IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	**The Florida Bar Case** **Case No. 96-70,553(11A)**
Complainant,	
vs.	**Supreme Court Case** **No.87,538**
LIJYASU KANDEKORE,	
Respondent.	

_________________________/

AMENDED

RESPONDENT'S REPLY BRIEF

LIJYASU KANDEKORE, ESQ.
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CERTIFICATE OF TYPE SIZE AND STYLE

In this brief, the appellant uses 14-point CG Times.

PREFACE

The documents in the Record will be referred to by name and the Transcript of the Hearing will be referred to as (Tr. -).

STATEMENT OF THE CASE AND FACTS

The respondent, Lijyasu M. Kandekore, Esq., is an attorney and a member of the Florida Bar and will be referred to as the respondent.

The complainant, the Florida Bar will be referred to as the Bar.

(i) Initial Proceedings in Supreme Court

Upon the complaint of the Bar served on March 7, 1996 and predicated upon the fact of an automatic disbarment of the respondent in New York because of the aforesaid conviction this Court directed the appointment of a Referee to hold a hearing. On August 2, 1996 the Referee recommended that the complaint be dismissed but this Court on June 7, 199 ordered instead a stay of the proceedings pending the respondent's appeal of the conviction in New York. Before that process was terminated the Bar erroneously filed a Notice of Disposition and acting thereon this Court by order dated March 11, 1999 directed the Referee to make a supplemental report as to discipline. On March 29, 1999 the Referee recommended that the respondent be disbarred.

The respondent timely filed a Petition for Review.

(iii) Statement of Facts:

On March 7, 1996 the Bar filed a complaint by which it sought that "the respondent be appropriately disciplined" by virtue of an automatic disbarment in New York based upon a felony conviction. This court ordered on March 15, 1996 that a referee be appointed and pursuant thereto the Acting Chief Judge of the 11th Circuit by order dated March 20, 1996 appointed the Referee, Hon. Thomas M. Carney, Circuit Judge.

The Bar sought and obtained discoveries and a hearing was held on July 26, 1996 before the Referee. There was no oral testimony and over the respondent's objection the Bar was allowed to read what it purported to be the testimony of a police officer. (Bar's Exhibit No. 4) (Tr. 20).

The respondent protested at the introduction of that evidence without the Bar presenting the transcript of his testimony, the testimony of the doctor, the medical record of the respondent or the medical record of the complainant police officer. The respondent then sought an adjournment to introduce those written documents and it was denied by the Referee. (Tr. 37-42).

The referee then made a recommendation dated August 2, 1996 that the second case be dismissed. (Referee's Findings of Fact and Recommendation, August 2, 1996). The Bar's motion for

rehearing was denied by the Referee on August 15, 1996. This court however by order Dated June 4, 1997 stayed the proceedings instead of dismissing the case.

The respondent's appellate process in New York was terminated on March 15, 1999 when leave to appeal to the highest court in that state (The Court of Appeals) was denied by Associate Judge, Richard C. Wesley and the respondent duly filed a notice thereof in this court. (Respondent's Filing of Notice and Motion for Stay, Exhibit thereto).

Before the occurrence of the latter event the Bar filed a Notice of Disposition of Appeal erroneously advising this court that the respondent's appellate process in New York had been terminated on December 21, 1998. (Florida Bar's Notice of Disposition of Appeal).

Relying on that erroneous information by the Bar this Court by order dated March 11, 1999 returned the record herein to the Referee and directed him to submit a supplemental report.

The Bar filed a proposed supplemental report and the respondent objected and requested *inter alia* a fact-finding hearing. (Objection by Respondent to Proposed Supplemental Report of Referee as to Discipline).

The Referee held no hearing despite his promise to reopen the case after the notification of the results of the appeal (Referee's Recommendation dated August 2, 1996) and his supplemental report consisted entirely of repeating the earlier report by way of incorporation but in the supplemental report he recommended disbarment of the respondent whereas in the previous report he recommended that the case be dismissed. (Supplemental Report of Referee as to Discipline, March 29, 1999).

SUMMARY OF ARGUMENT

The hearing held by the Referee was a serious denial of due process because it was neither full nor fear as the respondent was prevented from presenting the transcript of his testimony at the trial as well as that of the doctor and the medical report of himself and that of the complainant police officer. The Fla. Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987). Additionally the Referee promised to reopen the case at the end of the appellate process in New York and the respondent relied on that promise to his detriment while the Referee failed to honor his

promise thereby denying the respondent an opportunity to present critical evidence to refute the Bar's hearsay documentary evidence.

The findings of fact were lacking in evidentiary support because they were inadequate and therefore misleading. The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992). No mention was made therein of the respondent's side of the story. Although the appellate decision was adverse to the respondent the reason for doing so was that the appellate process was not the appropriate process but the respondent is directed to collateral attack on the judgment which is obviously wrong.

The punishment recommended by the Referee is clearly erroneous because he applied an "automatic" standard instead of considering the full circumstances of the case, the respondent's unblemished record and failed to give the respondent an opportunity to call character witnesses. Additionally the circumstances surrounding the conviction for a minor felony as in the instant case do not warrant disbarment in light of previously decided cases and the minor nature of the case. [E.g. Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987) (minor felony does not necessarily result in disbarment); The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992), cumulative conduct of drunk driving and assault warrants reprimand; The Florida Bar v. Levin, 570 So.2d 917 (Fla. 1990), reprimand appropriate for misdemeanor; The Florida Bar v. John R. Kirkpatrick, 567 So.2d 1377 (Fla.

1990), reprimand for resisting arrest]. Even in the state of New York assault and driving while intoxicated attracted only a censure (See <u>In the Matter of Thomas F. Whelan</u>, 169 A.D.2d 71, 571 N.Y.S.2d 774 (A.D. 2d Dept. 1991).

The respondent's felony conviction is in the nature of a misdemeanor but in the state of New York it becomes a minor felony when the complainant is a police officer.

The Referee's recommendations should be rejected as excessive in light of the decided cases and the minor nature of the violation.

ARGUMENT

I. THE HEARING BEFORE THE REFEREE WAS A DENIAL OF DUE PROCESS BEING NEITHER FULL NOR FAIR

The Referee was obliged to hold a full and fair hearing consistent with due process requirements and only after such a hearing may he make findings of fact and submit recommendations. The Florida Bar v. Pavlick, 505 So.2d 1231, 1234 (Fla. 1987). Due process requires a full opportunity to explain the circumstances and to otherwise offer testimony in excuse or in mitigation. State ex rel. Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957) cited with approval in Pavlick where the court specifically stated that the imposition of discipline without affording the accused an opportunity to explain would violate due process. Pavlick at 1234.

In the instant case the respondent was denied due process because the Referee denied him an opportunity to present documentary evidence,

to wit, the transcript of his testimony at the trial as well as that of the doctor who examined the complainant police officer and the medical reports of the respondent as well as that of the police officer. This would have shown clearly that the respondent was in fact the victim and not the assailant, that he was injured and the police was not and that the doctor in fact did not treat the police for any injury but sent him back to work the very next day and without any medication or dressing of any wound. It would have been seen that the police knocked the respondent several times to the ground and was actually beating the respondent while using racial slurs to describe him.

The Bar failed to present a fair case by not presenting the whole story to the Referee and when the respondent sought an adjournment to present documentary evidence the Referee denied it and promised to reopen the case at the end of the appellate process. (Referee's Recommendation dated August 2, 1996). The respondent relied on this to his detriment but the Referee failed to keep his promise and made his recommendation without giving the respondent the promised opportunity to present evidence.

Additionally the respondent was not able to call character witness to attest to his good character and this is of vital importance in a hearing because the Referee is obliged to consider the respondent's unblemished record before making a recommendation as to discipline. The Florida Bar

v. Wasserman, 654 So.2d 905 (Fla. 1995). There the court said, "When imposing a sanction, it is also appropriate for us to consider an attorney's disciplinary history." At 908. The respondent has had an unblemished record and has never been subjected to discipline in any jurisdiction or been the object of any criminal prosecution anywhere in the world. Had the Referee considered the respondent's history he would have made a different recommendation because as set out below the recommendation is clearly erroneous. (See III below).

II. THE REFEREE'S FINDINGS OF FACT ARE LACKING IN EVIDENTIARY SUPPORT BECAUSE THEY ARE INADEQUATE AND THEREFORE MISLEADING

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The Referee's findings of fact recite the fact of the felony conviction, that the respondent has been disbarred in New York and that on the basis of the hearing with all the deficiencies set out above he made his recommendation. Such findings of fact are clearly lacking in evidentiary support because they ignore critical evidence of the circumstances of the conviction and make it clear that the Referee is acting solely on the fact of the conviction without more and this is

impermissible. This court has held that in disciplinary proceedings based upon a felony conviction the result will not necessarily be disbarment where there is evidence supporting innocence. The Florida Bar v. Isis, 552 So.2d 912, 913 (Fla. 1989). The inference is unavoidable that the Referee is therefore obliged to examine the circumstances of the conviction the respondent's explanation and character evidence and then make findings of fact. Even where an attorney pleads guilty to a minor felony disbarment is not automatic because the court will scrutinize the facts and circumstances of the judgment and determine what is the appropriate disciplinary measure if any that should apply. The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987) cited with approval in Isis, *supra*. Only when a judgment of guilt is "not adequately controverted or explained after a full and fair hearing, the judgment of guilt may then constitute the basis for disciplinary action." Pavlick, at 1234. The Referee's findings of fact are conspicuously devoid of the type of inquiry and conclusion contemplated by the law and it is respectfully submitted that because of what it omitted it is lacking in evidentiary support by being therefore inadequate and consequently misleading.

The Referee failed to include in his findings of fact (and no doubt because of his failure to hold to full and fair hearing as set out above) that the respondent and the police officer were the only eye witnesses to the

events which occurred, that both gave different and contradictory accounts of what transpired, that the police admitted lying and signing false document, that he suffered no injuries as supported by the doctor's testimony and certificate and the respondent's testimony and that subsequently discovered medical and work record supported the respondent's side of the story that the police feigned injury. Additionally by the same judgment the respondent was acquitted of the pretextual false charges of traffic violation and driving while intoxicated plus the outstanding fact that the police admitted that the document he used to support the violation of driving while impaired was a forgery. (Objection by Respondent to Proposed Supp. Report, para. 7).

The 11th Circuit has been very critical of pretextual stops by police officers and in one case has noted that where the alleged deviation [by the motorist] from the lane was about six inches, that only slight "weaving" within a single lane was involved, that the officer had no interest in investigating possible drunk driving, and that before the officer observed any traffic violation, he had instituted the pursuit because of his thoughts concerning drug involvement such a stop was pretextual and unconstitutional. United States v. Smith, 799 F.2d 704 (11th Cir. 1986) *cited in* United States v. Valdez, 931 F.2d 1448, 1450-51 (11th Cir. 1991).

The conviction of the respondent is clearly violative of that ruling and could not withstand the scrutiny of the 11th Circuit or of this Court which has equally been critical of pretextual stops and has stated that where there is an absence of reasonable suspicion necessary to authorize an investigatory stop such a stop was illegal and unconstitutional. Popple v. State, 626 So.2d 185, 188 (Fla. 1993). It must be remembered that the respondent was acquitted of passing the steady red light and being intoxicated and in circumstances where the police admitted that the document he used to support his claim of intoxication was a forgery. (*See* Objection by Respondent to Proposed Supp. Report, para. 7, *Supra*.)

Further it was the respondent who was injured as a result of the savage beating he received at the hands of the white policemen and was obliged to seek medical attention. (*See* Objection by Respondent to Proposed Supp. Report, para. 7, *Supra*.).

This court is not asked to retry the case but to take into consideration the circumstances of the conviction and to say that the Referee's findings of fact that omitted those circumstances is clearly lacking in evidentiary support because had the Referee taken those

circumstances into consideration the findings of fact would have been reflective thereof.

It is therefore respectfully submitted that the Referee's findings of fact are lacking in evidentiary support because they are inadequate and therefore misleading and consequently should not be accepted.

III. THE REFEREE'S RECOMMENDATION IS CLEARLY ERRONEOUS BECAUSE IT IS CONTRARY TO THE PRIOR RULINGS OF THIS COURT

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This Court reviews a referee's recommendation on a clearly erroneous standard. The Florida Bar v. Grief, 701 So.2d 555, 556 (Fla. 1997) and cases cited therein.

The referee's first recommendation recited the fact that this court granted the respondent's motion to terminate or modify [referred to by the Referee as "some form of injunctive relief"] and on the basis of that finding of fact he recommended a dismissal of the second case. (Referee's Findings of Fact and Recommendation dated August 2, 1996). However when the New York appeal case was decided against the respondent without there being a change in the other circumstances in

the case the Referee recommended disbarment. (Supplemental Report of Referee as to Discipline, March 29, 1999).

It is self evident that in making such a recommendation the Referee is acting solely upon the fact of the felony conviction and nothing more while the previous decisions of this court clearly states that a felony conviction does not automatically lead to disbarment. *Id*. at 556 citing with approval Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987) ("automatic disbarment upon felony conviction is inappropriate"); The Florida Bar v. Wilson, 643 So.2d 1063, 1064 (Fla. 1994). The court places the burden on the respondent to overcome the presumption but the Referee never addressed these issues – the circumstances under which the conviction was obtained and the respondent's unblemished record. He applied an automatic standard in clear violation of the prior decisions of this court as set out above.

In cases where this court has imposed disbarment for a felony conviction the respondents confessed the underlying facts supporting the conviction and in each case the felony conviction was based upon serious cases of fraud involving the practice of law. In Wilson the respondent was convicted of grand larceny and conspiracy to defraud the Medicaid Program. He was ordered to pay $100,000 in restitution. In disciplinary proceedings arising therefrom he stipulated to various violations of the

Bar Rules. This court disbarred him because he helped to defraud over $100,000 in public funds. In The Florida Bar v. Isis, 552 So.2d 912 (Fla. 1989) the respondent pleaded no contest to conspiracy to commit organized fraud of a large sum of money and to unlawful use of boiler rooms. The record disclosed no evidence of a protestation of innocence. He was disbarred. In The Florida Bar v. Grief, 701 So.2d 555 (Fla. 1997) the respondent conspired to defraud the federal government in an immigration scam. He was disbarred. In The Florida Bar v. Cohen, 583 So.2d 313 (Fla. 1991) the respondent committed felony arson and collected insurance money. This court held that his felony conviction warranted disbarment.

On the other hand however, where the respondent pleaded ***nolo contendere*** **and was adjudicated guilty on two separate incidents of first-degree felonies of delivering cocaine to a minor this court said disbarment was inappropriate. The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987). This Court has held that "a minor felony conviction entered to an** ***Alford*** **plea will not necessarily result in disbarment if there is evidence and a referee's finding supporting innocence." The Florida Bar v. Isis, 552 So.2d 912, 913 (Fla. 1989)** ***cited*** **with approval in Cohen** ***supra***. **The court went on to say that "If there is evidence on the record that a plea was accompanied**

by protestation on innocence, a respondent's "version of the underlying case...may properly be considered." ***Id*****.**

In the instant case not only did the respondent plead not guilty but he initiated a civil suite against his assailants, reported the matter to his congressman and the FBI clearly demonstrating his innocence of the false charges. Although greatly disadvantaged by a police campaign of perjury and cover-up maneuvers by the white police force in a small town with only one police station and facing a white jury the respondent maintained his innocence throughout and continues to this day. Additionally, the respondent was acquitted of the pivotal charge of passing a steady red light which according to the complainant police officer was the reason for the invasion of the respondent's home where the incident occurred. The complainant police officer admitted forging the document which initiated the proceedings, the respondent was acquitted of the false charges of drunk driving. Additionally the government concealed critical exculpatory evidence from the defense at the trial and subsequent to the trial more exculpatory evidence was located and which was also concealed by the government. (*See* Objection by Respondent to Proposed Supp. Report, paras. 7-8).

This court is asked to take particular note that the government concealed from the respondent at the trial exculpatory material in

violation of <u>Brady</u>. (*See* Objection to Proposed Supp. Report, paras. 7-8)

Additionally the Referee has totally failed to consider the respondent's impeccable record both as a lawyer and as a civilian. This Court has held that, "When imposing a sanction, it is also appropriate for us to consider an attorney's disciplinary history." <u>The Florida Bar v. Wasserman</u>, 654 So.2d 905, 908 (Fla. 1995), citing with approval <u>The Fla. Bar v. Lawless</u>, 640 So.2d 1098, 1101 (Fla. 1994).

In these circumstances the Referee's recommendation is clearly erroneous because this felony is a minor felony, indeed it is only a felony because the complainant is a police officer otherwise it would have been a misdemeanor. (*See* New York Penal Law 120.05(3) making the offense a "D" felony the lowest level of felony in that state). Additionally there were no allegations of use of weapons, the incident occurred in the privacy of the respondent's home as distinct from a public place. (See Indictment, "Exhibit A" to Florida Bar's Motion for Rehearing).

This court has held that "a minor felony conviction entered pursuant to an *<u>Alford</u>* plea will not necessarily result in disbarment if there is evidence and a referee's finding supporting innocence." <u>The Florida Bar v. Cohen</u>, 583 So.2d 313, 314 (Fla. 1991) citing with approval <u>The Fla. Bar v. Isis</u>, 552 So.2d 912, 913 (Fla. 1989) and <u>The Fla. Bar v. Pavlick</u>, 504 So.2d 1231 (Fla.

1987). The court went on to say that where there is a protestation of innocence the respondent's version of the underlying facts may properly be considered in mitigation. Cohen, at 314.

Accordingly the decided cases show that disbarment is inappropriate. In The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992) the defendant was charged with a third-degree felony because he stole a car and lied to police on the scene about. This court held that because the respondent had not been subjected to prior disciplinary action and there was mitigating evidence it was appropriate to suspend him for thirty days.

In Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994) the respondent engaged in conduct which he believed to be criminal but was in fact only unethical. He was suspended for 60 days. In The Florida Bar v. Temmer, 632 So.2d 1359 (Fla. 1994) the respondent was suspended for 90 days for the possession and use of cocaine. Equally in The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988) the respondent pleaded *nolo contendere* to the crime of delivery of cocaine and was suspended for 90 days. In neither Temmer nor Weintraub did the respondent have prior disciplinary records. In The Florida Bar v. Blau, 630 So.2d 1085 (Fla. 1994) the court held that several episodes of drug possession warranted 60-day suspension. In The Florida Bar v. Levine, 498 So.2d 941 (Fla. 1986) a misdemeanor conviction for drugs warranted a public reprimand. In The Florida Bar v. Dubbeld,

594 So.2d 735 (Fla. 1992) even after a history of wife battery and another conviction for an altercation with a police he was reprimanded for driving under the influence of alcohol. In The Florida Bar v. Levin, 570 So.2d 917 (Fla. 1990) the respondent was reprimanded for a misdemeanor conviction. In The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990) the respondent pleaded no contest to resisting arrest and failed to comply with his probationary obligations pursuant thereto. He was reprimanded. In The Florida Bar v. Schreiber, 631 So.2d 1081 (Fla. 1994) the respondent beat up his girl friend and pleaded *nolo contendere* to battery. He was suspended for 120 days by this court.

In New York where an attorney was convicted of two misdemeanor counts of driving while intoxicated, misdemeanor assault and a traffic violation he was subject to censure and in doing so the court took into consideration "the extensive character affidavits as well as the respondent's previously unblemished record." In the Matter of Thomas F. Whelan, 169 A.D.2d 71; 571 N.Y.S.2d 775 (A.D. 2nd Dept. 1991). (Emphasis added).

It is self-evident that the Referee's recommendation is out of character with the decided cases and this court should let itself be guided by the New York case of Whelan, by Jahn and Kirkpatrick as the circumstances there present the best parallel to the instant case.

This court has fashioned the appropriate standard of discipline when it said,

> We have held that bar disciplinary proceedings must serve three purposes: first, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public of the services of a qualified lawyer; second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and third, *the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.*
>
> *The Fla. Bar v. Lord*, 433 So.2d 983, 986 (Fla. 1983) (emphasis in original).

The Florida Bar v. Poplack, 599 So.2d 116, 118 (Fla. 1992).

It is respectfully submitted that the Referee's recommendation cannot be reconciled with these standards. As to the first standard the conduct which is in question does not touch or concern the practice of law so there neither is nor was any threat to the public nor was there any injury to the public. The respondent has denied the accusations and has rigorously fought to assert his rights in the courts. There has been no

disciplinary measures taken against the respondent in the *six years* since this incident occurred for anything and he has never been subjected to discipline in any jurisdiction before and so he continues to have an impeccable record.

As to the second standard disbarment would be extremely excessive as the above-mentioned analysis clearly shows that the appropriate treatment is far less than disbarment. It is to be remembered that the New York rule is different from the Florida rule – the former mandates automatic disbarment for any felony (without a hearing) while the Florida rule prescribes suspension subject to explanation and character evidence in mitigation. Yet even in New York as the parallel case shows [Whelan, *supra.]* the relevant violation attracts no more than a censure except that because in the instant case the complainant is a police officer the charge becomes a felony with the consequent automatic disbarment.

As to the third standard, deterrence of others should not be used to justify excessive punishment because it is axiomatic that punishment should be appropriate for the alleged violation otherwise one person would be punished for violations that others *might commit* instead of for the violation for which he is actually held responsible.

This court is asked to take judicial notice of the fact that New York police are notorious for their brutality of minorities and for covering up their crimes.

CONCLUSION

It is respectfully submitted that because the Referee's recommendation is demonstrated to be out of character and otherwise inconsistent with the decided cases of this court the recommendation should not be acted upon and instead the court should look to Whelan, Jahn and Kirkpatrick for guidance. For this court to do otherwise would be to violate its own rules and disregard its own precedents.

In light of the foregoing analysis this court is asked to reject the Referee's recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by mail on August 3, 1999 to the following:

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