bar v. Randolph*, 238 So.2d 635 (Fla. 1970), wherein the respondents sought reduction of Bar recommended sanctions. In those cases this Court said the disciplinary process must "be handled with dispatch, without undue delay." *Papy*, 358 So.2d at 6; *see Randolph*, 238 So.2d at 638. Interestingly, the Court in *Papy* was complaining about the Bar's failure to "expeditiously prosecute the complaint against [Papy]," and that the case was "replete with delays from the Bar's activity or inactivity." *Id.* at 6 (Court reduced recommended disbarment to 1-year suspension). In *Randolph*, this Court complained again of the delay in disciplinary prosecution caused by the Bar. *Randolph* (Court reduced recommended 2-year suspension to 90-day suspension).

The concern of the Court in both *Papy* and *Randolph* was that a delay in disciplinary proceedings permits rule violators to remain in active practice which, in turn, could undermine the public confidence in the Bar's announced determination to keep its house in order. This Court wrote in another case that:

> [T]he appearance of a convicted attorney continuing to practice does more to disrupt public confidence in the legal profession than any other disciplinary problem.

The Florida Bar v. Prior, 330 So.2d 697, 702 (Fla. 1976).

In the instant case, the Bar's asserted need for speed, and the authority offered in support thereof, is grossly misplaced. First, the Bar has ***not*** been dilatory in seeking the proper discipline in the present case as the Appellee was promptly suspended from the practice of law after conviction. Second, any concerns that the Appellee not practice while he stands convicted of criminal offenses is precluded by the suspension (and his

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JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

incarceration in the Florida State Prison).

B. Abatement of disbarment proceedings is appropriate

The Appellee recognizes this Court's authority to order disbarment even though a member's criminal conviction is under appeal. *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994) (disbarment ordered pending appeal, respondent used attorney position to commit crimes in New York); *The Florida Bar v. Winn*, 593 So.2d 1047 (Fla. 1992) (disbarment ordered pending appeal, substantial aggravating evidence and no mitigating evidence presented); *see The Florida Bar v. Jackman*, 145 So.2d 482 (Fla. 1962) (disbarment ordered upon felony conviction, conviction not on appeal). Consequently, because a felony conviction does not require automatic disbarment, this Court's judgment in a disciplinary proceeding should be determined on a case-by-case basis. *Wilson*, 643 So.2d 1063; *see The Florida Bar v. Jahn*, 509 So.2d 285 (Fla. 1987) (Court rejected Bar proposal for automatic disbarment on felony conviction as each attorney discipline case should be viewed solely on its merits). Because the Court can use its discretion when imposing sanctions on criminally convicted attorneys, several cases have resulted in abatement of suspension and/or disbarment proceedings where there was a pending appeal. *See The Florida Bar v. Smith*, 301 So.2d 768 (Fla. 1974) (suspension not imposed pending appeal); *The Florida Bar v. Levenson*, 211 So.2d 173 (Fla. 1968) (suspension imposed until conviction affirmed or reversed on appeal); *The Florida Bar v. Cohen*, 191 So.2d 49 (Fla. 1966) (suspension delayed pending appeal to the U.S. Supreme Court); *see also The Florida Bar v. Tifford*, 373 So.2d 919 (Fla. 1979) (felony suspension terminated upon reversal of conviction by federal court).

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In support of the position that delaying the disbarment process would be improper, the Bar argues that the holding in *The Florida Bar v. MacGuire*, 529 So.2d 669 (Fla. 1988), should control. In *MacGuire*, the respondent sought a delay in disbarment proceedings pending the outcome of a Rule 3.850[2] motion following his felony convictions. This Court adopted the referee's recommendation for disbarment, stating:

> While the lack of finality of MacGuire's conviction would not necessarily preclude disbarment, *cf.* rule 3-7.2(h), Rules of Discipline of the Florida Bar, it is clear from the record that ***he has filed no appeal***.

Id. at 670 (emphasis added). This Court also distinguished MacGuire's request from that of other convicted members by noting that his Rule 3.850 motion was a "collateral attack" and "***does not establish the finality of conviction***." *Id.* (emphasis added). The present Appellee stands in the position eluded to by the Court in *MacGuire* in that he is pursuing a ***direct appeal*** and the "finality of conviction" is the precise issue he presents for appellate consideration.

For additional support, the Bar offers rulings of New York courts in *Mitchell v. Association of the Bar of the City of New York*, 386 N.Y.S.2d 95 (N.Y. 1976), and *In re Cally*, 519 N.Y.S.2d 650 (N.Y. App. Div. 1987). These cases stand for the proposition that disbarment should not be delayed pending appeal. Nevertheless, the courts in *Mitchell* and *Cally* were bound by New York Judiciary Law, section 90, subdivision 4, which provides that

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[2]Rule 3.850 of the Florida Rules of Criminal Procedure provides for post-conviction relief via a motion to vacate, set aside or correct sentence on the ground that a judgment was entered in violation of state or federal constitutions or laws, that the court was without jurisdiction, the sentence was illegal, the plea involuntary, or other grounds subject to collateral attack.

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
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a bar member's name be ***automatically stricken*** from the rolls of attorneys upon felony conviction. *Mitchell*, 386 N.Y.S.2d at 96; *see In re McDonald*, 296 So.2d 141 (Ala. 1974) (Alabama bar rules call for automatic disbarment upon felony conviction). In drafting the Rules Regulating the Florida Bar, the Florida Legislature obviously intended to provide its members the due process benefit not available in an inflexible disbarment such as those in states mentioned by Appellant.

The Bar also argues that the decision in *The Florida Bar v. Winn* supports its position. In that case, the respondent was disbarred despite a pending appeal of his federal felony conviction. Despite its holding, the Court in *Winn* cited approvingly to *The Florida Bar v. Heller*, 473 So.2d 1250 (Fla. 1985), in its opinion. In *Heller*, the Court held that the suspension of a member is appropriate while his federal appeal is pending. Likewise, in *Heller* the Court relied on its earlier decision in *The Florida Bar v. Prior*, 330 So.2d 697 (Fla. 1976). In *Prior*, the Court stated that "an attorney who has been convicted of a felony should be suspended pending the appeal of that conviction." *Id.* at 701.

Interestingly, in *Winn* the Court stated that it would disbar Winn in the face of his appeal so as not to "entangle this Court in speculation about the outcome of a federal proceeding." *Id.* at 1048. Nevertheless, in his specially concurring opinion in *Heller*, Justice Boyd reviewed the merits of the respondent's appeal of conviction and commented on its facial strengths. *See id.* at 1252. This same type of speculation into appellate results was expressed by the Referee in the present case. The present Referee even commented on the likelihood of appellate success based on a district court decision addressing one of the identical issues of Appellee's appeal of conviction. (*See* APPENDIX VII, *Order Granting*

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Motion to Abate Proceedings).

The important point that must prevail in this case is the fact that the Appellee is not attempting to avoid suspension of his ability to practice law. The Bar places a great deal of emphasis on decisions of the Court, such as *Prior* and *Heller*, to support its position. As argued above, the Bar mixes "apples and oranges" by relying on these cases that find felony suspension proper when the Appellee questions neither the authority of the Court, nor the Bar rule mandating such suspension. The Appellee seeks the abatement of a disbarment proceeding against him pending the appeal of his criminal conviction.

CONCLUSION

For the Court and the Bar to act without due consideration of the circumstances affecting a member of the Bar, especially when those circumstances have a direct and inseparable tie to the judicial mechanism to which these entities vow defense and obedience, would be to proclaim that the system is both inadequate and undeserving of our faith that justice may be achieved. The Appellee stands before this Court under suspension from the practice of law and, due to his current incarceration, is unable to conduct a practice or counsel. Because the objectives of attorney discipline are met by felony suspension, disbarment would not only be premature due to the pending appeal, but simply too harsh a sanction under the circumstances.

WHEREFORE, the Appellee, David I. Lusskin, respectfully requests this Honorable Court AFFIRM the Referee's *Order Granting Motion to Abate Proceedings*.

LAW OFFICES OF BOGENSCHUTZ & DUTKO, P.A.
JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Appellee's Initial Brief has been furnished by U.S. Mail to Kevin P. Tynan, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and John F. Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 12th day of July 1995.

Respectfully submitted,

BOGENSCHUTZ & DUTKO, P.A.
Counsel for Appellee
Jefferson Bank Building
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301
Telephone: (305)764-2500

BY: 
J. DAVID BOGENSCHUTZ, Esquire
Florida Bar No. 131174

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APPENDIX VI (*Order* of felony suspension)

APPENDIX V (*Notice of Appeal*)

APPENDIX VI (*Motion to Abate Proceedings*)

APPENDIX VII (*Order Granting Motion to Abate Proceedings*)

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JEFFERSON BANK BUILDING • 600 SOUTH ANDREWS AVENUE, SUITE 500 • FORT LAUDERDALE, FLORIDA 33301 • (305) 764-2500 • FAX (305) 764-5040