IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LIJYASU MAHOMET KANDEKORE,

Respondent.

_____________________________________/

Supreme Court Case
No. 87,538

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Complainant". Lijyasu Mahomet Kandekore will be referred to as "Respondent" or "Mr. Kandekore” or "Lijyasu Mahomet Kandekore".

Abbreviations utilized in this brief are as follows: “TR” will be used to refer to the transcript of the final hearing held on July 26, 1996. “A” will be used to refer to the appendix.

As to the Appendix:

“A-1" will be used to refer to the complaint of The Florida Bar filed on March 8, 1996.

“A-2" will be used to refer to the order of disbarment of the New York Court dated December 19, 1995.

“A-3" will be used to refer to the referee’s order dated August 2, 1996.

“A-4" will be used to refer to the referee’s supplemental report as to discipline.

I hereby certify that this brief is typed in Times New Roman, 14 Point type.

____
RANDI KLAYMAN LAZARUS

STATEMENT OF THE CASE AND OF THE FACTS[1]

On March 8, 1996, The Florida Bar filed its complaint charging the respondent with having been found guilty by a jury in the State of New York of a felony of assault of the second degree and the misdemeanor charges of resisting arrest and driving while ability impaired. The complaint alleged that the New York Bar, of which the respondent was a member, sought and obtained respondent's disbarment from the Appellate Division of the Supreme Court of New York on December 19, 1995 as a result of the felony conviction. (A-1) The Florida Bar's complaint was filed pursuant to Rule 3-7.2(j)(2) of The Rules Regulating The Florida Bar which provides that the adjudication by a court or other disciplinary jurisdiction of misconduct shall be sufficient basis for the filing of a complaint and appointment of a referee without a finding of probable cause.

On August 9, 1995, The Florida Bar had filed its Notice of Determination of Guilt. On August 17, 1995, the respondent filed his Petition to Terminate or Modify Suspension. On November 1, 1995 this Honorable Court issued its order granting the Petition to Terminate or Modify Suspension pending the disposition of the

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[1]The Florida Bar is unable to accept the respondent's statement of the case and facts as it contains a recitation of facts which in most part is completely outside of the record on review and without transcript citations. The Florida Bar has reprinted its statement of the case and of the facts as set forth in The Florida Bar's initial brief filed on November 4, 1996. Additions have been made to bring the matter up to date.

respondent's convictions. (Supreme Court Case No. 86,224). The complaint filed in the instant matter made reference to the proceedings in regard to The Florida Bar's endeavor to obtain respondent's suspension pursuant to the conviction of a felony. (A-1, p. 3, fn. 1).

On March 15, 1996, this court issued its order to the chief judge of the eleventh judicial circuit requiring the appointment of a referee. Pursuant to said order, the Honorable Thomas M. Carney, Circuit Judge was appointed on March 20, 1996.

A final hearing was held before Judge Carney on July 26, 1996. The Florida Bar introduced the judgment of the New York Court disbarring the respondent, as well as a response by the court to Mr. Kandekore's objection to the automatic disbarment rule in the State of New York. The court stated that the issue had been litigated and decided against the respondent. (TR 18, The Florida Bar Ex. 2) The next item introduced into evidence by The Florida Bar was the sentencing commitment which provided that as to count I, assault, time served and five years of probation; as to count II, resisting arrest, was concurrent and that the respondent lost his driver's license for ninety (90) days and was fined $400.00. (TR 18-19, The Florida Bar Ex. 2) The Florida Bar submitted the indictment into evidence. It alleged that on October 30, 1993, the respondent with the intent to prevent a police officer from performing a lawful duty caused physical injury to a police officer. (TR 19-20, The Florida Bar Ex.

3) The next item introduced was the testimony at Mr. Kandekore's criminal trial of Officer Wagman, the law enforcement officer the respondent was found to have assaulted. (TR 30, The Florida Bar Ex.4) The Florida Bar read several portions of the testimony into the record. They included the following:

> That the officer asked the respondent to return to his car. The respondent told the officer he had no right and began punching the officer in the chest and in the side of the head. (TR 21)
>
> That the officer pushed the respondent to the ground, advised him to remain there and that he was under arrest. The respondent ignored the officer and attacked him again and was again pushed to the ground and advised he was under arrest. The respondent got up again, grabbed the officer around his legs, lifted him up and body slammed him head first into the pavement. (TR 22)
>
> That while the officer was on the ground, the respondent was punching, kneeing and kicking the officer. The officer said he was fighting for his life. (TR 23)
>
> That when another officer arrived on the scene both tried to handcuff the respondent. The respondent resisted and caused the handcuffs to rip the officer's hand wide open between the index finger and the thumb. (TR 25-26)
>
> That the officer continues to have blurriness in his right eye and constant headaches. The officer at times can take two tylenol every four or five hours. When that does not work he takes Midrin, which is effective but puts him to sleep. (TR 27-29)

The final composite exhibit introduced by The Florida Bar were two judgments out of the civil courts of New York. (TR 32, The Florida Bar Ex. 5) One

involved a lawsuit brought by the officer and his wife against the respondent. The officer received a summary judgment as to liability for assault, battery, and negligence finding that the jury in the criminal case necessarily discredited the respondent's position that he never hit the officer by their verdict. (TR 30-31) The other lawsuit was one brought by the respondent against the Town of Greenburgh and the two police officers and dismissed by the court. In so doing the court stated that the jury by their verdict necessarily credited the police testimony and found they were acting lawfully and that the arrest was authorized. (TR 31-32) The Florida Bar rested its case after presenting case law and references to the Florida Standards for Imposing Lawyer Sanctions as a basis for the referee to impose disbarment as a disciplinary sanction.

The respondent then argued that The Florida Bar had not presented other testimony from the criminal trial which the respondent believed established that the officer suffered no injuries. (TR 38) The respondent contended that the civil judgments introduced were irrelevant. (TR 39) The respondent presented no evidence and sought a continuance to do so. The request was denied. (TR 41)

Thereafter, the referee made the following findings of fact.

> THE REFEREE: All right. Let me just set out some findings for the record here.
>
> Firstly, it's apparent to the Court that Mr. Kandekore was convicted of a felony in the State of New York previously. That is still pending on appeal.

> Under theory of what I guess you'd call the rules of reciprocal discipline, the Bar now seeks for me to recommend that the Respondent be disbarred because he was disbarred previously in New York. That's the second track issue here.
>
> Now, the Supreme Court of Florida has previously granted something in the nature of an injunctive relief allowing the Defendant or Respondent a respite from proceedings to disbar him until the resolution of the appeal in New York.
>
> Now, a petition for rehearing in the case which is 86-224 -- that's the Florida Supreme Court number -- the petition was denied without explanation, which to me indicates that the injunctive relief that they granted is still viable, is still alive. So I'm going to recommend that in this case, this case be stayed until such time as the resolution of the appeal in New York.
>
> If the appeal is affirmed, the Court will alternatively now recommend that he be disbarred. If it is reversed, that he be retained as a Florida in lawyer in good standing.
>
> That's it.
>
> (TR 43-44)

On August 2, 1996, the referee forwarded written findings which stated:

> FINDINGS OF FACT
>
> 1. Respondent was convicted of a felony in the State of New York.
>
> 2. Respondent has appealed that conviction and it is presently pending.

3. Respondent has been disbarred in New York pursuant to the above conviction.

4. In a prior disbarment proceeding in Florida based on the same felony conviction, Respondent obtained a stay from the Florida Supreme Court. Case No. 86-224.

5. Said stay remains in force until the disposition of Respondent's appeal of the New York conviction.

RECOMMENDATION

1. That this case be dismissed pursuant to the Order of the Florida Supreme Court in Case No. 86-224 dated November 1, 1995.

2. That the Florida Bar's grounds of "reciprocal discipline" be denied because;

   a) New York's disbarment is, by operation of law, an automatic proceeding that follows the Respondent's conviction without any hearing whatsoever.

   b) Respondent is entitled to the benefit of the prior ruling of the Florida Supreme Court.

3. That after notification of the results of the appeal, Case No. 86-224 be reopened.

(A-3)

As a result, The Florida Bar filed a motion for rehearing. The motion was denied on August 15, 1996.

The Florida Bar petitioned for review. The Florida Bar's initial brief was filed on November 4, 1996. On June 4, 1997 this court issued its order staying the instant proceedings. Both parties were ordered to immediately notify the court of the disposition of the appeal. Pursuant thereto, on January 5, 1999 The Florida Bar served its notice of disposition of appeal which stated that the Supreme Court of the State of New York had unanimously affirmed respondent's conviction as to all charges on December 21, 1998. Thereafter, on March 11, 1999 this court returned the record to the referee and ordered the referee to submit a supplemental report as to discipline. The referee did issue a supplemental report on March 29, 1999 and recommended that Lijyasu Mahomet Kandekore should be disbarred. (A-4)

The respondent served his petition for review on April 28, 1999 and his initial brief on May 29, 1999. The Florida Bar's motion to strike respondent's petition for review was denied on June 22, 1999. The Florida Bar's brief follows.

SUMMARY OF ARGUMENT

The respondent, formerly a member of the New York Bar, was disbarred in that state as a result of being convicted by a jury of a second degree violent felony, assault on a police officer. The Florida Bar filed its complaint on that basis. Previously this court had stayed The Florida Bar's request to felony suspend the respondent as a result of respondent's argument that he was a victim of racial discrimination. The parties were requested to advise this tribunal when the appellate court in New York rendered its decision regarding Mr. Kandekore's appeal of his felony conviction.

Nearly two years later the referee recommended disbarment after the respondent's convictions were upheld.

The Florida Bar posits that the respondent has failed to meet his burden of establishing an infirmity in the New York procedure. Further, the New York Court in its opinion specifically addressed respondent's contention that their procedure of automatic disbarment constituted a deprivation of Mr. Kandekore's rights by pointing out that their procedure had been previously adjudicated constitutional.

Further, the respondent has not established that the referee's findings were unsupported by competent substantial evidence. On the contrary, The Florida Bar's case established that the respondent has been convicted of a violent felony against a police officer. Further, in the State of New York both a criminal jury, civil courts and

appellate level have <u>all</u> found against the respondent. The respondent chose not to present evidence, witnesses or testify in his own behalf before the referee.

The Florida Bar further contends that given the type of crime committed, disbarment is mandated by case law and the Florida Standards for Imposing Lawyer Sanctions.

POINTS ON APPEAL

I

THE FINAL HEARING BEFORE THE REFEREE WAS FAIR (RESTATED)

II

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE (RESTATED)

III

WHETHER DISBARMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE (RESTATED)

I

THE FINAL HEARING BEFORE THE REFEREE WAS FAIR (RESTATED)

A constant thread exists in all of the respondent's arguments. Everything that happens to the respondent is everyone else's fault and he is blameless. In fact, the reality of the occurrences belie those conclusions. A final hearing was held before the Honorable Thomas Carney on July 26, 1996. The respondent was given nearly six weeks of notice of the date.[2] It was the respondent who appeared before the referee at this crucial hearing entirely unprepared. The respondent failed to present any evidence, any witnesses and did not present his own testimony. It is ironic that the respondent cries foul when it is he who failed to carry the ball.

> Due process, however, requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or mitigation of the penalty.
>
> State ex rel. The Fla. Bar v Evans, 94 So.2d 730, 735 (Fla. 1957)

The respondent was given the opportunity as elucidated in Evans, supra. Instead of explaining the circumstances and offering any testimony, including his own, the respondent requested a continuance to present evidence. The respondent's request

[2] A notice of the final hearing to be held on July 12, 1996 was initially served on June 14, 1996. A notice of cancellation and notice resetting the final hearing to be held on July 26, 1996 was served on July 9, 1996.

for a continuance to present evidence was denied. (TR 41). The referee's decision is easy to understand given the fact that the respondent gave no explanation for his failure to present evidence at the time of trial. The denial of the motion was purely within the referee's discretion. The Florida Bar v. Roth, 693 So.2d 969 (Fla. 1997). In The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986) the referee refused to grant a motion for continuance filed two weeks prior to the final hearing. This court held that the referee had not abused his discretion and viewed respondent's request as an "eleventh hour motion".

In The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987) The Florida Bar sought a continuance in order to present witnesses to rebut the testimony of the respondent regarding his submission of an Alford Plea in his underlying case. The Bar requested a delay to give a more "complete version" of the facts. The referee denied the request. This court again held that the referee had not abused his discretion since respondent's testimony was not a surprise to The Florida Bar nor were they unable to obtain in advance whatever testimony they sought to introduce. Id, at 1234. In the instant case the respondent failed to provide any justification for his failure to present any evidence or testimony at the final hearing. The respondent should be held to the same standard as The Florida Bar was in Pavlick, supra.

The respondent asserts that the referee mislead him into believing that the case

would be reopened and that the respondent would be given the opportunity to present evidence at the end of the appellate process. Again, the respondent is shifting blame. The record is quite clear. The referee found the following:

> If the appeal is affirmed, the Court will alternatively now recommend that he be disbarred. If it is reversed, that he be retained as a Florida in lawyer in good standing.
>
> That's it.
>
> (TR 43-44)

The referee never advised the respondent, either at the final hearing or through his findings of fact that testimony and evidence would be entertained at a later date. In fact, what is unquestionable is that the referee intended to reopen the case and disbar the respondent if his conviction was affirmed based on the compelling evidence presented by The Florida Bar.

Last, the respondent's statement on page thirteen (13) of his brief that he "was not able to call character witnesses" is misleading. The respondent chose not to present these witnesses. Any inability to do so, was of his own making. The respondent's silence at the final hearing should not now be used as a sword.

II

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE (RESTATED)

It is well established that a referee's findings of fact in an attorney disciplinary case are presumed correct and will be upheld on appeal unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Winderman, 614 So.2d 484 (Fla. 1993). The respondent has not set forth any basis to establish that the referee's findings were either erroneous or lacking in evidentiary support. Instead, the respondent argues that the referee ignored critical evidence. The referee, however, considered the evidence presented. As previously stated in argument I, the respondent failed to present any evidence. The Florida Bar, on the other hand did present the referee with the order disbarring the respondent in the State of New York, the sentencing commitment in the State of New York setting forth respondent's felony conviction for assault and two misdemeanors, the testimony of the assaulted police officer, a civil judgment against the respondent by the injured police officer which found that the criminal jury discredited the respondent's position that he did not strike the police officer and an order dismissing the respondent's lawsuit against the police which found that the police acted lawfully and that the arrest was authorized. (TR 18 - 32).

The respondent's argument that the referee is obliged to examine the circumstances of the conviction is incorrect. Rule 3-7.2(i)(3) provides that a felony conviction constitutes conclusive proof of the criminal offense charged. In The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) and its litany, this court held that an attorney does not have a right in a disciplinary proceeding to a trial de novo before a referee for purposes of showing that his conviction is erroneous.

Additionally, Rule 3-4.6 of the Rules Regulating The Florida Bar provides:

> A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

The introduction in evidence of a properly authenticated judgment by a sister state shall constitute conclusive proof of guilt of the acts of misconduct. The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965). The referee is to decide what discipline shall be appropriate. In Re Question of law certified to the Supreme Court of Florida by the Florida Board of Bar Examiners, 265 So.2d 1, 2 (Fla. 1972). In the case at hand, The Florida Bar introduced the judgment of the State of New York disbarring the respondent. (TR 18)

Wilkes, supra went on to state:

> Nevertheless, right and justice require that when the accused attorney shows that the proceeding in the foreign state was so deficient or lacking in notice or opportunity to be heard, that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct involved Florida can elect not to be bound thereby. We should note here that the burden of showing why a foreign judgment should not operate as conclusive proof of guilt in a Florida disciplinary proceeding is on the accused attorney.
>
> Wilkes, at 198.

Mr. Kandekore had the burden of establishing "a paucity of proof" or some other "grave reason" why the judgment of the New York Court should not operate as conclusive proof. He made no showing whatsoever. In fact, The Florida Bar introduced the testimony of the assaulted officer for the purpose of establishing the egregious set of circumstances and injuries to the officer for consideration toward the level of discipline to be imposed. The respondent did not seek to introduce any portion of the criminal trial.

In The Florida Bar v. Friedman, 646 So.2d 188 (Fla. 1994), that attorney was prosecuted by the New York Bar. The New York Court ordered an indefinite suspension. This court held that it was Mr. Friedman's burden to demonstrate why the foreign judgment is not valid or why Florida should not accept it. In finding that Mr. Friedman had failed to meet his burden, this court pointed out that Mr. Friedman

was given ample opportunity to demonstrate any inadequacies.

Mr. Kandekore was on notice of the proceedings against him from the point that the complaint of The Florida Bar was served. It was The Florida Bar that introduced the opinion of the New York Court which specifically addressed Mr. Kandekore's contention that the New York procedure of automatic disbarment for a felony conviction was unconstitutional. The opinion set forth that the issue had previously been litigated and adjudicated and that the procedure was held constitutional. (A-2)

It is well established that if there is record support for a referee's findings, this court will not substitute their judgment for that of the referee. The Florida Bar v. Segal, 663 So.2d 618 (Fla. 1995). This referee's findings are amply supported by the evidence.

III

WHETHER DISBARMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE

At the conclusion of the final hearing the referee announced the following from the bench:

> If the appeal is affirmed, the Court will alternatively now recommend that he be disbarred. If it is reversed, that he be retained as a Florida lawyer in good standing.
>
> (TR 44)

Once the respondent's appeal was affirmed the referee recommended disbarment. A referee's recommendation of discipline is to be afforded deference unless it is erroneous or unsupported by the record. The Florida Bar v. Grier, 701 So.2d 555 (Fla. 1997).

The respondent was convicted of a felony, designated as violent in the State of New York. The felony was the assault of a police officer. In The Florida Bar v. Eberhart, 631 So.2d 1098 (Fla. 1994) it was held that a suspension or resignation from another state warrants disbarment in this state. The Florida Bar v. Clark, 359 So.2d 863 (Fla. 1978) stood for the proposition that a lawyer who loses his or her civil rights following a felony conviction should not be allowed to have the privilege of practicing law. In that Mr. Kandekore did lose some of his civil rights in New York as a result of that conviction, he like Mr. Clark, is not entitled to hold the privilege of a law

license. New York Statute, Judiciary Law Section 510, New York statute, Election Law, Section 5-106, subsections 3 and 5[3]. See also, In Re Florida Bar of Bar Examiners, 350 So.2d 1072 (Fla. 1977).

In Kentucky, an attorney named Mr. Evans pled guilty to assault under extreme emotional distress and wanton endangerment in the first degree, and was disbarred. Mr. Evans beat up another lawyer in a courthouse and threatened a bailiff. Kentucky Bar v. Evans, 843 S.W.2d 320 (Ky. 1992).

In The Florida Bar v. Barket, 633 So.2d 19 (Fla. 1994), that attorney was convicted of the felony of lewd and lascivious assault upon a minor and was disbarred. That respondent paid his client $100.00 to have sexual intercourse with a fifteen (15) year old runaway. Although, Mr. Kandekore's assault does not involve a minor, it does involve a police officer in the exercise of his lawful authority. An attorney, as an officer of the court, should be most cognizant and respectful of the need to obey the law, as well as the law enforcement authorities who are charged with the task of enforcing those laws.

Section 5.11 of the Florida Standards for Imposing Lawyer Sanction provides, in part:

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[3] Section 510 provides that one who has been convicted of a felony may not serve as a juror. Section 5-106 provides that one who has been convicted of a felony and sentenced to imprisonment may not vote. Mr. Kandekore was sentenced to time served.

a. Disbarment is appropriate when a lawyer is convicted of a felony under applicable law.

b. Disbarment is appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.

Both standards are applicable. First, Mr. Kandekore was convicted of a felony. Second, the assault on a police officer after a lawful arrest is most certainly serious criminal conduct which includes the interference with the administration of justice. Last, Mr. Kandekore shows no remorse and has taken no responsibility for his actions. On the contrary, he has accused the police, government and court system in the State of New York of perjury, concealing evidence, forgery, etc. Yet, the respondent is the one who remains convicted.

The foregoing cases and standards and argument require that Mr. Kandekore be disbarred and that The Florida Bar be awarded costs for the prosecution of this matter. Should this court impose a disciplinary sanction other than disbarment the legal community will receive the message that the court system and its results are meaningless.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this honorable tribunal follow the referee's recommendation that the respondent should be disbarred.

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's answer brief was forwarded via regular mail to **Debbie Causseaux**, Acting Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to **Lijyasu Mahomet Kandekore**, respondent, at his record bar address of 18350 N.W. 2nd Avenue, 5th Floor, Miami, Florida 33169, on this ______ day of July, 1999.

____
RANDI KLAYMAN LAZARUS
Bar Counsel

INDEX TO APPENDIX

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A-2 Order of disbarment of the New York Court dated December 19, 1995.

A-3 Referee's order dated August 2, 1996.

A-4 Supplemental report of referee as to discipline dated March 29, 1999.