IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	
Complainant-Appellee,	)	Supreme Court Case
	)	No. 85,451
v.	)	
	)	The Florida Bar Case
DAVID SMITH NUNES,	)	Nos. 94-50,161(17C)
	)	and 95-50,151(17C)
Respondent-Appellant.	)	

ANSWER BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE

The Florida Bar filed a four part complaint against respondent, David Smith Nunes, on March 31, 1995 and charged him with two counts of incompetency under Rule 4-1.1 of the Rules of Professional Conduct, one count of failing to properly communicate with his clients under Rule 4-1.4(b), and one count of charging a clearly excessive fee under Rule 4-1.5(a). The referee held hearings on the complaint on the following dates: July 5, 1995, August 30, 1995, September 7, 1995 and September 29, 1995. (RR., p. 2).

The referee rendered his report on October 30, 1995 and recommended that respondent be found guilty on all four counts. (RR., pp.8-9). The referee recommended that the respondent be suspended for ninety (90) days and for an indefinite period thereafter until respondent made restitution to his clients, Gloria and Leon Burton in the amount of $2,225. (RR., pp. 8-9). Further, upon reinstatement, the referee recommended that respondent be placed on probation for one (1) year to run consecutively with any unserved probation from his prior case and to complete twenty five (25) hours of continuing legal education to consist of twenty (20) hours in the area of immigration law and five (5) hours in the area of ethics. (RR., p. 12). The referee found three aggravating factors under the Florida Standards for Imposing Lawyer Sanctions:

prior disciplinary offense under Standard 9.22(a), multiple offenses under Standard 9.22(d), and substantial experience in the practice of law under Standard 9.22(i). (RR., p. 10). The referee found no factors in mitigation. (RR., p. 10).

Thereafter, respondent served a motion to reopen on November 3, 1995. The basis of this motion was that "new factual basis has been established." (A., p. 39).

The referee denied this motion on November 16, 1995.

Thereafter, respondent prepared another motion styled "Motion to Compel Referee to Reopen Proceedings." (A., p. 50). He filed this motion with the Supreme Court of Florida.[1]

Again this motion argued that the case should be reopened because of "newly acquired evidence." (A., p. 51). This motion referred to action that respondent had taken on the Burton case subsequent to the referee proceedings. The substance of respondent's motion is reiterated in respondent's brief. The bar submits this one response to respondent's argument and the bar

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[1] As reflected by respondent's certificate of service, he did not serve a copy of the motion on the bar counsel who was handling the case out of the bar's Fort Lauderdale office. Instead, respondent mailed a copy of this motion to The Florida Bar in Tallahassee without specifying the name of any individual and without providing copies of the exhibits that were referenced in the motion. (A., p. 51).

understands that the motion will be considered in conjunction with the merits of the case.

STATEMENT OF FACTS

In order to highlight certain aspects of this matter, The Florida Bar presents the following statement to supplement the material submitted by the respondent.

THE BURTON CASE

In or about November 1993, Gloria and Leon Burton retained respondent to obtain lawful, permanent residence in the United States for their son, Mark Burton. (RR., p. 2, T., p. 159). In or about December 1988, Mark Burton had been deported from the United States based upon a criminal conviction for the possession of cocaine. (RR., p. 2). Mrs. Burton told Mr. Nunes about the deportation for cocaine. (T., pp. 158-159). Mr. Burton told Mr. Nunes that if there was no way Mark could come back, he wanted to know now. (T., p. 160). Mr. Nunes responded "Five years, he has done five years. We'll bring him back." (T., p. 160).

Former U. S. Immigration Judge, Jeffrey N. Brauwerman, who also served as Regional Counsel for the Southern Region of the Immigration and Naturalization Service ("INS") and as INS District Counsel for the District of Miami testified there was absolutely no way to obtain an immigrant visa for Mark Burton (RR., p. 3, T., pp.

30, 31, 33, 40, 43-44). Similarly, Bruce Marmar, Senior Immigration Examiner for the INS in Miami, testified that there were no procedures available for someone in Mark Burton's position that would lead to obtaining a green card because the deportation for the cocaine conviction acts as a permanent bar. (RR., p. 3, T.,pp. 107-108). Mr. Brauwerman, also, testified that Mr. Nunes may have been confused with respect to the five year provision. (T., pp. 37-38). If a person wishes to enter the United States within five years of deportation, a special application needs to be made (T., p. 37-38.)[2] After five years, there is no longer a requirement for a special application but there is no waiver for the cocaine conviction (T., pp. 37-38).

Mr. Nunes prepared an Application for Immigrant Visa and Alien Registration. (RR., p. 4; Bar Exhibit 8). In this Application, Mr. Nunes failed to disclose Mark Burton's cocaine conviction in response to question 33(b). Question 33 stated:

> Except as otherwise provided by law, aliens within the following classifications are ineligible to receive a visa. Do any of the following classes apply to you... (b) An alien convicted of, or who admits committing a crime involving moral turpitude, **or violation of any law**

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[2] See, INA Sect. 212(a)(6)(B), 8 U.S.C. Sect. 1182(a)(6)(B).

relating to a controlled substance. (emphasis added).

Both Mr. Brauwerman and Mr. Marmar testified that respondent should have checked "yes" in response to question 33(b). (RR., p. 14, T., pp. 48, 112). Gloria Burton brought the inaccurate response to respondent's attention but he insisted on checking "no". (RR., p. 5, T., p. 168).

Mr. Nunes led the Burtons to believe that Mark just had to go through a few formalities to obtain his green card (T., p. 170) and that there would be no problem (T., pp. 200-201). Mr. and Mrs. Burton were planning to bring Mark to the United States to help with their business (T., p. 171). They were sitting by the telephone waiting to hear the outcome of Mark's interview at the London Embassy. (T., p. 171). Mrs. Burton testified that Mark called and said: "I was called by the Consulate just before my medical and they took my money and they says 'Whoever your parents hired to do this paperwork has ripped your parents off...'" (T., p. 172) and he was further told that his papers were not filled in properly (T., p. 173).

Mark Burton was denied a visa (attachment to bar exhibit 14) based on the controlled substance exclusion of INA Section 212(a)(2)(A)(i)(II), 8 U.S.C. Sect. 1182(a)(2)(A)(i)(II), which section provides in pertinent part:

> ...any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of---
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign counrty relating to a controlled substance (as defined in section 802 of Title 21) is excludable.

When Mr. Nunes was confronted by Gloria Burton about this section, Mr. Nunes said he had never heard of such a law. (T., p. 174). Mr. Burton went in person to see Mr. Nunes and gave him a copy of the visa denial. (T., p. 196). Mr. Nunes said he didn't understand it. (T., p. 196). Mr. Burton waited a matter of weeks and then sent Mr. Nunes a letter demanding his money back. (T., p. 196, bar exhibit 15).

In the respondent's Statement of Facts, respondent stated that the issue of reopening the original deportation was not addressed by the bar's experts. (Respondent's brief, p. 4). There was nothing in the record before the referee to indicate that Mr. Nunes intended to attempt to reopen the original deportation, or that he had, in fact, taken any steps to reopen the proceeding or that he had ever advised his clients with regard to reopening the deportation.

Subsequent to the final hearing before the referee, respondent filed a response to the INS notice of intent to revoke the approval

of the petition for alien relative. (A., p. 6). Although the response was filed subsequent to the final hearing, this response did have a relationship to an item that was a matter of record in the referee proceeding. Bar Exhibit 6 showed that the petition for alien relative petition had been returned from the Department of State to the INS. Mr. Brauwerman testified that the petition was simply being returned to INS because the visa could never be granted. (T., pp. 45-46, 103). If there were a chance that the visa could be granted later the Consulate would have kept the petition (T., p. 45). The petition could be approved where there is a relationship between a mother who is a U. S. citizen and a child seeking relief. (T., p. 46). In other words, the petition merely established the relationship between a U.S. citizen and an alien seeking entry into the country.

In Mr. Brauwerman's opinion, there was no reason to file the relative petition in the first instance and the relative petition would not help obtain the ultimate relief sought [which relief was the green card]. (T., p. 46). The bulk of respondent's argument in his brief is based on respondent's response to the notice of intent to revoke the approval of the relative petition. This response was prepared by respondent subsequent to the referee proceeding and was not a matter of record in the referee

proceeding. Respondent purported to file this document on behalf of Gloria Burton as petitioner.

However, in the referee proceeding, respondent asked Gloria Burton about the fact that the file was being returned:

> However, if you had received what is marked as defense exhibit 3, would you have wanted your case to be continued in an effort to bring Mark here?
>
> Not by you. (T., p. 190)

This response of Mrs. Burton's will be discussed in more detail in the Argument section of this brief.

THE WHYNES CASE

The referee found that in addition to the lack of competency in the Burton case, Nunes also failed to provide competent representation in the Whynes case in violation of Rule 4-1.1 of the Rules of Professional Conduct. Although Nunes was retained to stop the deportation of Dennis Whynes (RR., p. 6), Nunes failed to file an "I-246" which is an application for a stay of deportation to the District Director of INS. (RR., p. 7). The bar's expert, Jeffrey Brauwerman testified that a reasonably competent attorney would not only file this form but physically bring a copy to the Assistant District Director of INS, Kenneth Powers (RR., p. 7; T., pp. 52-53). Although respondent addressed motions to the immigration

judge including a motion to reopen, Mr. Brauwerman testified that there was no basis for the judge to grant relief. (RR., p. 7, T. pp. 54-55, 58). Mr. Brauwerman further testified that the court had no jurisdiction to grant a stay or a motion to reopen (T., p. 62). Similarly, Kenneth Powers, Assistant District Director for Detention and Deportation testified that if an attorney files a motion to reopen in court, but does not file an application for stay with INS, he was not obligated to hold off deporting the alien (RR., p. 8, T., p. 138). The filing of the motion to reopen will not stay the deportation (RR., p. 8, T., p. 138).

Additionally, Mr. Brauwerman testified that there was no cause and effect between what Mr. Nunes did and whatever short delay there was in Mr. Whynes actually getting deported. (T.,pp. 62-63). Mr. Brauwerman also testified that there was further relief available to Mr. Whynes if proper procedures were followed. (T., p. 85).

Nunes took the position in his testimony that Dennis Whynes had taken a voluntary departure from the country because he did not want to spend more time in jail. (T., pp. 217, 219, 235). Robert Whynes testified that his son had been deported (T., p. 254) and the bar's expert, Jeffrey Brauwerman, testified that Dennis Whynes was deported (T., p. 96).

The referee found that the procedures utilized by respondent were inappropriate. (RR., p. 7). The referee concluded that Nunes failed to provide competent representation by failing to file the "I-246" and by failing to request an audience with the Assistant District Director of INS or anyone in the deportation branch. (RR., p. 8).

SUMMARY OF ARGUMENT

Respondent's entire argument in the Burton case was one that was not presented to the referee at trial and is grounded in material that is outside the record. Although respondent claims that he was taking a "radical" approach, the record shows that he did nothing but apply for the visa in the ordinary course of events and never advised his clients that there was a provision that barred their son from obtaining a green card because of the cocaine conviction and deportation. It appears that Nunes, in fact, was never aware of applicable law until it was brought to his attention by the Burtons.

The bar submits that this court may decide not to consider the material that is not a part of the record or the arguments in appellant's brief that are based on this material. Alternatively, if the court considers respondent's materials, the bar submits that

they should be considered in aggravation as the record clearly establishes that Nunes never informed his clients of any "radical" approach and the attorney-client relationship had ended prior to Mr. Nunes having filed the recent response. The response was apparently filed with the disciplinary proceedings in mind. For the sake of judicial economy, the court may wish to consider these matters in aggravation rather than referring the case back to the referee.

The bar, also, notes that appellant's brief discusses this matter as if Mr. Nunes has now reopened the deportation proceeding. He, in fact, never addressed any petition for relief to the immigration judge or to the Board of Immigration Appeals. He simply filed the unauthorized response to the INS notice. Even if the INS does not revoke the approval of the relative petition, Mark Burton will still not have obtained a visa.

There was ample evidence to support the referee's determination that Mr. Nunes was incompetent in the Whynes matter. The testimony of the bar's experts established that Mr. Nunes failed to follow appropriate procedures and that appropriate procedures were in fact available. This testimony further established that there was no cause and effect between what Mr. Nunes did and whatever short delay there was in Dennis Whynes

actually being deported. Although Mr. Nunes currently argues that he was successful and testified at trial that he believed that Dennis Whynes was not deported but voluntarily departed the country, the record establishes otherwise.

ARGUMENT

INTRODUCTION

The referee's findings are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Winderman, 614 So. 2d 484, 486 (Fla. 1993). See also, The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986). If the referee's findings are supported by competent, substantial evidence, this court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The Florida Bar v. MacMillan, 600 So. 2d, 457, 459 (Fla. 1992). The bar submits that there is no reason to disturb the referee's findings in this case.

I. THE REFEREE DID NOT ERR IN FINDING THAT RESPONDENT WAS INCOMPETENT IN HIS REPRESENTATION OF THE BURTONS AND THIS COURT SHOULD NOT CONSIDER RESPONDENT'S MATERIALS THAT ARE OUTSIDE THE RECORD. ALTERNATIVELY, IF THIS COURT CONSIDERS RESPONDENT'S MATERIALS THAT ARE OUTSIDE THE RECORD, THEY SHOULD BE CONSIDERED IN AGGRAVATION TO INCREASE THE SUSPENSION FROM NINETY (90) TO NINETY ONE (91) DAYS.

Respondent's entire argument with respect to the Burton case

was one that was not presented to the referee at the trial and is grounded in respondent's response to notice of intent to revoke (A., p.8-11) which was not a part of the record before the referee. The bar would like to point out that the Burtons retained respondent in 1993, that Mark Burton was denied his visa in June 1994, that the bar grievance was filed in August, 1994 (bar exhibit 14), and that respondent wrote letters explaining his position (bar exhibits 1 and 2) as well as testified in the referee proceeding. The first time respondent's "nunc pro tunc" argument appears in detail is in 1996 in front of this court.[3] Respondent takes the position in his brief that he was suffering from influenza and, therefore, failed to present his position properly (Respondent's brief, p. 3). It must have been a long, lingering illness since respondent from 1993 forward had ample opportunity to present his argument and did not do so.

The Response to Notice of Intent to Revoke was not in existence at the time of trial. The bar submits that this court may decide not to consider it or the arguments in appellant's brief

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[3]There is a passing reference in Nunes' motion to reopen on pp. 8-9 to " non pro tunc" [sic]. This motion was denied by the referee. Although on p. 9 of the motion, there is a reference to an attached "response to the Government Notice of Intent to Deny", there was nothing attached to the copy served on bar counsel.

that are based on this document.

It is axiomatic that appellate review is limited to those matters contained within the record on appeal. Fla. R. App. P. 9.200; Kelly v. Kelly, 75 So. 2d 191 (Fla. 1954); Thornber v. City of Fort Walton Beach, 534 So. 2d 754 (Fla. 1st DCA 1988); Sheldon v. Tiernan, 147 So. 2d 593 (Fla. 2nd DCA 1962). The record on appeal should be limited to what the trier of fact (the referee) saw and heard and no more. Matson v. Wilco Office Supply & Equipment, 541 So.2d 767 (Fla. 1st DCA 1989).

Respondent's use of an appendix to submit matters outside the record is similar to that found in Altchiler v. Department of Professional Regulation, 442 So. 2d 349 (Fla. 1st DCA 1983). In Altchiler the court found that

> When a party includes in an appendix material or matters outside the record, or refers to such material or matters in its brief, it is proper for the court to strike same. That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.

Altchiler at 350 (citations omitted).

The appellate courts have as a matter of course stricken briefs and/or appendixes for containing materials and reference to matters outside the record. Altchiler (brief struck and lawyer publicly reprimanded); Thornber (motion to amend record on appeal

with newspaper articles denied and lawyer publicly reprimanded); Matson (brief struck which made reference to video taped deposition not in record); Hillsborough County Board of Commissioners v. Public Employee Relation Commission, 424 So. 2d 132 (Fla. 1st DCA 1982) (appendix struck which included portions of record in case on appeal in different circuit); Fine v. Carney Bank, 508 So. 2d 558 (Fla. 4th DCA 1987) (affidavit submitted on appeal not part of record).

Alternatively, if this court considers respondent's materials that are outside the record, they should be considered in aggravation to increase the suspension from ninety (90) to ninety-one (91) days. First of all, if an attorney intends to take a "radical approach" (Appellant's brief, p. 14), it is incumbent on the attorney to know existing law and to explain to the clients that he is undertaking a course of action that may not be supported by existing law. The record establishes that Nunes was not apparently aware of applicable law and did not explain it to his clients.

The record reveals that Nunes told his clients that obtaining the green card would be no problem (T., pp. 160, 200-201) and led them to believe that they could just expect a few formalities (T., p. 170). When Mark's visa was denied, they were upset and

disappointed and confronted Nunes who told them that he had never heard of the law in question. (T., pp. 173-174 and 196).

Second, until this appellate proceeding, there was no indication that Nunes was attempting to do anything different than apply for a visa in the ordinary course of events. The testimony of the bar's expert, Jeffrey Brauwerman, was based on his review of Nunes' file (T., p. 28) and what Nunes did (T., p.32). The reason the bar's experts did not address Nunes' so called "radical" approach was because the file and Nunes' own explanation of his actions did not show any evidence of such an approach.

Third, at the time an attorney takes a "radical" approach, the attorney must have a client. Nunes did not. As reflected by the record, the Burtons had asked for their money back (Bar exhibit 15). Nunes, also, asked Mrs. Burton on cross-examination if she would have wanted her case to be continued and she responded: "Not by you." (T., p. 190). It is clear from the record that the Burtons regarded their client relationship with Nunes as having ended.

It appears that Nunes' response to the notice of intent to revoke was written for the benefit of himself in these proceedings. Although respondent purportedly filed this petition on behalf of Gloria Burton, Mrs. Burton's position with regard to Mr. Nunes was

made clear in her testimony before the referee which clearly showed that she regarded the attorney-client relationship to have concluded. The conduct of Mr. Nunes in filing the response without the authorization of Mrs. Burton under the circumstances of this case warrants, in the bar's estimation, an increase in discipline from a ninety (90) to a ninety-one (91) day suspension.

Although the court could refer the matter back to the referee for further proceedings, the bar submits that for the sake of judicial economy, the court should not do so. The Burtons deserve finality to the matter and deserve finality with regard to the restitution recommended by the referee. The fact that Nunes has chosen to act on his own behalf without the authority of the Burtons is not a reason to engage in further protracted proceedings. Although Mr. Nunes argues that there is new evidence, the pending revocation of an approval that has been in place since 1994 does not constitute new evidence. It simply means that the INS sees no reason to keep the relationship between Mrs. Burton and her son of record because there is no possibility of Mark Burton ever obtaining an immigrant visa. If the petition for alien relative formed any kind of basis for Mr. Nunes to take action, query why he had to wait until the approval was about to be revoked. Moreover, the referee has already denied the motion to

reopen that was directed to the referee instead of to this court.

Finally, the bar would briefly like to address Nunes' argument on the merits if the court finds it necessary to reach the point.

There is no authority for the proposition that a deportation proceeding could be reopened nunc pro tunc under the circumstances of this case.[4] Appellant's cases do not stand for the proposition that the proceeding could be so reopened. Matter of NG, 171 I & N Dec. 63 (BIA 1979), cited by appellant, stands for the proposition that the immigration judge and the Board have authority to grant advance permission to an excludable alien to reenter the country. It has nothing to do with reopening a deportation proceeding and nothing to do with the exclusion under INA Sect. 212(a)(2)(A)(i)(II), 8 U.S.C. Sect. 1182(a)(2)(A)(i)(II) for violation of a law relating to a controlled substance. Similarly, aside from the fact that the opinion in Matter of M-C, 9 I & N Dec. 280 (BIA 1961) used the phrase "nunc pro tunc", it has no

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[4] However, respondent argues that he would reopen the proceeding to use the relief available under 212(c). This section provides that the Attorney General may grant an otherwise deportable alien discretionary relief from deportation but only if the alien has met a seven year unrelinquished lawful domicile requirement and the alien has not proceeded abroad under an order of deportation. While 212(c) relief may have been available to Mark Burton at the time of deportation, the possibility of obtaining a waiver under that provision ended when he was deported.

applicability to the current facts.

Mark Burton was excluded on a provision that the bar's expert described as "black letter law." (See RR., p. 3). Nunes made no effort to reopen the deportation proceeding or obtain an order nunc pro tunc during the time he represented the Burtons. Whether such an order could even be obtained is not an issue that needs to be decided in this proceeding. Moreover, this court need not consider whether Nunes is now attempting to use an appropriate procedural vehicle in his recent activities.[5] Although the appellant's brief discusses this matter as if Nunes has now reopened the matter in court (Appellant's brief, p. 10-11), Nunes' materials were, in fact, addressed to the INS not to the immigration judge. Even if the judge or Board of Immigration Appeals has authority to grant relief nunc pro tunc, which authority is not established by existing precedent, nothing has ever been addressed by Nunes to the judge or to the Board. Materials submitted to the INS in response

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[5]The bar would note, however, that Nunes' materials were filed in response to notice that the approval of petition for alien relative was being revoked. As discussed in Mr. Brauwerman's testimony, that approval merely establishes the relationship between Mrs. Burton and her son Mark. Even if the approval is not revoked, Mark Burton will still not have obtained a visa. The approval of the petition and grant of a visa are two separate matters. The INS notice which invited the response stated that there was no waiver available for Mark Burton. (A., p. 6).

to a notice of intent to revoke the relative petition are not tantamount to reopening the deportation.

In any event, the Burton matter should be decided on the basis of the record established before the referee. Although Nunes argues that malpractice in itself is not necessarily tantamount to incompetence based on The Florida Bar v. Neale, 384 So. 2d 1262 (Fla. 1980), this argument ignores the decision in The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993) which questioned Neale. Littman was a rather benign case with no real client prejudice. In Littman, the respondent failed to advise his male client that he would have to continue to pay child support even if he secured custody of his child, and the respondent also filed an application for change of residential custody without the requisite affidavit. In the instant case, Nunes failed to advise his clients that there was a law which precluded their son from obtaining a green card and also filed the visa application without disclosing the cocaine conviction. Nunes also charged his clients for a task that was not accomplished and could not be accomplished. In Littman, this court approved the referee's recommendation of a violation of Rule 4-1.1. Similarly the referee's recommendation of a violation of Rule 4-1.1 as well as the violations of Rules 4-1.4(b) and 4-1.5(a) should be upheld in this case.

Alternatively, if the court chooses to go outside that record, the bar submits that respondent's materials under the facts of this case warrant an increase in the suspension.

II. THE REFEREE DID NOT ERR BY FINDING THAT RESPONDENT WAS INCOMPETENT IN THE WHYNES CASE

Nunes argues that he was successful in the Whynes case. (T., p. 15). It is undisputed that Nunes did not obtain an order which stayed the deportation. Nunes was asked at the trial if he could point to a piece of paper which showed his success and he pointed to the government's motion to change venue:

> Can you show me the order that sets the deportation order aside or is that just all contained in the motion to change venue?
>
> This is what's contained in the motion to change venue because they could not house the fellow down here in Florida because he was a criminal. (T., p. 218).

The Referee rejected Nunes' contention that he was successful because the government filed a motion to change venue. It is not necessary to delve into the intricacies of immigration law to determine that a motion to change venue is not equivalent to a stay of deportation.

It appears that when Mr. Nunes uses a word, it means what he

chooses it to mean.[6] However, the referee had ample evidence that Mr. Nunes was not successful including the bar's expert who testified that there was no cause and effect between Nunes' efforts and any delay in the deportation. (T., pp. 62-63).

Nunes was also adamant that Dennis Whynes voluntarily departed the country and was not deported. (T., pp. 219, 235). Nunes had taken an appeal of the denial of his motion in the Whynes' case. (T., p. 217). The appeal was dismissed on the basis that Whynes "departed the United States." (T., p. 216). Nunes read that order to mean voluntary departure. However, his reading does not make it so. Both Robert Whynes and Jeffrey Brauwerman testified that Dennis Whynes had been deported. (T., pp. 96, 254).

Given Jeffery Brauwerman's testimony that Nunes failed to use appropriate procedures and that appropriate procedures were in fact available and given Kenneth Powers' testimony that Nunes' paperwork did not obligate him to hold off deportation, there was ample evidence to support the referee's findings.

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[6]"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more or less." Lewis Carroll, Through the Looking Glass, 113 (Dial Books for Young Readers, NAL Penguin, Inc., 1988) (1872) cited in Northern Palm Beach County Water Control District v. State, 604 So. 2d 440, 447 (Fla. 1992) and State v. Robertson, 614 So. 2d 1155 (Fla. 4th DCA 1993).

CONCLUSION

Although Mr. Nunes attempts to portray his actions as being novel and innovative, the record reveals a far different scenario. The bar submits that the referee's findings of fact should be approved. Alternatively, the bar submits that if this court chooses to consider Mr. Nunes' material which is foreign to the record, the court should consider the material in aggravation and increase Mr. Nunes' suspension from ninety (90) to ninety-one (91) days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by regular U.S. mail to Peter Ticktin, Attorney for David Smith Nunes, NationsBank Building, 2000 Glades Road, Suite 110, Boca Raton, Florida 33431-8504 this 4th day of April, 1996.

RONNA FRIEDMAN YOUNG