IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

DAVID CARLTON ARNOLD,

Respondent.
_____/

Supreme Court Case No. 94,727

The Florida Bar File No. 1999-70,788(11N)

On Petition for Review

INITIAL BRIEF OF COMPLAINANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

INTRODUCTION

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point type.

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STATEMENT OF THE CASE AND FACTS

The respondent pled guilty to one count of a federal felony pursuant to 18 U.S.C. 1957. That statute provides that a party who:

> "Knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as specified in subsection (b)."

The factual circumstances which resulted in the guilty plea and the respondent's admission of guilt are contained in the record of the hearing on the plea. The following statements, quoted directly from that hearing, were made by Alan Kaiser, Assistant United States Attorney, and where designated, by the respondent:

> "Your Honor, in support of Count II, if the case were to proceed to trial -- and I'm going to read into the record a factual basis in support of the plea that we have agreed to. If the case were to proceed to trial, the Government would establish beyond a reasonable doubt the following:
>
> On or about June 19th, 1985, William Rigo entered into an offer to purchase a 38 foot Erickson sailboat for 95,000 from Argonaut Yacht Sales.
>
> Rigo deposited 9,500 towards the purchase price of the sailboat, agreeing to pay the balance of the purchase price at the time of the delivery of the sailboat.
>
> The records of Argonaut Yacht Sales show that on September 9th, 1985, David Arnold paid 9,000 in cash to John Bouchet, Vice-President of Argonaut Yacht Sales, towards the purchase of the sailboat on behalf of William Rigo.

On September 18th, 1985, William E. Rigo told John Bouchet that his attorney would be stopping in on the following day to make a payment towards the purchase of a sailboat.

On September 19th, 1985, David Arnold paid 9,000 cash to John Bouchet towards the purchase of a sailboat on behalf of William Rigo.

On September 20th, 1985, David Arnold paid 9,000 to Ray Sopp, a salesman in Argonaut Yacht Sales, towards the purchase of a sailboat on behalf of William Rigo.

Further, the government's evidence would establish that the cash utilized by David Arnold towards the purchase of the sailboat was given to William Rigo by Charles Goldman whom Arnold had known for several years having, among other things, represented him on various legal matters.

On or about July 24th, 1986, William Rigo caused the delivery of a sailboat to Argonaut Sales with instructions to sell it.

Thereafter, William Rigo gave David Arnold a power of attorney authorizing David Arnold to close on the sale of the sailboat which had been previously purchased by Rigo.

On or about November 11, 1986, Arnold closed on the sale of the sailboat for approximately $78,700. David Arnold received a check from Argonaut Yacht Sales for $68,931.15 and deposited it into a trust account at Southeast Bank.

On December 3, 1986, David Arnold wire transfers $67,987.27 from his trust account at Southeast Bank to Planters Bank, Manila, Philippines to the account of Charles Goldman who Arnold knew had left the United

States in June of 1986 and was living in the Philippines.

David Arnold knew or deliberately avoided learning that which was readily apparent, that some of the proceeds used to purchase the sailboat on behalf of William Rigo were derived from Charles Goldman's marijuana smuggling activities, specifically the importation of approximately 45,000 pounds of marijuana on the vessel Saga.

As such, David Arnold knew that the funds he caused to be wire transferred from Miami to Manila, Philippines into an account of Charles Goldman were derived from the sale of property which had been purchased in part with proceeds from Charles Goldman's marijuana smuggling activities, the events occurring in the Southern District of Florida.

Then the Court responds:

Sir, did you hear and fully understand that statement made by the United States Attorney?

Then the Defendant, David Arnold: Yes.

The Court: Do you agree with that statement?

The Defendant: Yes.

(Quoted at the final hearing, T. 49-52)

Respondent reiterated at the final hearing that he did not dispute the factual basis of the plea colloquy. (T. 351). John Long, who was an investigator for the Department of Transportation, provided background information regarding respondent's guilty plea including information obtained from interviewing the respondent.

Long was part of an investigative team that included the Coast Guard, the FBI, the IRS and the Department of Transportation (T.381). Respondent told Long that he had gone to California with Rigo to assist with the purchase of a sailboat. (T. 381). After a down payment of $9,500, respondent delivered three payments of $9,000 each. (T. 382).

A portion of the money for the sailboat came from Goldman's marijuana smuggling enterprise. (T. 384). Respondent sent the proceeds from the sale of the boat to Goldman in the Philippines. Goldman fled to the Philippines to avoid prosecution. Goldman told Long that he had made millions of dollars in the narcotics smuggling business and that he was attempting to legitimize some of his money. (T. 388).

The respondent offered evidence before the Referee regarding the events which preceded his plea. He was convicted of six felony counts in the second of two trials. However, those convictions were reversed on the basis that Brady material had been withheld. The first trial had resulted in a mistrial due to a hung jury. (T. 140). Following those events, respondent entered a guilty plea to one felony count.

Evidence was also introduced regarding a mistake made by the Bar. After the convictions were reversed and remanded, respondent wrote to the Bar to report that his case had been "vacated". The Bar sent respondent a letter informing him that he was in good standing and was free to resume the practice of law. (T. 259).

Respondent did practice for several months during 1998. (T. 274).

The Referee found that respondent was guilty of violating Rule of Discipline 3-4.3 (Misconduct and Minor Misconduct). He also found the following mitigating factors:

1) Respondent had an unblemished disciplinary record prior to his felony suspension;
2) There was an absence of a dishonest or selfish motive;
3) There was no injury to the client;
4) Respondent had a cooperative attitude toward the disciplinary proceedings;
5) Respondent presented credible character witnesses and letters;
6) The Bar caused an unreasonable delay in these proceedings which was prejudicial to respondent;
7) Respondent demonstrated interim rehabilitation;
8) That other penalties and sanctions were imposed on respondent;
9) The underlying offense for the conviction was remote in time;
10) Governmental misconduct in the underlying case.

The Referee recommended a sixty day suspension. The Bar filed it's Petition for Review on December 27, 1999.

SUMMARY OF ARGUMENT

This Court's review of disciplinary recommendations is broader than that which deals with findings of fact. The Bar submits that the sixty (60) day suspension recommended by the Referee should be rejected. It violates the goals of discipline insofar as it is unfair to society and an insufficient deterrent.

Felonies of a similar nature have resulted in disbarment in prior cases. Also, felony convictions were held to be a basis for disbarment despite mitigating factors

much stronger than those applicable herein.

The Referee relied heavily upon a case which does not remotely resemble the case at bar. There was no criminal conviction in Marable, infra. Furthermore, conduct similar to entrapment was apparent in Marable, but non-existent in this case.

Reasonable discipline in this case would be a three year suspension nunc pro tunc rather than sixty (60) days.

ARGUMENT

THE REFEREE ERRED BY RECOMMENDING A SUSPENSION OF ONLY SIXTY DAYS

This Court's review over disciplinary recommendations is broader than that afforded to findings of fact. The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997); The Florida Bar v. Hmielewski, 702 So. 2d 218 (Fla. 1997).

The sanction imposed must serve three purposes. First, the judgment must be fair to society. Second, the judgment must be fair to the attorney. Third, the judgment must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996).

The Bar would submit that a sixty day suspension does not meet the aforementioned purposes. It is a brief suspension which is not fair to society, nor does it serve as an effective deterrent. It is overly generous from the standpoint of being fair to the respondent.

In The Florida Bar v. Horne, 527 So. 2d 816, 817 (Fla. 1988) this Court stated:

> It was not appropriate nor proper to receive evidence bearing on guilt or innocence of respondent of the original criminal charge. However, respondent was given opportunity to testify as to any facts which might be considered in mitigation of the sanctions administered in these disciplinary proceedings.

> Paragraph 3-7.2(b), Rules of Discipline, provide that a determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon a felony trial ... shall be conclusive proof of guilt of the criminal offense charged for the purposes of these rules.
> Consequently, the allegations included in the charges attached to the Complaint are proven facts.
>
> (Emphasis supplied)

Horne's federal offenses were quite similar to that of the respondent. Horne's client had

> "... illegally derived from importation and distribution of controlled substances, considerable assets. Respondent conspired with Dugan to form a foreign corporation and do other illegal acts to "launder" these illegally gained assets. This conduct on the part of Respondent constituted illegal conduct of moral depravity." (p. 817).

Horne's conviction on four counts was based upon his efforts to "impede and obstruct the collection of income tax" (p. 817) on the drug money. He was sentenced to five years of imprisonment and five years of probation. This Court regarded Horne's conviction as "a serious criminal violation." (p. 817). Horne was disbarred.

Similarly, the Referee in this case was presented with conclusive proof of a violation of a federal felony statute whereby the respondent sought to mask the

income of a client which was derived from drug trafficking.

Respondent pled guilty to one count of a felony under federal law, namely 18 U.S.C. 1957. That statute provides that a party who:

> "Knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value of greater than $10,000 and is derived from specified unlawful activity, shall be punished as specified in subsection (b)."

The plea colloquy revealed that respondent was directly involved in the purchase and sale of a sailboat on behalf of William Rigo and Charles Goldman, a former client.[1] Respondent knew Goldman for many years and had represented him on several occasions. (T. 50, 51) Goldman testified at the trial that a portion of the money to purchase the boat came from his drug smuggling business. (T. 89).

Respondent delivered three $9,000 checks to the vendors of the sailboat, toward the total purchase price of $95,000 in 1985. (T. 50, 382). During 1986 he received a check from the sale of the boat in the amount of $68,931.15. He transferred $67,987.27 of those funds to Planters Bank in the Philippines to the account of Charles Goldman.

In The Florida Bar v. Eisenberg, 555 So. 2d 335 (Fla. 1989), the respondent

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[1] The plea colloquy was published at T. 49-52 and is presented verbatim in the Statement of the Case and Facts.

committed a similar crime. He had "participated in a conspiracy to conceal the proceeds from the illegal importation of marijuana." He pled guilty to two federal felonies. Eisenberg also provided extraordinary cooperation. The prosecutors made the following statement to the Court when he was sentenced.

> The number of areas in which he has provided cooperation goes well beyond what we anticipated. In trying to measure the impact of that cooperation, your Honor, he has assisted in what can be best described as an overall effort by the United States to dismantle domestic and foreign laundering operations ... His assistance has been essential and has been effective in achieving our goal.

No mitigation of great significance applies to this case. Eisenberg's extraordinary assistance to the law enforcement agencies was considered in mitigation. However, it merely resulted in a nunc pro tunc application of the disbarment which was ordered. As this Court stated:

> "There were serious drug offenses, and as we stated in The Florida Bar v. Hecker, 475 So. 2d 1240 (Fla. 1945) participation in illegal drug activities will be dealt with severely."

The Referee in this case was apparently heavily influenced by The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994) which is cited in the Referee's Report. Marable was given a sixty day suspension. Marable, however, had committed no

crime according to the Referee. This Court agreed with that finding.

This Court did determine that Marable was guilty of ethical misconduct. The ethical misconduct was ameliorated by the conduct of law enforcement officers who were involved with his unethical misconduct. Surely, the following conclusion was given great weight by this Court in the Marable case:

> We note that in their investigation, law enforcement officers actively orchestrated various scenarios in several attempts to entice Marable into criminal acts. These schemes operated as the inducement for Marable to commit the ethical violations at issue in the case. The investigative tactics went beyond what would be reasonably calculated to discover evidence of an extortion attempt and included at least one incident that was nothing more than a provocation. Under the unusual circumstances of this case, we find that the appropriate discipline is suspension from the practice of law for sixty days.

Unlike Marable, this respondent did commit a felony. That alone creates a distinction of such import that it renders Marable meaningless. Second, the issue of the Brady material had been eliminated at the time that respondent entered his guilty plea. The prior conviction had been reversed and the potential retrial would have taken place on a clean slate. In other words, the government's misconduct was not applicable to the guilty plea. Government conduct similar to entrapment was found to

exist in relation to Marable's ethical violation, but not in the case at hand. Furthermore, the judgment based upon the guilty plea makes it improper to consider attacks upon it. The Florida Bar v. MacGuire, 529 So.2d 669 (Fla. 1988).

Additionally, the mitigating factors that the Referee found do not justify a minimal suspension, i.e., 60 days, for a federal felony conviction. In The Florida Bar v. Golub, 550 So. 2d 455 (Fla. 1989), a misappropriation case, this court ordered disbarment despite some of the same mitigating factors. While the crime herein is not the same, it is a felony pertaining to a statute which has a vital role in the effort to halt drug trafficking. The appropriate discipline must be decided in that context.

CONCLUSION

WHEREFORE, based upon the foregoing the Bar would submit that the sixty (60) day suspension should be rejected and a three year suspension nunc pro tunc should be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Initial Brief of Complaint was mailed via Airborne Express to Debbie Causseaux, Acting Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a true and correct copy was hand-delivered to David Carlton Arnold, respondent, co-counsel, at his record bar address at 8301 S.W. 164th Street, Miami, Florida 33157-3640, and hand-delivered to Jerome H. Shevin, Attorney for respondent at 100 North Biscayne Boulevard, 30th Floor, Miami, Florida 33132 and mailed to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this ____ day of January, 2000.

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