No. SC00-256

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee,

v.

ALAN I. KARTEN,

Respondent/Appellant.

On Petition For Review of the Report of the Referee
For the Eleventh Judicial Circuit

INITIAL BRIEF OF THE APPELLANT

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III. WHETHER THE REFEREE ERRED, AS A MATTER OF LAW, IN RECOMMENDING PETITIONER'S DISBARMENT BASED ON IMPROPER AGGRAVATING FACTORS AND WHETHER DISBARMENT IS AN UNREASONABLE SANCTION UNDER THE TOTALITY OF THE CIRCUMSTANCES IN THIS CASE?

STATEMENT OF THE CASE[1/]

In April 1998, 12-time convicted felon, Nelson Loynaz, Jr., began filing a series of *pro se* complaints with the Florida Bar,[2/] accusing his former attorney, Petitioner Alan Ira Karten, of defrauding him of 4 antique automobiles. (*See* Florida Bar ("FB")

[1/] Citations to the transcripts of the hearings before the Referee in this case will be referred to as "T." followed by the appropriate page numbers. Exhibits entered into evidence during the hearings will be referred to by the party and exhibit number.

[2/] Loynaz' *pro se* complaints are part of the Bar's file in this case but were not made a part of the record before the Referee.

Exhibit 5, p. 6.) As discussed more fully below, Karten had been appointed under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, to represent Loynaz in his most recent and serious criminal case, *United States v. Nelson Loynaz, Jr.*, Case No. 96-439-Cr-DAVIS (S.D. Fla.).

After considering and rejecting Karten's responses (*see* T. 19-21 and FB Exhibits 2-5), on February 3, 2000, the Bar filed a Complaint against Karten and, on April 6, 2000, an Amended Complaint. The Complaint sought sanctions against Karten on two bases. *First*, the Complaint alleged that Karten violated the CJA by taking 4 automobiles that Loynaz allegedly owned and had forfeited to the United States in his criminal case as fees for services performed under his court appointment. *Second*, the Complaint alleged that Karten engaged in a scheme to defraud Loynaz out of the 4 automobiles by buying them back from the United States, without Loynaz' permission, for $30,000 and selling them for profit. The Bar alleged that this conduct violated Rule 4-8.4(c) of *The Rules Regulating the Florida Bar* ("[a] lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and sought his disbarment as a sanction, along with restitution.

Karten denied Loynaz' allegations, claiming that, ***after*** Karten's CJA appointment had terminated, he and Loynaz jointly entered into an contract to repurchase the 4 forfeited cars from the United States. Since Loynaz was indigent, Karten agreed to

fund the purchase entirely with his own funds. He would then attempt to sell the cars and, after reimbursing himself for the purchase price, split any profit with Loynaz.

The dispute was eventually referred to a Referee, the Honorable Jerald Bagley, Miami-Dade County Circuit Court Judge. The Referee convened evidentiary hearings on the dispute on December 15 and 18, 2000, and January 5, 11, 12 and 19, 2001. The principal witnesses were Karten, Loynaz, Loynaz' wife (Mary Loynaz), and FBI Special Agent Scott Wiegmann -- the lead agent in charge of Loynaz' federal criminal case.

On January 29, 2001, the Referee issued a written Report, upholding the Bar's allegations. *See* **APPENDIX 1**. According to the Referee, Loynaz was more "credible" than Karten, because Loynaz allegedly had "no discernible motive ... to testify untruthfully." *Id.* at 4-5. The Referee further adopted the Bar's recommendation that Karten be disbarred, due principally to Karten's lack of "contrition," his "refusal to acknowledge" his culpability and "indifference to making restitution to Mr. Loynaz." *Id.* at 6.

On February 8, 2001, Karten, through new counsel, filed a Motion To Supplement Record and For Rehearing, requesting that the Referee reconsider its findings in light of additional evidence and testimony new counsel had uncovered that showed

that Loynaz had falsely testified during the hearings. However, on February 27, 2001, the Referee summarily denied the motion.

Karten filed a timely petition with this Court to review the Referee's rulings. The Court has jurisdiction under Art. V, § 15, of the Florida Constitution.

STATEMENT OF THE FACTS

The Undisputed Facts, Documentary Evidence and Testimony of Disinterested Witnesses

On June 10, 1996, a federal grand jury returned a one count superseding indictment in *United States v. Nelson Loynaz, Jr.*, Case No. 96-439-Cr-DAVIS (S.D. Fla.), charging Loynaz and 21 co-defendants with conspiring to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Karten Exhibit 4.) Due to the seriousness of the allegations, as well as Loynaz' lengthy criminal record, Loynaz faced a life sentence if convicted of this charge. (T. 285-87.)

The indictment included criminal forfeiture allegations under 21 U.S.C. § 853. It sought the forfeiture of $45,000,000 in drug proceeds and 5 homes or condominiums. None of the assets the government itemized in the indictment included the automobiles at issue in this case. (*See* Karten Exhibit 4.)

On June 21, 1996, federal agents seized a 1995 Mercedes Benz 320E automobile that was parked in the driveway of Mary Loynaz' home. (T. 240-241, 338, 379-381; FB Exhibit 12.) That same day, agents executed a search of a warehouse leased to

Mary Loynaz. Inside, the agents found and seized 5 additional vehicles: 1 Dodge Viper, 2 Ford Mustangs and 2 Corvettes. (*Ibid*.) The Mustangs and Corvettes constitute the 4 cars Loynaz later claimed he owned and that Karten fraudulently stole from him. The evidence is undisputed, however, that the 4 cars were never registered to Loynaz. They were, instead, registered to an automobile dealership, Tropikar Sales, Inc. (T. 63, 78-80, 84; FB Exhibit 2; Karten Exhibits 1-2.) *See* **APPENDIX 2**. During the hearings before the Referee, the Bar itself admitted into evidence an affidavit from the owner of Tropikar, Manuel Fernandez, Jr.[3/] Fernandez swore that ***he***, and no one else, owned all 4 cars:

> I, Manuel Fernandez, Jr., owner of Tropikar Sales, Inc., do, of my own free will, swear and attest ... [that] I/Tropikar Sales Inc., do own the following automobiles. [Description of vehicles omitted.] I further swear there are no liens or charges against any of the above automobiles and that I/Tropikar, are the only owners.

(T. 312; FB Exhibit 2, attachment.) *See* **APPENDIX 3**. Moreover, at least one of the titles, on its face, reflected that Tropikar purchased the car from Quality Leasing on October 27, 1989. (Karten Exhibit 1.)

Karten was appointed to represent Loynaz on June 27, 1996. (FB Exhibit 12, p. 2.) At that time, although the 4 vehicles in dispute had been seized, no forfeiture

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[3/] Neither party called Fernandez as a witness during the hearings before Judge Bagley.

proceedings of ***any*** kind were pending against them.[4/] In claiming that he was indigent and could not afford counsel, Loynaz concededly did ***not*** assert any claim of ownership over the seized vehicles.

On September 27, 1996, Karten filed a motion for return of 5 of the 6 cars seized by the government in Loynaz' federal case, pursuant to Fed. R. Crim. P. 41(e) and 21 U.S.C. § 888. (T. 240-241, 338, 379-381; FB Exhibit 12.)[5/] The motion asserted that Mary Loynaz was the lawful owner of the 1995 Mercedes but did ***not*** assert that Loynaz or his wife were the legal or registered owners of the other 4 cars. Karten nonetheless sought the return of these 4 cars to Mary Loynaz solely on a bailment theory, *i.e.*, that she held a leasehold interest in the warehouse where the 4 cars were located at the time of their seizure. (*Ibid.*) Karten then argued that the 4 cars could no longer be subjected to civil forfeiture, because the United States failed to file a timely notice of rights on ***Mary*** Loynaz, as required by Section 888(b). (*Ibid.*)[6/]

[4/] The Referee's report incorrectly asserts that the vehicles were initially subject to a civil, "administrative" forfeiture under 21 U.S.C. § 881(b). *See* **APPENDIX 1**, at p. 4.

[5/] The motion did not seek the return of the Dodge Viper, which apparently was owned by Loynaz' brother Carlos -- the lead defendant in the *Loynaz* indict-ment.

[6/] Section 888(b) provides:

(continued...)

In order to circumvent Karten's motion, on October 11, 1996, the federal prosecutors filed a Bill of Particulars, pursuant to Fed. R. Crim. P. 7(f), listing the vehicles -- for the first time -- as assets allegedly belonging to Loynaz that the United States now intended to ***criminally*** forfeit, as part of Loynaz' criminal case. (FB Exhibit 12, p. 2; T. 241.) The federal court accordingly denied Karten's motion as moot. (*Ibid.*) Karten later renewed his motion for return of the 4 cars. This motion too was based ***solely*** on behalf of ***Mary*** Loynaz' right to possession (not ownership) of the vehicles under a bailment theory. The renewed motion, however, was also denied due to the Bill of Particulars. (FB Exhibit 12, p. 2.) At no time during this litigation over the return of the vehicles did ***Nelson*** Loynaz claim ***any*** legal or equitable interest in them.

In order to save Loynaz from the life sentence he otherwise faced, Karten subsequently negotiated a plea agreement for him with federal prosecutors. The agreement was signed by Loynaz, Karten and Assistant United States Attorney ("AUSA")

[6/](...continued)

(b) Written notice of procedures

> At the time of seizure, the officer making the seizure shall furnish to any person in possession of the conveyance a written notice specifying the procedures under this section. At the earliest practicable opportunity after determining ownership of the seized conveyance, the head of the department or agency that seizes the conveyance shall furnish a written notice to the owner and other interested parties (including lien-holders) of the legal and factual basis of the seizure.

John Roth on June 17, 1997. (T. 93-94; Karten Exhibit 2.) *See* **APPENDIX 4**. Under the agreement, the United States promised to dismiss the onerous Section 846 charge and to allow Loynaz to plead guilty to a far less severe charge, 21 U.S.C. § 843(b) (prohibiting the use of a telephone to further a drug offense). In exchange for this lenient treatment, Loynaz agreed to be debriefed and to provide "truthful and complete information and testimony," whenever required by the United States. (*Id.*, at p. 3.) The agreement held out the possibility that the United States would one day seek a reduction from whatever sentence Loynaz received for the Section 843(b) violations based on its unreviewable evaluation of the merits of Loynaz' cooperation. As noted in the plea agreement, the United States had the sole power to obtain a sentencing reduction for Loynaz under the federal sentencing guidelines (U.S.S.G. §5K1.1) and/or Fed. R. Crim. P. 35(b). (*Id.* at pp. 4-5.)

Under the clear and unambiguous terms of the plea agreement that he signed, Loynaz also promised to forfeit his interest in "***all***" his "personal or real property, ***if any***, subject to forfeiture" and to execute any and all documents "necessary" to transfer title of that property to the United States. (*Id.* at pp. 3-4.) Since the Mustangs and Corvettes were now subject to forfeiture through the Bill of Particulars, through Loynaz' plea agreement, he expressly agreed to forfeit whatever interest he had ("if any") in them. However, since Loynaz had never claimed to hold any such interest,

the plea agreement expressly included the following caveat: "The government acknowledges that this agreement binds only the defendant and does not bind others who may own the subject property." (*Id.* at p. 4.)

Under federal law, the effect of this agreement was to forfeit the vehicles to the United States, regardless of whether Loynaz actually owned them.[7/] In the event that third parties actually own property that a defendant agrees can be forfeited to the United States as part of his criminal case, third parties are required to wait until the end of the defendant's criminal case to file claims to the property with the sentencing court, pursuant to the procedures set forth in 21 U.S.C. § 853(n).[8/] Although these so-called

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[7/] In *Libretti v. United States*, 516 U.S. 29, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995), the United States Supreme Court held that federal judges could accept guilty pleas from criminal defendants ***without*** requiring a factual basis for the forfeiture aspects of the pleas. Karten also put on expert testimony to explain the peculiarities of federal forfeiture law to the Referee. (T. 213-230.)

[8/] 21 U.S.C. § 853(k) thus provides:

> Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may--
>
> (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
>
> (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(continued...)

"ancillary" proceedings are held under the rubric of the criminal case number attached to the defendant's case, they are, in fact, ***civil*** in nature.[9/]

Pursuant to the plea agreement, a two count Superseding Information was filed against Loynaz on June 17, 1997. (T. 97.) The Information contained two Section 843(b) charges but no forfeiture allegations at all. (*Ibid.*)

In early August 1997 -- *i.e.*, ***after*** Loynaz' guilty plea pursuant to the plea agreement but ***before*** his sentencing -- Loynaz attended a debriefing with AUSA Roth, FBI Special Agent Scott Wiegmann and Karten. (T. 367.) In a setting where Loynaz' very liberty depended upon his veracity, Loynaz expressly denied owning ***any*** of the 4 cars at issue herein. As Special Agent Wiegmann testified:

> **Q. Did Mr. Loynaz tell you and [AUSA] John Roth that he did <u>not</u> own the two Corvettes and the two Mustangs.**
>
> **A. <u>Yes, he did</u>.**

[8/](...continued)
See generally United States v. Roberts, 141 F.3d 1468 (11th Cir. 1998).

[9/] *See United States v. Gilbert*, Case No. 97-4578 (11th Cir. March 16, 2001), 2001 U.S. App. LEXIS 3986, at ** 42-47; *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995). As the United States Court of Appeals for the Eleventh Circuit recently noted in *Gilbert*, by merging the criminal and civil forums, "Congress intended that third-party petitions ancillary to a criminal forfeiture take the place of civil cases, and that such a procedure would enable innocent third parties to adjudicate their property interests swiftly instead of having to file separate civil suits." *Gilbert*, at * 46, citing *Douglas*, 55 F.3d at 586.

(T. 367-368; emphasis added.) During this same debriefing, Loynaz confirmed the accuracy of the affidavit Karten obtained from Manny Fernandez asserting that Fernandez, not Loynaz, owned the cars. Special Agent Wiegmann thus testified:

> **Nelson Loynaz told us that he did <u>not</u> own the vehicles. He said at that time that he could place a mechanics lien or some type of lien on those vehicles and that <u>the actual owner of Tropikar Sales who was a person by the name of Manny Fernandez</u> [who] owed him some money, owed Nelson some money.**

(T. 373-374; emphasis added.)[10/]

AUSA Roth and Special Agent Wiegmann accepted Loynaz' statements as truthful and in compliance with the plea agreement and, without objection, allowed Loynaz to receive the full benefits of the plea agreement negotiated by Karten. Accordingly, on August 27, 1997, Loynaz was sentenced to a mere 8 years in prison. (T. 86.) As Loynaz himself acknowledged, Karten's original appointment under the CJA ***ended at sentencing***. (T. 86.)

Karten also viewed his CJA duties to Loynaz as over and submitted his bill to federal court for reimbursement under the CJA. (Karten Exhibit 8.) The records reflect that the district court declined to reimburse Karten for any work related to the return of the vehicles for Mary Loynaz. (T. 252-253; Karten Exhibit 8.)

[10/] As discussed *infra*, in finding Loynaz' recent claims of ownership "credible," the Referee completely ignored Agent Wiegmann's testimony.

Since some of Loynaz' co-defendants went to trial, the cars, although now owned by the government through Loynaz' plea agreement, could not immediately be sold by the United States. Once property is forfeited to the United States, federal law requires the United States to sell it to public but only after the entire case has ended. *See* 21 U.S.C. § 853(h). Hoping to avoid both this delay and a public sale, on September 23, 1997 -- *i.e.*, sometime ***after*** Loynaz' sentencing but before the civil "ancillary" proceedings were over -- Karten negotiated a "Stipulation and Settlement Agreement" (hereinafter the "Stipulation") with the United States. (T. 35; FB Exhibit 6.) *See* **APPENDIX 5**. The circumstances surrounding and meaning of the Stipulation are at the core of this dispute and, therefore, are described more fully *infra*.

However, on its face, the 2-page Stipulation provided that the Mercedes, the 2 Mustangs and the 2 Corvettes, "shall be returned to the defendant" and that the Dodge Viper and "thirty thousand ($30,000.00) dollars, ***via cashier's check from Alan I. Karten, Esq.***, attorney for Nelson Loynaz, Jr., payable to `United States Marshals Service,' shall be forfeited to the United States of America." (**APPENDIX 5**, p. 2; emphasis added.) The Stipulation further required Loynaz and his wife to release any claims to the vehicles. Loynaz and his wife signed the Stipulation on ***the same page*** reflecting that ***Karten*** himself was paying the $30,000. (*Id.* at p. 2.) A final order of

forfeiture was subsequently entered by the federal court, ratified the terms of the Stipulation. (FB Exhibit 12, p. 2.)

At Loynaz' sentencing, the prosecutors did not believe that Loynaz' cooperation warranted a further sentence reduction and refused to seek one for Loynaz under U.S.S.G. 5K1.1. Under federal law, a federal court has no jurisdiction to grant a sentence reduction under either Section 5K1.1 or Rule 35 absent the filing of a motion by the government seeking such a reduction. *Wade v. United States*, 504 U.S. 181, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992). Accordingly, Loynaz received the maximum, 8-year sentence contemplated by his plea agreement.

Loynaz, unhappy with this sentence, required Karten to file a notice of appeal on his behalf -- the last act Karten took on Loynaz' behalf pursuant to his original CJA appointment. Karten subsequently received a second, separate appointment to represent Loynaz on appeal. (T. 362-363; Karten Exhibit 10.)

On September 15, 1997, Carlos Loynaz -- Nelson's brother and lead defendant in the criminal case -- gave Karten a letter instructing Manny Fernandez, the owner of Tropikar, to release the original titles of the Mustangs and Corvettes directly to Karten. (FB Exhibit 2, attachment.)

On November 14, 1997, Karten retrieved the 4 cars from a government warehouse. (Karten Exhibit 6.)[11/] Three days later, Karten sent Loynaz a draft Retainer Agreement. (App. 13; FB Exhibit 7; T. 40-42.) The draft indicated that Loynaz had agreed to reimburse Karten for the $30,000 Karten had paid and allowed to be forfeited to the United States in order to obtain the release of the cars. The draft also contemplated that Karten's reimbursement would come from the sale of the cars. If the sale proceeds exceeded $30,000, Loynaz and Karten would split the excess evenly. Karten also sent Loynaz powers of attorney to assist in obtaining titles to the vehicles. (T. 44-45; FB Exhibit 8.)

Loynaz did not sign and never returned either the draft agreement or the powers of attorney to Karten. (T. 42.) Nor, however, did he proceed to file complaints about Karten with the Bar and federal court. He simply waited.

Meanwhile, on January 5, 1998, Karten sold the cars to restaurant owner Robert Woltin for $30,000. (T. 155-157; FB Exhibit 4, attachments.) Karten retained this sum as his reimbursement for buying the forfeited cars from the United States pursuant to the Stipulation.

[11/] On December 2, 1997, Mary Loynaz retrieved her Mercedes from the same government facility. (T. 49-50.) She acknowledged that it was Karten who convinced the government to release the Mercedes back to her and that Karten did not charge her anything for these legal services. (T. 146.)

On March 9, 1998, Loynaz sent Karten a letter, accusing him for the first time of misconduct in connection with the cars. (T. 130, 271, 309.) Thereafter, on March 11 and 13, 1998, Woltin sold 1 of the 4 vehicles to Thomas Duncan for $25,000. (T. 158-159, 166-170; FB Exhibits 9-11.) Duncan testified that, by the time he bought the car, it was only in "average" condition and "wasn't anywhere near a show car." (T. 173.) Indeed, he had to invest an additional $10,000 in repairs after buying it from Woltin. (T. 173.)

By this time, Karten had become a partner with Woltin and Carl Karmin in a new restaurant in Delray Beach, Florida. (T. 155-156.) On March 16, 1998, Woltin attributed $24,000 of the $25,000 he received from Duncan as part of Karten's "capital contribution" to the restaurant. (T. 159, 301; FB Exhibit 1.) The Bar introduced considerable evidence concerning Karten's disputes with Woltin and Karmin over the restaurant and this payment. (T. 157-164; FB Exhibit 1.) Eventually, Woltin and Karmin forced Karten out of the business. (T. 164.)

The only discernable relevance of Karten's dispute with Woltin and Karmin to the Bar's Complaint against Karten was that Karten did not share any of the $24,000 with Loynaz. However, it is undisputed Loynaz had already commenced his attacks against Karten by the time the $24,000 was invested in the restaurant on Karten's behalf.

Karten filed his initial brief for Loynaz in the United States Court of Appeals for the Eleventh Circuit in March 1998. As noted at the outset, by April 1998, Loynaz had begun filing his complaints with the Bar. Loynaz also began filing *pro se* motions in his federal criminal case, complaining about Karten's conduct and seeking the return of the cars. Loynaz finally replaced Karten with ***retained*** counsel, Joaquin Perez. Where Loynaz suddenly obtained assets to retain private counsel remains unexplained on this record. Moreover, even after retaining Perez, Loynaz continued to file his pleadings *pro se* in federal district court.

Despite Loynaz' new counsel, the United State continued to maintain that Loynaz' alleged cooperation did not warrant a sentencing reduction. (T. 325, 328; Karten Exhibit 9.) The Eleventh Circuit agreed and, on October 16, 1998, affirmed his 8-year sentence. (FB Exhibit 13, p. 3.)

In federal district court, Loynaz' *pro se* motions resulted in an evidentiary hearing on October 27, 1998, before U.S. Magistrate Judge William C. Turnoff at which both Loynaz and Karten testified. However, on January 9, 1999, Magistrate Judge Turnoff decided he lacked jurisdiction to resolve the dispute. (FB Exhibit 13.) In so ruling, however, he openly questioned Loynaz' veracity and motives:

> Of course, this [dismissal for lack of jurisdiction] does not prevent Defendant from proceeding against Mr. Karten in a different forum, e.g., ***for ineffective assistance of counsel or breach of contract***. That being said, however, the undersigned is not suggesting that such a claim would

> have merit. Although it seems curious that an attorney would put up a large sum of money for a client without the security of a written agreement, the undersigned has not drawn any conclusions about Mr. Karten's veracity in this matter. As stated, *supra*, such an inquiry is best left for the CJA committee. Moreover, as discussed at oral argument, ***the undersigned has concerns about Defendant's credibility, and representations Defendant may have made about his finances in order to qualify for CJA counsel in the first place***.

(FB Exhibit 13, p. 5 n. 2; emphasis added.) *See* **APPENDIX 6**.

Magistrate Judge Turnoff's references to Loynaz motivations were not with-out support. Sometime in 1999, Loynaz "made a demand pursuant to Florida's Civil Theft Statutes" against Karten. (T. 21; FB Exhibit 5, p. 6.) And, Mary Loynaz acknowledged having a financial stake in the outcome of the Bar litigation, as well. (*See* T. 144.)[12/]

The Conflicting Testimony Before the Referee

Karten's Testimony

Before the Referee, Karten testified that Loynaz ***never*** claimed ownership of the 4 cars at issue herein until March 9, 1998, the day he wrote Karten firing him. (T. 271) Karten also pointed out that Loynaz' lack of any ownership interest was reasonable in light of Loynaz': (1) claims of indigency; (2) failure to join the motions for return of

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[12/] Petitioner is moving to supplement the record with the demand letter referred to in FB Exhibit 5, as well as other public record documents in which Loynaz indicated that he was contemplating using his dispute with Karten as the grist for an ineffective assistance of counsel claim against him.

the vehicles; and (3) express denials of ownership during the pre-plea debriefing with FBI Special Agent Wiegmann. (T. 245-247, 250-251, 258.) The discussions he initiated with the government to buy the cars back, moreover, occurred ***after*** his CJA appointment ended. (T. 248, 257, 331.)

Karten also testified that he thoroughly discussed the terms of the Stipulation with Loynaz and that Loynaz agreed that Karten would use his own funds (although the $30,000 Karten actually used was obtained from his wife) to buy the cars from the United States. (T. 238, 261.) Since Loynaz claimed to be indigent[13/] and could not pay the price demanded by the United States, Karten agreed to buy the vehicles himself for $30,000. (T. 263.) Moreover, even if he had had the funds (and could explain his prior claims of indigency), Loynaz was barred under 21 U.S.C. § 853(h) from buying back the cars from the United States himself or with "any person acting in concert with him or on his behalf." (T. 280.)[14/] The government was apparently willing to ignore Section 853(h), and give Karten and Loynaz the inside track on the sale, because Loynaz was cooperating and the cars were deteriorating as they sat in

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[13/] Loynaz' retained counsel, Joaquin Perez, did not enter the case until later.

[14/] *See* 21 U.S.C. § 853(h), which provides, in pertinent part, that: "Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, ***nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States***." (Emphasis added.)

a government warehouse. (T. 262.) As Karten explained: "So it behooved the Government to get money in lieu of the cars. That was my proposition. Money doesn't rot." (T. 262.) Karten testified that Loynaz fully agreed with these arrangements:

> I had discussed with him that I was going to get the cars for me for $30,000 and because of the situation and for a number of reasons, I had told him that I would put up the money, sell the cars. The first $30,000 would come back to me and I would split the profits with him.

(T. 263.)

Since Loynaz did not own the cars anyway, he was quite content with the arrangement. (T. 264.) Karten also knew, from speaking with an attorney who represented the real owner of the vehicles, Manny Fernandez, that Fernandez did not intend to file a claim for the cars for fear of getting indicted himself. (T. 337.) Both Mary and Nelson Loynaz plainly knew that Karten was going to pay the $30,000, since they signed the Stipulation which expressly so stated. (T. 272.) Karten frequently discussed the arrangement with Loynaz over the telephone and denied refusing to accept Loynaz' calls. (T. 238, 309-310.) Unfortunately, once Karten retrieved the cars, they had deteriorated and were not worth what he and Loynaz had hoped. (T. 308.)

Loynaz' Testimony

Loynaz testified that ***he*** and he alone was the actual owner of the 4 cars and that he bought them in either 1992 or 1993 from a drug trafficker named Horacio Sardinas for $150,000 in cash. (T. 30, 62, 65-67.) He further claimed that all the titles were "reassigned" to Tropikar in **1993**, following his arrest on criminal charges relating to his possession of a machine gun. (T. 66-69, 80-81.) As previously noted, at least one of the titles, on its face, indicated that Tropikar obtained title in **1989**. *See* **APPENDIX 2**.

By the time Loynaz was arrested on federal drug charges, he already had 12 prior felony convictions. (T. 61.) While he acknowledged entering a guilty plea pursuant to a plea agreement negotiated by Karten, Loynaz refused to acknowledge the enormous benefit he received from that agreement. According to Loynaz, he "wasn't guilty" at all. (T. 87.)

Loynaz' description of the terms of the plea agreement also directly conflicted with its actual terms. According to Loynaz, he never agreed to forfeit all 4 vehicles. Instead, he claimed that he only agreed to forfeit **2** of them to the United States (and only the 2 he chose). He claimed that the United States agreed to return the other 2 cars directly to him. (T. 32-33.) A few weeks after the plea agreement was accepted by the federal court, Loynaz testified that he asked Karten to approach AUSA Roth to see if the United States would allow him to buy back the other 2 cars. (T. 33.) After Karten allegedly conferred with AUSA Roth, Karten allegedly told him that the government would sell him back the 2 Mustangs for $30,000. (T. 33-34.)

As previously discussed, the actual terms of the agreements in this case (the plea agreement and the Stipulation) belie Loynaz' description of them. The plea agreement required Loynaz to forfeit "all" his forfeitable property without exception, and the Stipulation indicated that all 4 cars would not be forfeited only if Karten paid $30.000 that would be forfeited. *See* **APPENDICES 4** and **5**.

Loynaz acknowledged that he and his wife signed the Stipulation which, on its face, reflected that ***Karten*** was paying the $30,000. (T. 37-38.) However, Loynaz repeatedly claimed he never agreed that Karten would pay the money and that he never had ***any*** discussions with Karten about the deal. (T. 40, 101, 114, 117, 123, 125.) "Never. I never talked to Mr. Karten about anything.... [W]e didn't have any conversation concerning no stipulation." (T. 43, 114.) Indeed, despite the language in the Stipulation itself indicating that the $30,000 came from Karten, Loynaz stated that he never agreed to Karten's assistance: "No, he wasn't going to put up the $30,000." (T. 102.) Instead, a friend of his, Manuel Mesa, was supposed to take a check to Karten for $30,000. (T. 103, 105, 117-118.)

Mesa never testified before the Referee and did not even provide an affidavit to corroborate Loynaz' claim. Moreover, the Bar never produced a copy of any such check or of any agreement between Loynaz and Mesa. Loynaz conceded that he himself had never seen such a check and had no correspondence with Mesa to corroborate his story. (T. 110, 121.) The Stipulation itself does not refer to the money as coming from anyone other than Karten. *See* **APPENDIX 5**.

After later receiving the powers of attorney Karten sent to him, Loynaz claimed that he again tried to call Karten from prison but that Karten was "never there." (T. 43-44.)

> Many times I tried to call Mr. Karten and I say to my family to call, also, because it's very hard to be calling from prison. He never answered by calls. He never returned any calls.

(T. 47.)[15/]

Loynaz claimed that he was only able to speak with Karten's secretary, Elena Garcia. He claimed that he told her that he was not going to sign the documents Karten sent him. (T. 43-44.) He spoke to Garcia "maybe 60 times" but was only able to get through to Karten "once or twice." (T. 522.) He called Karten approximately 35 times in September and October 1997 alone. (T. 528.) He further claimed that only "a few" of these calls were collect calls. (T. 530.)

After learning that Karten had picked up the automobiles in December 1997, Loynaz again claimed that he repeatedly tried in vain to call Karten. "No answer, no return calls, no nothing." (T. 50.) Loynaz then purportedly sent his aunt, his mother, his wife and friends over, but Karten "was never there." (T. 50-52, 523.)[16/] His wife and a friend, Manuel Mesa, specifically went to Karten's office twice but Karten was never there. A third time, in early March 1998, they allegedly appeared unannounced at Karten's office but he refused to meet with Mesa. Loynaz claimed that Mesa had

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[15/] Karten, of course, could not "return" any calls to Loynaz. Inmates in federal prisons do not have their own telephones. Inmates must make collect calls to outsiders.

[16/] Other than Loynaz' wife, none of these individuals testified during the hearings to corroborate Loynaz' story.

a check for $30,000 that Mesa had intended to give to Karten to reimburse him for the forfeited funds. (T. 54-56.) Loynaz claimed that between September 1997, when the Stipulation was signed, and March 1998, he had not attempted to repay Karten because Karten "never asked" for repayment and had been "just giving me the runaround...." (T. 56.)

Mary Loynaz sought to corroborate Loynaz' testimony. However, she contradicted material portions of it. For example, she testified that the first time she ever saw the 4 cars in question was "about four years ago" -- *i.e.*, 1996 -- and that her husband purchased the cars ***after*** that. (T. 145.)[17/] She also claimed that she and Mesa had made "various" appointments with Karten but that he would never be there. (T. 137.) And, she too claimed that Mesa had been prepared to tender a $30,000 check to Karten but that she never actually saw the check. (T. 141-44.)

Florida Bar Investigator James Crowley

In an effort to undermine the live, sworn, in-court and cross-examinable testimony of FBI Special Agent Wiegmann that Loynaz expressly ***denied*** owning the vehicles during the August 1997 debriefing, the Bar called its investigator, James Crowley. Crowley testified that "last night" he made a telephone call to AUSA John

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[17/] As previously noted, Loynaz himself had testified that he purchased the cars in 1992-1993, while the titles themselves reflect that Tropikar purchased at least one of them in 1989.

Roth. Crowley, however, conceded that AUSA Roth spoke solely from memory and had not reviewed the case file before the telephone call. (T. 196.) Roth, who the Bar chose ***not*** to call as a witness, allegedly told Crowley that Loynaz once proffered that he did own the vehicles. (T. 193-194.) AUSA Roth also commented that it was not uncommon for drug traffickers to place assets in the names of third parties. (T. 194.)

The Referee's Preliminary Finding

Following closing arguments of counsel -- arguments in which counsel for the Florida Bar again asked for both disbarment and "restitution" to Loynaz as penalties (T. 403), the Referee recessed the proceedings. A few days later, the Referee announced its preliminary ruling, finding Karten in violation of Rule 4-8.4(c) and scheduling hearings on the penalty to impose. (T. 453.)

The Mitigation Evidence

Karten's former secretary, Elena Garcia (now Elena Linder) testified during the mitigation portion of the hearing but prior to the entry of the Referee's Report. Garcia and the telephone records she introduced directly refuted the stories presented by Loynaz and his wife.

Garcia worked for Karten between 1996 until the middle of 1998. (T. 553-554.) During her tenure working for Karten, Garcia had numerous conversations with

Loynaz. When Loynaz would call, she would speak and sometimes flirt with him for 2-3 minutes before passing the calls to Karten. (T. 556, 585.) Garcia testified that Loynaz was fully aware that Karten was going to pick up the cars. (T. 564-565.)

Garcia flatly contradicted Loynaz' story that Karten ducked Loynaz' calls. She testified that Karten spoke with Loynaz approximately 70 percent of the time he called. (T. 570.) Through Garcia, Karten also introduced his telephone billing records for the relevant time period, as well as a chart summarizing the calls from Loynaz between September 1997 and January 15, 1998. (T. 558-562; Karten Exhibits A-C.) A copy of this chart is attached hereto as **APPENDIX 7**. The records and chart reflect ***ninety-three (93)*** collect calls from Loynaz and dozens of lengthy calls (between 5-15 minutes) from Loynaz.

The Referee sustained the Bar's objection to further testimony from Garcia, on the theory that her testimony related to Karten's innocence, rather than to mitigation. (T. 565.) Counsel then proffered that Garcia would have testified that she had conversations with Loynaz in which Loynaz: (1) expressly indicated that he was aware of and consented to Karten's purchase and sale of the vehicles; (2) "at no time" complained that Karten had stolen the cars or that he was firing Karten because of fraud; and (3) told her that the reason he was firing Karten was "because he [Loynaz] didn't get his [U.S.S.G. §] 5k." (T. 567, 570, 592-593.)

In addition to Garcia, Karten introduced numerous witnesses attesting to his good character, history of public service and *pro bono* work for clients. Among these witnesses were one sitting Circuit Court Judge (the Hon. Stanford Blake) and one sitting County Court Judge (the Hon. Mark King Leban). (T. 541-551.) Several highly respected lawyers also testified on Karten's behalf, including Alan Kluger, Fred Robbins and Mel Black. (T. 472-510.)

The Motion To Reopen the Proceedings

On February 8, 2001, Karten sought to reopen the proceedings to present additional evidence, but the Referee summarily denied the motion. Among other things, the motion included an affidavit from Dennis Bruce, an attorney who shared office space with Karten for many years. In his affidavit, Bruce swore that he personally witnessed Garcia putting Loynaz' calls through to Karten and "observed Mr. Karten talking to Mr. Loynaz on the telephone immediately thereafter." Motion to Supplement Record and For Rehearing, Exhibit A. Bruce not only undercut Loynaz' testimony but corroborated Karten's testimony:

> In early Fall, 1997, Mr. Karten advised me that he was negotiating for the release of vehicles in the Nelson Loynaz case. I was already familiar with the client's name and case. He further advised me that Nelson Loynaz could not afford to post the $30,000.00 required to seek the release of the vehicles. Therefore, he and Mr. Loynaz agreed that Mr. Karten would post the $30,000.00, sell the vehicles and divide any profit from the sale of the vehicles. Mr. Karten discussed with me the status of his negotiations with the United States, prior to the time the vehicles were

> released. At all times, he stated that Mr. Loynaz had entered into an agreement for Mr. Karten to post the money, sell the cars and divide any profit.

Id.

In addition, Karten asked the Referee to consider a letter Loynaz had written to the federal court, complaining about the conduct of his next attorney, Joaquin Perez. Motion, at p. 9 and Exhibit B. Loynaz' complaints against Mr. Perez were eerily similar to the ones in this case:

> The reason for my letter is to ask the Honorable Judge Davis for help. I just received a sentence reduction on May 27, 1999 for 24 months. I would like to informed [sic] the Honorable Judge Davis that I never agree [sic] with my attorney Mr. Joaquin Perez to the 24 month reduction.
>
> My attorney Mr. Joaquin Perez never informed me of such reduction. I never got the opportunity to go before the Honorable Judge Davis to decide what kind of reduction I deserve.... My attorney Mr. Joaquin Perez agreed with the government without my consent for 24 month reduction....

Id. Finally, counsel submitted additional affidavits concerning Karten's restaurant investment. *Id.* at pp. 12-13, Exhibit C, D and E.

STANDARDS OF REVIEW

I. A lawyer seeking to review of a Referee's Report must demonstrate that the report "is erroneous, unlawful or unjustified." Rule 3-7.7(c)(5) of *The Rules Regulating the Florida Bar.* To be upheld, a Referee's findings of fact must be "supported by competent, substantial evidence," *The Florida Bar v. Clement,* 662

So.2d 690, 696 (Fla. 1995), and will be reversed if clearly erroneous. *The Florida Bar v. Weiss*, 586 So.2d 1051, 1053 (Fla. 1991).

II. Whether the Referee committed reversible error in refusing to reopen the evidentiary hearings to consider, first, Elena Garcia's full testimony, and, second, the materials presented in the supplemental motion is subject to review under an abuse of discretion standard. *Donaldson v. State*, 722 So.2d 177, 181 (Fla. 1998).

III. "The Court's scope of review when reviewing a referee's recommended sanction is somewhat broader than when reviewing the referee's findings of fact because the Court ultimately has the responsibility to order an appropriate sanction." *Clement*, 662 So.2d at 698, citing *The Florida Bar v. Pearce*, 631 So.2d 1092, 1093 (Fla. 1994). Moreover, whether particular factors are properly considered aggravating is an issue of law subject to *de novo* review. *See The Florida Bar v. Mogil*, 763 So.2d 303, 312 (Fla. 2000); *The Florida Bar v. Corbin*, 701 So.2d 334, 337 (Fla. 1997).

SUMMARY OF THE ARGUMENT

I. The Florida Bar failed to prove by clear and convincing evidence that Karten violated his duties under the CJA or that he committed a fraud on Loynaz. *The Florida Bar v. Rayman*, 238 So.2d 594, 596 (Fla. 1970). No competent witness testified for the Bar concerning the scope of the CJA. Moreover, Loynaz himself testified that Karten's appointment terminated after his sentencing. The Referee fundamentally

misconstrued the scope of Section 853 and the nature of the civil ancillary proceedings that the Stipulation addressed. Loynaz had no right to counsel in that proceeding and Stipulation constituted a contract between the United States, Karten and Loynaz that was discrete and separate from Loynaz' criminal case.

The Bar also failed to prove by clear and convincing evidence that Karten defrauded Loynaz of the 4 cars. The Referee's recommendation to the contrary was based upon numerous factual findings that were clearing erroneous, including the over-riding finding that Loynaz had no "discernible motive ... to testify untruthfully." The record established that Loynaz possessed at least three such motives: (1) financial gain (the desire for restitution and the threat of a civil suit); (2) a potential ineffective assistance claim against Karten; and (3) revenge for Karten's inability to "get his [U.S.S.G. §] 5k" sentence reduction. Loynaz' claims were also refuted by neutral witnesses (FBI Special Agent Wiegmann, Garcia and Bruce), telephone records, and, indeed, the very documents Loynaz signed. Karten's disbarment cannot be sustained based upon such "evasive and inconclusive" evidence. *Rayman*, 238 So.2d at 596.

II. Alternatively, the Court should remand for additional fact-finding. The Referee abused its discretion in refusing to re-open the proceedings, prior to entering its Ruling, to consider Garcia's entire testimony and, after its Ruling, to consider the other evidence offered by Karten. *Donaldson v. State*, 722 So.2d 177, 181 (Fla. 1998);

Jones v. State, 745 So.2d 1121 (Fla. 5th DCA 1999). Since there was no jury, the additional testimony would not have caused a significant disruption. The sanction sought by the Bar, disbarment, is the harshest the Court may impose. And, most importantly, the additional evidence would have seriously undercut the credibility of Loynaz -- the factor the Referee most heavily relied upon in sanctioning Karten. In this case, "justice" was "too swift," *see United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987), and "the ends of justice" were "defeated." *Steffanos v. State*, 86 So. 204 (Fla. 1920).

III. The Referee's recommendation of disbarment should not be adopted by the Court. Disbarment is too extreme for the conduct at issue here, and the Referee expressly based its recommendation on improper factors, such as Karten's alleged lack of contrition. Since Karten "has always denied (and continues to deny) the misconduct at issue," his conduct was not aggravated by his defense of the charges levied against him. *See The Florida Bar v. Mogil*, 763 So.2d 303, 312 (Fla. 2000) (citations omitted).

Karten has been an upstanding member of the Bar for many years and his career has been distinguished by public service and *pro bono* work. The conduct alleged here was conducted openly. The agreements at the heart of the dispute were not only publicly filed but agreed upon by the federal government. If the Court finds him guilty

of misconduct at all, a lesser sanction should be imposed, not disbarment. *See*, *e.g.*, *The Florida Bar v. Thomas*, 698 So.2d 530 (Fla. 1997); *The Florida Bar v. Rose*, 607 So.2d 394 (Fla. 1992).

ARGUMENT

I. THE FLORIDA BAR FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT KARTEN EITHER VIOLATED THE CJA OR DEFRAUDED HIS FORMER CLIENT

Introduction

Since the Bar sought sanctions against Karten for "conduct involving dishonest, fraud, deceit, or misrepresentation" under Rule 4-8.4(c), the Bar bore the burden of establishing its claims by a heightened "clear and convincing" standard. *The Florida Bar v. Mogil*, 763 So.2d 303, 309 (Fla. 2000); *The Florida Bar v. Schonbrun*, 257 So.2d 6, 8 (Fla. 1971); *The Florida Bar v. Rayman*, 238 So.2d 594, 596 (Fla. 1970). "[W]here the evidence is conflicting `there must be a clear preponderance against [the accused attorney.'" *Rayman*, 238 So.2d at 596, quoting *Zachary v. State*, 43 So. 925 (Fla. 1907). "[E]vasive and inconclusive" testimony "given by the complaining witness" is "insufficient to sustain." *Id.*, citing *State ex rel. Florida Bar v. Junkin*, 89 So.2d 481 (Fla. 1956). The Court in *Rayman* capsulized the required standard as follows:

> "The law is well settled in this jurisdiction that the evidence to sustain a charge of unprofessional conduct against a member of the Bar, where in his testimony under oath he has fully and completely denied the asserted wrongful act, must be clear and convincing and that degree of evidence does not flow from testimony of one witness unless such witness is corroborated to some extent either by facts or circumstances."

Id. at 597 (citation omitted).

In *Rayman*, the Court applied this standard to reject a recommendation of disbarment by a Referee. Although the Court conceded that there was some evidence in the record that could support the Referee's belief in the credibility of the complainant, the Court conducted its own examination of the testimony and found it "self-contradictory" and at times "evasive and inconclusive." *Id*. at 598. Such evidence, the Court held, "does not establish the charges with that degree of certainty as should be present in order to justify a finding of guilt on charges as serious as those made" against lawyers. *Id*. *See also The Florida Bar v. Burke*, 578 So.2d 1099 (Fla. 1991) (rejecting recommendation of disbarment by Referee, finding evidence failed to satisfy "clear and convincing" standard of proof); *The Florida Bar v. Schonbrun*, 257 So.2d 6 (Fla. 1971) (same).

As demonstrated below, the Referee's findings cannot be sustained under these standards. Loynaz' testimony was riddled with both inconsistencies and outright falsehoods. His testimony was not only contradicted by Karten but by the sworn, unimpeached testimony of an FBI agent, the testimony of Karten's former secretary, telephone billing records and the very documents he signed.

A. The Alleged CJA Violation

The Referee first agreed with the Bar that Karten's dealings with Loynaz violated the CJA. *See* **APPENDIX 1**, at pp. 4-5, ¶¶ 9-10. The Referee's findings on this issue,

however, were based on a mis-reading of the record in Loynaz' federal criminal case and a fundamental misunderstanding of federal forfeiture law and practice.[18/]

As a threshold matter, the Bar treated the CJA accusation during the hearings before the Referee as a mere afterthought. The Bar put on no expert testimony to explain the scope of the CJA. *Cf. Schonbrun*, 257 So.2d at 8 (reversing Referee's finding that attorney committed a "forgery" where "[t]he opinions of the experts w[ere] divided"). Nor did it show that Karten was ever found to have violated the CJA by the CJA Committee overseeing CJA appointments in the Southern District of Florida.[19/]

The only evidence put on by the Bar concerning the scope of Karten's appointment came from Loynaz and Karten. Loynaz agreed with Karten that the appointment terminated at Loynaz' sentencing in August 1997. (T. 86.) It is undisputed that the Stipulation between Karten and Loynaz was negotiated ***after*** the sentencing and was not signed until **September 23, 1997**. *See* p. 12 *supra*.

[18/] The deference the Court normally affords a lower court's findings of fact or discretionary rulings is eliminated if the Court finds that the findings and rulings were predicated on a misinterpretation of controlling law. In that event, the Court's review becomes "plenary." *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 556 (11th Cir. 1998), *reh'g en banc denied*, 172 F.3d 884 (11th Cir.), *cert. denied*, 120 S.Ct. 309 (1999) (citation omitted). *See also Revson v. Burstein*, 221 F.3d 71, 78 (2d Cir. 2000).

[19/] Magistrate Judge Turnoff's Report and Recommendation noted that the allegation of a CJA violation was "best left for he CJA committee." *See* p. 16 *supra*.

The Referee's findings reflect utter confusion concerning the events and their legal meaning. At one point, for example, the Referee makes the factual finding that Loynaz' agreement to forfeit a check for $30,000 from Karten in exchange for the return of the 4 cars was "a part of his plea agreement." *See* **APPENDIX 1**, at p. 2, ¶ 2. In fact, the Stipulation and plea agreement were completely separate documents and signed on different dates. The plea agreement was signed on **June 17, 1997**, and required Loynaz to forfeit "all" his property. *See* **APPENDIX 4** and p. 8, *supra*. The only document memorializing an agreement to forfeit a check for $30,000 from Karten in exchange for the return of the four vehicles was the Stipulation, which was signed on **September 23, 1997**.

Contrary to the Referee's Report, the Stipulation was not part of Loynaz' criminal case. It was a separate agreement negotiated during the course of the post-sentencing ancillary proceedings that are, as a matter of law, "civil" in nature. *See* p. 9 *supra*. The Bar put on no evidence that Loynaz even had a right to counsel during such a proceeding, and the only reported decision counsel has found on the subject suggests otherwise. *See United States v. Property, All Appurtenances and Improvements Located at 1604 Oceola, Withita Falls, Texas,* 803 F. Supp. 1194 (N.D. Tex. 1992).

The Referee's confusion concerning the distinct nature of Loynaz' criminal case from the post-verdict ancillary proceedings was further demonstrated by his finding that "the action by the United States on October 11, 1996, opposing defendant's motion for return of property placed this matter a [sic] part of the criminal case and not an administrative forfeiture." **APPENDIX 1**, at p. 4, ¶ 9. There never was an "administrative forfeiture" proceeding filed by the government in this case. Karten filed motions seeking the return of the cars during the course of Loynaz' criminal case but the motions were filed only on behalf of Loynaz' wife, not Loynaz himself. And, the federal court did not consider this work compensable under the CJA. *See* p. 11 *supra*.

Moreover, the government pleading that originally injected the cars into the criminal case was not the government's response to Karten's motion for return of property but its Bill of Particulars. The cars, however, did not ***remain*** a part of the criminal case. As part of his guilty plea, Loynaz agreed to forfeit "all" his forfeitable assets, including the cars. Karten's representation then ended at sentencing. The Stipulation was not negotiated until ***after*** the sentencing and was signed as part of the post-sentencing civil ancillary proceedings. Accordingly, there is no support in this record for the Referee's finding that Karten violated the CJA.

B. <u>The Fraud Allegation</u>

The Referee's second and more serious finding was that Karten defrauded Loynaz of the 4 cars that were allegedly owned by Loynaz since, according to his testimony, 1992-1993. The Referee made repeated findings that the vehicles "belong[ed]" to and were "own[ed]" by Loynaz. *See* **APPENDIX 1**, at p. 2, ¶ 2; p. 4, ¶ 9; p. 5, ¶ 11. The Referee asserted that Loynaz' ownership claim was based on "credible testimony by Mr. Loynaz that he purposefully masked his ownership in the vehicles to avoid their seizure in the event of his arrest on drug charges." **APPENDIX 1**, at p. 4, ¶ 9. The Referee also expressly found Loynaz' version "credib[le]" because he allegedly had "***no discernible motive ... to testify untruthfully***." *Id.* at 5, ¶ 12. Included in the testimony the Referee specifically found credible was Loynaz' constant assertions that "he repeatedly and unsuccessfully tried to telephone Mr. Karten." *Id.* at 2, ¶ 3. *See also id.* at 2-3, ¶ 4 (finding that Loynaz "made repeated unsuccessful attempts, along with his now ex-wife to contact Mr. Karten about this matter"); *id.* at p. 4, ¶ 6 (finding that "Mr. and Mrs. Loynaz" had made "repeated attempts to contact" Karten in order to pay him $30,000). All of these findings were clearly erroneous.

1. Loynaz' "discernible motives" to lie

The Referee's finding that Loynaz had no "discernible motive" to fabricate his story was refuted by the Bar's own arguments during the proceedings and, indeed, by the Referee's own Ruling. Although the Referee did not order it, the Bar expressly

sought restitution as a sanction and the Referee found that Karten's failure to offer restitution to Loynaz constituted an aggravating factor. Other evidence before the Referee, introduced by the Bar itself, indicated that Loynaz had threatened Karten with a civil lawsuit "pursuant to Florida's Civil Theft Statutes." (T. 21; FB Exhibit 5, p. 6.)[20/] And, Mary Loynaz' testimony indicated that she anticipated a financial benefit from the ongoing litigation over the cars. (T. 144.)

"`[T]he intent of a person to realize a monetary gain out of an incident which has become the subject of litigation, as may be evidenced by the pendency of a civil action for damages ... is an individualized fact having a logical tendency to show bias ... and an interest ... in the outcome of the legal dispute.'" *Payne v. State*, 541 So.2d 699, 700 (Fla. 1st DCA 1989) (citation omitted). Thus, courts have repeatedly reversed criminal convictions where trial courts have failed to recognize the potential for bias posed by actual or threatened civil lawsuits. *See, e.g.*, *Caton v. State*, 597 So.2d 414 (Fla. 4th DCA 1992); *Hudak v. State*, 457 So.2d 594 (Fla. 4th DCA 1984); *Cox v. State*, 441 So.2d 1169 (Fla. 4th DCA 1983); *Lombardi v. State*, 358 So.2d 220 (Fla. 1st DCA 1978); *Webb v. State*, 336 So.2d 416 (Fla. 2d DCA 1976).

[20/] As previously noted, Karten is moving to supplement the record with additional evidence concerning this threat.

As Magistrate Judge Turnoff perceived,[21/] Loynaz may also have been contemplating a challenge to his plea and/or sentence, based on ineffective assistance of counsel. *See* p. 16 *supra*. *See generally United States v. Romero*, 780 F.2d 981, 985 (11th Cir. 1986) (holding that defendant did not waive conflict-free counsel, in part, where counsel simultaneously represented unindicted co-conspirator in various civil matters "and in a forfeiture action related to this case").

The testimony of Elena Garcia should have made clear to the Referee that Loynaz had still other motives to lie. She testified that in her conversations with Loynaz he "complained about Alan" and told her that he was firing him "because he didn't get his [U.S.S.G. §] 5k." *See* p. 25 *supra*.

The timing of Loynaz' actions in this case strongly corroborated Garcia's testimony about Loynaz' retaliatory motives. Loynaz waited to file his first complaints with the Bar and federal court until ***after*** Karten had been unsuccessful in convincing the government to reduce his sentence under U.S.S.G. 5K1.1 and until ***after*** Karten filed his initial brief on appeal for him. After that point, Loynaz concluded that he no longer needed Karten's services and was free to begin attacking him.[22/]

[21/] Again, as previously noted, Karten is moving to supplement the record with additional evidence supporting Magistrate Judge Turnoff's conjecture.

[22/] The Referee also refused to consider additional evidence submitted by Karten, including the letter Loynaz wrote to federal court complaining about his next attorney. (continued...)

On this record, the Referee's unwavering faith in the veracity of Loynaz' testimony and inability to grasp that Loynaz possessed numerous motives to fabricate his story against Karten are inexplicable and clearly erroneous. Courts have frequently recognized the dangers of relying on the testimony of federal inmates, such as Loynaz seeking their freedom. Those who do "not appreciate the perils" of relying upon such witnesses risk "compromising the truth-seeking mission of our criminal justice system." *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993) (citations omitted). *See generally United States v. Sepe*, 1 F. Supp. 2d 1372, 1375-76 (S.D. Fla. 1998) ("in the 10 plus years since the sentencing guidelines went into full force and effect in the federal court system we have come to a situation where the institutions of the Bureau of Prisons are basically anthills of snitches, each one trying to figure out how to work a deal whereby the government will bestow a `get out of jail early' card upon them in the form of a rule 35 motion"), *rev'd on other grounds*, 168 F.3d 506 (11th Cir. 1999); The Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381, 1382, 1385 (1996) (recognizing that "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law" --

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[22/](...continued)
See p. 27 *supra*.

including "lying, committing perjury, manufacturing evidence [and] soliciting others to corroborate their lies with more lies").

Loynaz was a savvy, career criminal. In addition to having multiple motives to lie, his testimony was contradicted by far more credible evidence presented during the hearings.

2. Loynaz' "ownership" of the cars

At the heart of Loynaz' contentions against Karten was that he, Loynaz, was the true owner of the vehicles since 1992-1993. In finding this claim "credible," the Referee ignored:

< The sworn testimony of FBI Agent Wiegmann, who testified that Loynaz -- during a debriefing required by his plea agreement -- expressly denied owning the cars and that Manny Fernandez was the true owner;

< The decision by the FBI and United States Attorney's Office to accept Loynaz denial of ownership as true for purposes of Loynaz' plea agreement with the government;

< The affidavit Karten submitted from Manny Fernandez in which Fernandez swore that he was, in fact, the true owner;

< The titles to the cars themselves, which indicated that the owner of the cars was Tropikar Sales, Inc., Fernandez' company;

< The fact that one of these titles reflected that Tropikar obtained title in 1989 -- years before Loynaz claimed he first acquired them -- and that Loynaz' wife placed his "ownership" in still another period (1996);

< Loynaz' declarations of indigency in the federal court, at a time when no forfeiture proceedings were pending against the cars;

< Loynaz' failure to complain when Karten filed motions to return the cars to his wife based only on his wife's standing as the owner of the warehouse where the cars were stored;

< Elena Garcia's testimony that Loynaz never asserted an ownership interest in the cars to her and expressed full agreement with Karten's conduct.

Most peculiar was the Referee's claim that Loynaz owned the cars because of allegedly "credible testimony by Mr. Loynaz that ***he purposefully masked his ownership*** in the vehicles to avoid their seizure in the event of his arrest on drug charges." **APPENDIX 1**, at p. 4, ¶ 9 (emphasis added). Contrary to the Referee, Loynaz never testified "that he purposefully masked his ownership in the vehicles to avoid their seizure in the event of his arrest on drug charges." The Referee apparently confused Loynaz' testimony with the testimony of Bar Investigator Crowley. Crowley testified that AUSA Roth told him (in a telephone call made the night before Crowley's testimony) that it was common for drug dealers to place assets in the names of third parties "so they're not forfeited when they get arrested." (T. 194.)

Even if the Referee's description of Loynaz' testimony was accurate, a defendant's "purposeful" concealment of ownership does not logically prove actual ownership. And, the intentional use of deceit certainly does not tend to make a witness "credible" -- especially when the witness later wages attacks on his prior

attorney in an effort to get out of prison, to pave the way for restitution or a civil lawsuit and/or for revenge. Moreover, at the time the relevant events took place in this case, ***even the government*** accepted the veracity of Loynaz' declarations that he did ***not*** own the vehicles. Bound by his plea agreement to provide a complete and truthful debriefing to the government, Loynaz met with AUSA Roth, Agent Wiegmann and Karten and denied owning the cars. Since the government accepted Loynaz' statements as truthful, it was certainly reasonable for Karten to do so.

3. Karten's allegedly "unauthorized" conduct

Having accepted Loynaz' motives, credibility and contradicted claims of ownership, the Referee went on to find that Karten's actions, including the execution of the Stipulation in September 1997 and the sale of the vehicles in December 1997, were unauthorized by Loynaz. *See* **APPENDIX 1**, at p. 3. In making these findings, as previously noted, the Referee accepted Loynaz' entire version of the facts, including Loynaz' claims about his inability to speak with Karten on the telephone.

Loynaz' insistent testimony concerning the telephone calls, however, was refuted by Karten, Elena Garcia and, later, Dennis Bruce, along with the telephone records themselves and the well-known practices of the Bureau of Prison. The Referee's Report was completely silent about these records and practices, as it had to be to find Loynaz credible. Karten could never "return" Loynaz' calls, because Loynaz was in

federal prison. Loynaz did not call Karten collect on only a "few" occasions. Karten's telephone billing records showed over 90 collect calls, many quite lengthy, that Karten accepted from Loynaz -- not the "few" he claimed under oath. For Loynaz to be telling the truth about the telephone calls, Karten, Garcia and Bruce had to be liars, the practices of the Bureau of Prisons had to change and the telephone records had to be fictitious.

Loynaz also disputed other objective facts. Despite his signature on his plea agreement and plea in federal court pursuant to that agreement, he continued to profess his innocence by testifying before the Referee that he "wasn't guilty" at all. (T. 87.) He steadfastly refused to acknowledge that he and his wife ***had*** to have been aware that Karten was posting the $30,000, since both Karten's and their names appear on the same page of the Stipulation they signed. *See* **APPENDIX 5**.

While, in most instances, the fact-finder is entrusted with the task of sorting out truth from lies, some testimony is so inherently incredible as to be unworthy of belief as a matter of law. Courts have not only the right but "the duty" to reject such testimony. *Van Note v. State*, 366 So.2d 78, 80 (Fla. 4th DCA 1978) (citations omitted). *Accord Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976) (citations omitted); *Wilcox v. Ford*, 813 F.2d 1140, 1146 (11th Cir.), *cert. denied*, 484 U.S. 925, 108 S.Ct. 287, 98 L.Ed.2d 247 (1987); *United States v. Chancey*, 715 F.2d 543, 547

(11th Cir. 1983). A witness' testimony can be deemed incredible as a matter of law, even in criminal cases, when "no reasonable person would believe it beyond a reasonable doubt." *Chancey*, 715 F.2d at 546. *Accord Wilcox*, 813 F.2d at 1146.

For example, in *Chancey*, the United States Court of Appeals for the Eleventh Circuit reversed a kidnapping conviction for insufficient evidence where the complainant testified that she did not consent to the kidnapping. The court found that all of the objective evidence established that "there was a wealth of opportunities" for her to escape or call for help but she never did either. *Chancey*, 715 F.2d at 547. The court rejected her testimony as incredible, because "[r]egardless of what she says, her every ***act*** and ***deed***, as she described them, shout that when she drove the car across the Florida State line she did it voluntarily." *Id.* (emphasis in original). *See also Holland v. Allied Structural Steel Co., Inc.*, 539 F.2d 476, 483 (5th Cir. 1976) (rejecting testimony given by plaintiff's witnesses as "incredible as a matter of law," since events testified took place at different times and was otherwise contradicted by objective facts); *Geigy Chemical Corporation v. Allen*, 224 F.2d 110, 114 n.5 (5th Cir. 1955) (rejecting as inherently incredible testimony that motorist could have stopped vehicle traveling 45 miles an hour within five feet and other testimony, noting that "[a]n inherently incredible story is not made credible by being sworn to") (citation omitted).

Loynaz' testimony, though "sworn to" was "inherently incredible." His claims about the telephone calls, his continued innocence and his purported ignorance of the meaning of documents he signed were so "completely at odds with ordinary common sense that no reasonable person would believe it." It was incredible as a matter of law and should have been rejected by the Referee on that basis, rather than blindly accepted in the face of overwhelming contradictory evidence. In any event, such testimony patently failed to satisfy the Bar's "clear and convincing" burden of proof.

II. THE REFEREE ABUSED ITS DISCRETION IN REFUSING TO REOPEN THE PROCEEDINGS TO CONSIDER ADDITIONAL EVIDENCE

Proceedings before a Referee are quasi-judicial, administrative proceedings. *See* Rule 3-7.6(e)(1), *The Rules Regulating the Florida Bar.* There was no jury, and the Referee's findings were not final until it issued his written Report on January 29, 2001. Nonetheless, the Referee refused to fully consider Elena Garcia's testimony during the mitigation portion of the hearings, despite the fact that the proffer of her testimony directly refuted significant portions of Loynaz' testimony and the Bar's case against Karten. After entering his Report, the Referee then summarily denied Karten's effort to present still more evidence undercutting Loynaz's credibility. Under the circumstances of this case, the Referee abused its discretion in refusing to reopen the proceedings.

A Referee's duty to ensure a "fair" judgment "to society" in a disciplinary proceeding means that it not only has the duty to protect the public from unethical lawyers. It also has the duty to ensure that the public is not denied "the services of a qualified lawyer...." *The Florida Bar v. Pahules*, 233 So.2d 130, 132 (Fla. 1970). Since disbarment is the most severe sanction that a Referee can impose, special care was required here to ensure a full and accurate record.

To be sure, the rules attendant to all litigation applied. And, the decision to reopen a case traditionally lies within the discretion of the tribunal. *Donaldson v. State*, 722 So.2d 177, 181 (Fla. 1998); *Jones v. State*, 745 So.2d 1121 (Fla. 5th DCA 1999). However, "[w]here a case is not technically closed," the denial of a request to reopen the proceedings "will be reversed if the motion was timely and a proper showing has been made as to why the evidence was omitted." *Donaldson*, 722 So.2d at 181. *See Steffanos v. State*, 86 So. 204 (Fla. 1920) (holding that the case should be reopened where "the cause ha[s] not proceeded so far that the ends of justice would [be] defeated, or the orderly process of the court disturbed"); *Louisy v. State*, 667 So.2d 972 (Fla. 4th DCA 1996) (reversing where defendant sought to reopen his case because defense counsel failed to elicit "crucial" questions when the defendant first testified); *State v. Ellis*, 491 So.2d 1296 (Fla. 3d DCA 1986) (reversing trial court order denying State's motion to reopen suppression hearing where hearing was not

technically closed and the ends of justice were served by the admission of crucial evidence previously omitted).

The Referee's refusal to consider all of Garcia's testimony constituted an abuse of discretion under this standard. Although the Referee had made a preliminary finding against Karten, its ruling was not yet final. Garcia's testimony was "crucial" to undermining Loynaz' credibility. The Bar was not prejudiced by allowing her testimony, since the Bar had fully deposed her. The ends of justice required the Referee to consider her testimony and its potential impact on the Referee's steadfast belief that Loynaz was credible.

Although the Referee had already issued its Report when Karten filed his written motion, the Court should nonetheless find that the Referee abused its discretion by summarily denying that motion, as well. "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11 L.Ed.2d 921 (1964). There was no need for a rush to judgment here. Karten's career was on the line, and the additional evidence further revealed Loynaz' perjury. This case truly exemplifies the adage: "justice which is too swift may result in a denial of the right to a fair trial." *United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987).

At the very least, the Court should reverse and remand for the Referee to consider the additional evidence proffered by Karten.

III. DISBARMENT IS AN EXCESSIVE SANCTION, ESPECIALLY IN LIGHT OF THE IMPROPER FACTORS CONSIDERED BY THE REFEREE

The Referee recommended the sanction of disbarment only after finding the presence of six (6) aggravating factors. Most of these factors were improper, as a matter of law. Karten's lack of "contrition", "refusal to acknowledge the wrongful nature of his conduct" and "indifference to making restitution to Mr. Loynaz," *see* **APPENDIX 1**, at p. 6, were improper, because Karten "has always denied (and continues to deny) the misconduct at issue." *The Florida Bar v. Mogil*, 763 So.2d 303, 312 (Fla. 2000). *Accord The Florida Bar v. Corbin*, 701 So.2d 334, 337 n. 2 (Fla. 1997); *The Florida Bar v. Lipman*, 497 So.2d 1165, 1168 (Fla. 1986).

The Referee also improperly relied upon an admonishment Karten received in another case on July 24, 1998. Since the admonishment occurred ***after*** the events at issue in this case had ended, the use of the admonishment as an aggravating factor was improper. *The Florida Bar v. Dunagan*, 565 So.2d 1327, 1329, n. 4 (Fla. 1990); *The Florida Bar v. Carter*, 429 So.2d 3, 4 (Fla. 1983).

Karten concedes that the "vulnerability" of a victim can be a proper aggravating factor. This Court has also recognized that an incarcerated person can be considered a vulnerable victim. *See The Florida Bar v. Benchimol*, 681 So.2d 663 (Fla. 1996).

However, Loynaz was hardly such. He was a career criminal, adept at filing both *pro se* complaints with the Bar and federal court. Under the circumstances of this case, the factor should not have applied.

Conversely, the Referee failed to adequately consider the host of character witnesses presented by Karten or to take sufficiently into account Karten's lack of a prior record and his long record of public service and *pro bono* activities. *See The Florida Bar v. Thomas*, 698 So.2d 530 (Fla. 1997) (rejecting Bar's request for disbarment and imposing 90-day suspension predicated upon attorney's lack of a prior record and isolated nature of the misconduct). *See also The Florida Bar v. Rose*, 607 So.2d 394 (Fla. 1992); *The Florida Bar v. Scott*, 566 So.2d 765 (Fla. 1990); *The Florida Bar v. Greenfield*, 517 So.2d 16 (Fla. 1987).

Karten is an attorney with an outstanding reputation, ethically and professionally. His actions were a one time event. It is undisputed that ***he*** paid $30,000 for the cars ***with*** the agreement of the United States. He has taken his *pro bono* obligations to heart and has conducted himself in an upright and honorable manner since these events. The sanction of disbarment was extreme and unjustified under these circumstances.

CONCLUSION

For all of the foregoing reasons, the Court must reverse and vacate the Report of the Referee in this matter.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed this 30th day of April 2001 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief was prepared in Times New Roman 14-point font.

_____

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